No. 23-___

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether local delivery drivers—i.e., workers who make in-state deliveries of goods in response to in-state orders, and play no role in transporting those goods across borders—are nevertheless "engaged in foreign or interstate commerce" for purposes of Section 1 of the Federal Arbitration Act?

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; judgment vacated November 18, 2022; post-remand judgment entered July 21, 2023);
- *Domino's Pizza, LLC v. Carmona*, No. 21-1572 (U.S.) (judgment issued November 18, 2022).

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INTRODUCTION

This Court should grant certiorari for three reasons. First, this case presents an important question of federal law that has not yet been, but should be, settled by this Court: Whether local delivery drivers who make in-state deliveries to fill in-state orders of goods are engaged in interstate commerce for purposes of Section 1 of the Federal Arbitration Act ("FAA"). Sup. Ct. R. 10(c). Here, the undisputed record is that Domino's purchased goods and shipped those goods to a California warehouse (where some were transformed into pizza dough and others were repackaged or stored). The goods were not purchased by Domino's to fill any specific end-customer's order; rather, they were ordered in anticipation of future sales generally. Once they reached the California warehouse, the goods remained there unless and until they were ordered by Domino's independent franchisees, who purchased goods directly from the California warehouse as the need arose. After those in-state orders were placed, the goods were pulled from general inventory at the in-state warehouse and delivered by Respondents to the in-state franchise owners who ordered the goods.

This important federal question impacts whether Respondents and other local delivery people—who pick up goods and transport them in-state as part of an entirely intrastate transaction—are engaged in interstate commerce for purposes of Section 1 of the FAA. This question was left unanswered by this Court's decision last year in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 n.2 (2022). But this case squarely presents the Court with an opportunity to resolve that important question of federal law, based on an undisputed record.

Second, the Ninth Circuit's answer to this important question, by way of the opinion below, is in conflict with the decisions of the United States Courts of Appeal for the First, Third, Fifth, and Seventh Circuits. Sup. Ct. R. 10(a). All those Circuits have held that, because local delivery drivers who make in-state deliveries in response to in-state orders by definition operate outside the stream of interstate commerce, they are not "directly involved" or "actively engaged" in that stream. *Saxon*, 142 S. Ct. at 1789–90. The Ninth Circuit's contrary holding creates the untenable situation whereby the enforceability of a bargained-for arbitration clause will turn on the Circuit in which the dispute happens to have been brought.[1]

Third, and finally, the Ninth Circuit's holding not only conflicts with the approach taken by the other Circuits, but it also ignores *Saxon*'s clear command and, along the way, conflicts with and misapplies this Court's stream-of-commerce precedent. That precedent (which largely stems from decisions involving the Fair Labor Standards Act which, unlike Section 1, is not narrowly construed) holds that goods transported interstate but held in general inventory for subsequent, intrastate transactions are not within interstate commerce. This is true even if the customers to whom those goods are ultimately sold constitute a fairly stable group, and the orders made are recurrent as to the type and amount of merchandise ordered. In applying a clause this Court has made clear should be

[1] The Court's resolution of the question in *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51—i.e., whether the Section 1 exemption is only available to workers who are "employed by a company in the transportation industry"—while potentially applicable here, will not mend the split presented by the decision below.

interpreted narrowly, the Ninth Circuit disregarded this precedent and adopted an even broader interpretation of what it means to be engaged in interstate commerce.

This case is an ideal vehicle through which this Court can resolve this important federal question and the problematic (and potentially widening) split that will necessarily lead to inconsistent and unpredictable results in cases seeking to enforce arbitration agreements under the FAA. Without this Court's intervention, 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 opinions of the Court of Appeals are published at 21 F.4th 627 (9th Cir. 2021) (original opinion) and 73 F.4th 1135 (9th Cir. 2023) (post-remand opinion). The opinion of the District Court is unreported.

JURISDICTION

The Court of Appeals filed its post-remand opinion and judgment on July 21, 2023. 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). And the "range" is quite "wide": 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 reach 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 FAA's "residual clause." *Circuit City*, 532 U.S. at 114. Consistent with Congress' attempt to counter "hostility" towards agreements to arbitrate, 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 that the clause be given "a narrow construction," *id.* at 118, one that covers only transportation workers who are "directly involved in transporting goods across

state or international borders," *Saxon*, 142 S. Ct. at 1789.

B. Facts and Procedural History

Domino's® is a well-known pizza company whose independent franchise owners operate thousands of stores around the world. Respondents were Domino's Delivery & Service Drivers, who made only local—i.e., in-state—deliveries of goods from Domino's Southern California Supply Chain Center to various Domino's franchisees in Southern California. App. at 4a. A *de minimis* portion of these goods crossed state lines before coming to rest in general inventory at the Supply Chain Center, but there is no evidence that Domino's ordered any of these goods with any specific franchisee in mind. *Id.* The undisputed evidence, in fact, is that Domino's purchased these goods and had them shipped to the Supply Chain Center where they sat unless and until an in-state franchisee determined they were needed. *Id.* These franchisee orders were entirely separate transactions from Domino's original purchase of the goods; they were in-state orders, placed by in-state franchisees, with the in-state Supply Center, as the need arose. *Id.*

Respondents signed agreements to arbitrate disputes arising out of their employment with Domino's. App. at 5a. They nevertheless sued Domino's in state court, alleging that Domino's failure to reimburse various expenses they incurred violated California law. App. at 20a. Invoking diversity jurisdiction under 28 U.S.C. § 1332, Domino's removed the action to the U.S. District Court for the Central District of California and moved to compel arbitration under the FAA. *Id.* The District Court denied that motion, concluding that Plaintiffs fell within the FAA's residual clause. App. at 29a.

The Ninth Circuit affirmed, largely in reliance on the fact that "*Domino's* is directly involved in the procurement and delivery of interstate goods." App. at 17a (emphasis added). This Court subsequently vacated that opinion, remanding the case for further consideration in light of *Saxon*. App. at 10a; *cf. Saxon*, 142 S. Ct. at 1788 (rejecting an "industrywide approach" when applying the residual clause and instructing instead that courts should focus on "the actual work that the members of the class, as a whole, typically carry out").

On remand, the Ninth Circuit again affirmed the District Court's denial of Domino's motion to compel arbitration. App. at 9a. Although properly abandoning its earlier focus on what Domino's "does generally," *Saxon*, 142 S. Ct. at 1789, the Ninth Circuit nevertheless held that Respondents are encompassed by the residual-clause exemption because the goods they delivered were "inevitably destined from the outset" for the local customers, App. at 9a.

REASONS FOR GRANTING THE PETITION

I. Whether the Residual-Clause Exemption Applies to Local Delivery Drivers Delivering In-State Orders to In-State Customers is an Important Question of Federal Law that this Court Should Settle.

It is difficult to find a merchant that does not sell goods that, at least in part, came from a different state or country. Bourbon sold at liquor stores in New York is likely produced and bottled in Kentucky; oranges sold at grocery stores in Texas almost certainly came from Florida; and there is a good chance that furniture stores in Illinois sell wooden dressers that were manufactured in North Carolina. Some courts have

(correctly) concluded that the employees and app-based delivery drivers that deliver these products to in-state consumers to fill in-state orders are not engaged in interstate commerce for purposes of the residual clause. *See* Point B, *infra*. This conclusion flows inexorably from the principal that, "to fall within the [residual-clause] exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (explaining that the residual-clause exemption turns on "what the worker does" and not "where the goods have been"); *accord Archer v. Grubhub, Inc.*, 190 N.E.3d 1024, 1032 (Mass. 2022) ("[A]t the moment the goods at issue here entered the flow of interstate commerce, the destination was not the address of the Grubhub customer ordering the takeout food or convenience items for delivery. At most, the goods were destined for the local restaurants, delicatessens, and convenience stores that ordered them."); *In re Grice*, 974 F.3d 950, 958 (9th Cir. 2020). If the workers are not directly involved in that act, they are not engaged in interstate commerce, even if the goods they deliver previously crossed state lines, and even if the intended recipients of those goods are predictable or well-defined. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569–70 (1943). The Ninth Circuit, in fact, has previously recognized the same principle, albeit in connection with a dispute that did not involve arbitration agreements. *See Watkins v. Ameripride Services*, 375 F.3d 821, 827 (9th Cir. 2004) (uniforms that came from out of state to fill subsequent, in-state orders placed by in-state customers were not delivered in interstate commerce because the uniforms "were fungible, and were taken from general inventory after the customer made an order").

In this case, which concerns the enforceability of arbitration agreements, the Ninth Circuit took a different view. The Ninth Circuit concluded that individuals who made intrastate deliveries of goods taken out of general inventory at a California warehouse to fill orders placed by California franchisees were engaged in interstate commerce simply because the goods at issue were "inevitably destined" for Domino's franchisees as a group. App. at 9a. This unprecedented approach risks transforming swaths of purely local delivery people into transportation workers engaged in interstate commerce—e.g., any local delivery person who delivers, to a specified group of customers, goods that in whole or in part came from another state, even if those goods come out of general inventory; any local delivery person who delivers goods (such as medical equipment) that, by their nature, are used only by a defined, finite group of consumers (like hospitals); and any local delivery person who delivers goods for a retailer that, either because of geography or consumer needs, is the only source for certain goods. Such an expansive approach to the residual clause would render unenforceable all the arbitration agreements those delivery people entered into with their employers, a result that is irreconcilable with both this Court's directive to apply the residual clause narrowly, and the federal policy favoring arbitration. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

This Court should therefore grant certiorari to resolve this important federal question that remains unresolved after *Saxon*. 142 S. Ct. at 1789 n.2; *see also infra* at 2 n.1.

II. The Ninth Circuit's Decision Conflicts with the Decisions of the First, Third, Fifth, and Seventh Circuits on this Important Question of Federal Law.

There is a clear split among the Circuit Courts regarding the applicability of the FAA's residual clause to local delivery drivers who make in-state deliveries in response to in-state orders. On one side of this split are the First, Third, Fifth, and Seventh Circuits, which have all recognized that local delivery drivers who make in-state deliveries in response to in-state orders are not "directly involved" or "actively engaged" in the stream of interstate commerce under *Saxon*. The Ninth Circuit's decision below—which held that the residual clause applied simply because the goods transported were "inevitably destined" for local Domino's franchisees—is in conflict with those decisions.

In the First Circuit's *Immediato v. Postmates, Inc.* decision, the plaintiffs delivered "meals prepared at local restaurants and goods sold by local retailers," both "in response to individual orders placed by local customers within the state." 54 F.4th 67, 74 (1st Cir. 2022). Some of the goods they delivered came from out of state. *Id*. at 78. The First Circuit held that the purely in-state nature of the plaintiffs' deliveries by itself was not dispositive in determining whether the plaintiffs were engaged in interstate commerce. *Id.* at 77 (noting that the residual-clause exemption "can apply to workers who are . . . responsible for only an intrastate leg of" an interstate trip). Nor was the fact that some of the goods had been "prepared into a meal" while others were simply repackaged, "bereft of [their] interstate brethren." *Id.* at 78. Instead, relying on this Court's decisions in *Walling v. Jacksonville Paper Co.*,

317 U.S. 564 (1943), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the First Circuit held that in-state deliveries "must be a constituent part of" a larger, continuous interstate journey—i.e., that the deliveries must take place in the stream of interstate commerce—for the residual-clause exemption to apply. *Immediato*, 54 F.4th at 77.

Evidence supporting such a finding was lacking in *Immediato*. In fact, the First Circuit noted that there was "[n]othing in the record suggest[ing] . . . that [the plaintiffs'] customers . . . [were] buying goods as part of an interstate transaction"; instead, the record showed that "the goods [we]re purchased from local vendors" after they "already exited the flow of interstate commerce." *Id.* at 78. So the First Circuit held that the plaintiffs were not encompassed by the residual-clause exemption, and had to proceed to arbitration. A different result would likely have ensued if that case had been heard by the Ninth Circuit, as the undisputed record shows that Domino's franchisees were not buying goods as a part of an interstate transaction, but rather from the local warehouse as the need arose. *Cf. Canales v. CK Sales Co., LLC*, 67 F.4th 38, 44 & n.1 (1st Cir. 2023) (describing the test as "whether plaintiffs' intrastate transportation of the . . . goods is a continuation of the same interstate journey that br[ought] the goods to the [in-state] warehouse or a separate, purely intrastate journey" and noting that the relevant facts "would include, for example, whether the goods are ordered to the warehouse pursuant to a prior contract or understanding with the ultimate recipients or whether the shipments to the warehouse populate a general

inventory from which subsequent in-state orders are filled").[2]

The Third Circuit has taken the same approach as the First Circuit in applying the residual clause to in-state drivers making in-state deliveries to fulfill in-state orders. In *Singh v. Uber Techs., Inc.*, Uber drivers whose trips were usually in-state argued they were nonetheless encompassed by the residual-clause exemption because many of these in-state trips involved transporting customers to or from airports for interstate travel. 67 F.4th 550, 562 (3d Cir. 2023). The Third Circuit disagreed. It held that the plaintiffs were not encompassed by the residual-clause exemption because they failed to show that their work was "'a constituent part' of th[at] interstate movement of . . . people"; instead, the plaintiffs were only involved in "'independent and contingent intrastate transactions[s].'" *Id.* at 558 (quoting *Immediato*, 54 F.4th at 77). That, of course, is precisely the nature of the transactions Respondents were involved in—yet the result in this case was the opposite.

The Fifth Circuit, on nearly identical facts to this case, reached an outcome in line with the approach taken by the First and Third Circuits. In *Lopez v.*

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[2] The First Circuit reiterated this approach to the stream-of-commerce test in *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228 (1st Cir. 2023). There, the plaintiffs received promotional materials from out of state and delivered them to in-state customers' stores for display. *Id.* at 230. The First Circuit held that such deliveries were likely still in the stream of commerce because the "materials—from the beginning—were all destined for particular retail stores." *Id.* at 241. Again relying on *Walling*, the First Circuit contrasted this with situations involving "an out-of-state delivery that ends in . . . general inventory, followed by an in-state trip to a customer's home when [it is] later determine[d] the [item] is required[.]" *Id.*

Cintas Corp., the plaintiffs "pick[ed] up items from a local warehouse and deliver[ed] those items to local customers." 47 F.4th 428, 432 (5th Cir. 2022). Although some of the items "arrived at the warehouse from out of state," *id.* at 430, the Fifth Circuit held that the drivers were not encompassed by the residual-clause exemption because "[o]nce the goods arrived at the [local] warehouse and were unloaded, anyone interacting with those goods *was no longer engaged in interstate commerce*," *id.* at 433 (emphasis added). That holding would have resulted in the enforcement of the arbitration agreements the Ninth Circuit deemed unenforceable below.

The Seventh Circuit's approach to local-delivery drivers is in accord with *Immediato*, *Singh*, and *Lopez*. In *Wallace v. Grubhub Holdings, Inc.*, local delivery drivers made the same argument Respondents make in this case—i.e., that they were transportation workers exempt from the FAA because "they carr[ied] goods that ha[d] moved across state and even national lines." 970 F.3d 798, 802 (7th Cir. 2020). The Seventh Circuit recognized that the potato chips the drivers delivered in Chicago might have come from Idaho, and the chocolate from Switzerland. *Id*. But this was not enough to transform the delivery drivers into workers engaged in interstate commerce. Rejecting the notion that the exemption hinged on "where the goods have been," the Seventh Circuit held that if all a plaintiff had to show for the exemption to apply was that he delivered goods that had once traveled in interstate commerce, the residual clause 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." *Id*. That

result, the court observed, would "run afoul" of both this Court's instruction that the scope of the residual clause "be controlled and defined" by the work done by the worker, and its admonition that the residual clause be "afforded a narrow construction." *Id*. (quoting *Circuit City*, 532 U.S. at 106, 118).

Just like Respondents here, the plaintiffs in *Immediato*, *Singh*, *Lopez*, and *Wallace* were all engaged in making in-state deliveries in response to in-state orders. The First, Third, Fifth, and Seventh Circuits all concluded that these local delivery drivers were not encompassed by the residual-clause exemption and therefore had to adhere to their contractually agreed-upon arbitration clauses.

The Ninth Circuit should have done the same in this case. Like the plaintiffs in *Immediato*, *Singh*, *Lopez*, and *Wallace*, Respondents made in-state deliveries to in-state customers to fulfill in-state orders. Some of the goods they delivered may have come from out of state before coming to rest at the warehouse, but there is no evidence that any of these goods were originally ordered by Domino's to fill any particular order or with any particular customer in mind. There is therefore no evidence that Respondents even work *in* the stream of interstate commerce, let alone that they are "directly involved" or "actively engaged" in that stream. *Saxon*, 142 S. Ct. at 1789–90. Nevertheless, because they happen to be located in the Ninth Circuit, Respondents are permitted, as a result of the decision below, to disregard their obligation to arbitrate.

This Court should therefore grant certiorari to resolve this split of the Circuits on this important question of federal law.

III. The Decision Below Conflicts with This Court's Precedent.

The Ninth Circuit's decision below also conflicts with this Court's precedent on this important issue of federal law. *Saxon* instructed that workers are encompassed by the residual-clause exemption if—but only if—they are "directly involved" or "actively engaged" in "transporting goods across state or international borders." 142 S. Ct. at 1789–90 (internal quotation marks omitted). Respondents adduced no evidence showing they were in any way involved or engaged—actively or otherwise—in transporting goods across borders. The Ninth Circuit nonetheless concluded that they were encompassed by the residual-clause exemption.

That conclusion is irreconcilable with this Court's precedent. The conflict is all the more stunning because that precedent comes from cases involving the FLSA—a statute that, unlike the residual clause, is *not* given a narrow construction. *See Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1349 (11th Cir. 2021) ("The Fair Labor Standards Act has a 'remedial purpose,' and the Supreme Court has told us that we do not give its exemptions a narrow construction." (citing *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) ("We thus have no license to give the [FLSA] exemption anything but a fair reading."))). In applying the FLSA, this Court has repeatedly drawn a clear line between goods moved from "manufacturers or suppliers without the state, through [a] warehouse and on to customers whose *prior orders or contracts* are being filled," *Walling*, 317 U.S. at 569 (emphasis added), and goods "acqui[red] by a merchant for *general local disposition*," *McLeod v. Threlkeld*, 319 U.S. 491, 494 (1943) (emphasis added). Under this

precedent, workers handling the former goods are "engaged in" interstate commerce, while workers handling the latter are not. *See Walling*, 317 U.S. at 566 (quoting 29 U.S.C. §§ 206(a), 207(a)); *McLeod*, 319 U.S. at 492 (same).

Respondents here adduced no evidence showing that they were "fill[ing]" any "prior orders or contracts." *Walling*, 317 U.S. at 569. To the contrary, the undisputed factual record shows that all the goods received by the Supply Center are held until and unless they are subsequently ordered by the in-state franchisees pursuant to separate, in-state transactions. In other words, they are "not held, used, or sold by [Domino's] in relation to any *further* transactions in interstate commerce[.]" *Schechter*, 295 U.S. at 543 (emphasis added). Yet the Ninth Circuit concluded that Respondents were somehow engaged in interstate commerce. That conclusion—which rests on an interpretation of intrastate conduct than is even broader than the one applied under the FLSA, *cf. Circuit City*, 532 U.S. at 118 (noting that the residual clause is to be "afforded a narrow construction")—is inconsistent with this Court's precedent, which makes clear that the goods Respondents delivered were *not* in interstate commerce.

In *Walling*, a wholesaler imported out-of-state paper products for sale to in-state customers. 317 U.S. at 569. This Court held that products obtained to fill "*prior* orders or contracts" remained in the stream of commerce for purposes of the FLSA until final delivery to the customer, even if those products were temporarily held at the wholesaler's warehouse. *Id.* (emphasis added). By contrast, this Court held that products obtained and held at the warehouse for *subsequent* order and delivery to in-state customers were no

longer in the stream of commerce—and that the workers making those deliveries were therefore not "engaged in [interstate] commerce." *Id.* at 569–70. The Court reached this conclusion despite acknowledging that the wholesaler's manager "ha[d] a fair idea of when and to whom the merchandise w[ould] be sold" "before placing his orders"; the manager was "able to estimate with considerable precision the immediate needs of his customers even where they d[id] not have contracts calling for future deliveries"; "most of the customers form[ed] a fairly stable group"; and the "orders [we]re recurrent as to the kind and amount of merchandise." *Id.* at 569. For this Court, that evidence was simply insufficient to demonstrate "that the goods in question were different from goods acquired and held by a local merchant for local disposition." *Id.* at 570.

Here, the Ninth Circuit recognized that "Domino's franchisees do not order the goods until after they arrive at the" Supply Center. App. at 8a. However, in a broadening of the rule that *Walling* announced, the Ninth Circuit focused on a phrase from *Walling* suggesting that the right combination of facts and circumstances "might . . . at times be sufficient to establish" an exception to the announced rule. *See* App. at 8a (quoting *Walling*, 317 U.S. at 570). But the only facts and circumstances identified by the Ninth Circuit were that the goods Domino's had previously ordered were "inevitably destined . . . for Domino's franchisees" and that some of them came from "outside of California," App. at 9a—the same sort of facts presented in *Walling*, which, as noted above, was interpreting a more broadly construed statute.

The Ninth Circuit had a similarly myopic (and incorrect) reading of *Schechter*. In *Schechter*, poultry

was shipped across state lines and "commingled" in a local 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. Because the poultry was "not held, used, or sold . . . in relation to any further transactions in interstate commerce," this Court held that the poultry exited the "stream of interstate commerce" when it "c[a]me to rest within [the] state," and thus "[n]either the slaughtering nor the [subsequent] sales . . . were transactions in interstate commerce." *Id.*

The Ninth Circuit acknowledged *Schechter*. App. at 9a. But the Ninth Circuit believed that *Schechter* stands only for the proposition that goods remain in the stream of interstate commerce if they are delivered to the final customer in an "unaltered" form. App. at 9a.[3] That reading, of course, ignores *Schechter*'s actual holding, which had nothing to do with the alteration (i.e., butchering) of the poultry. As *Schechter* clearly stated, the "interstate transactions in relation to th[e] poultry . . . ended" the very moment it was "trucked to the[] slaughterhouses . . . for local disposition." 295 U.S. at 543.

This Court should therefore grant certiorari because the Ninth Circuit's decision conflicts with this Court's precedents.

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[3] The Ninth Circuit attempted to distinguish *Immediato* on the same basis, stating that *Immediato* was "inapposite" because "the products delivered in that case were transformed from their constituent ingredients into meals before the plaintiff drivers delivered them." App. at 9a. That is incorrect. *Immediato* specifically noted that, in addition to meals, the plaintiffs there delivered "packaged goods" and "comestibles and sundries from local grocery stores." 54 F.4th at 72, 78.

IV. This Case Is an Appropriate Vehicle to Resolve this Important Federal Question on Which the Circuits are Split.

The undisputed facts of this case squarely present an important and unresolved question of federal law and give the Court an ideal opportunity to resolve the split among the Circuits that is wreaking havoc throughout various industries. The Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 19, 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55009

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

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.

On Remand from the United States Supreme Court

Argued and Submitted June 20, 2023
Seattle, Washington

Filed July 21, 2023

OPINION

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

Opinion by Judge Hurwitz

SUMMARY[**]

Federal Arbitration Act

On remand from the United States Supreme Court, the panel affirmed the district court's order denying Domino Pizza's motion to compel arbitration in a putative class action brought by three Domino truck drivers, alleging violations of California labor law.

The panel previously affirmed the district court's denial of Domino's motion to compel arbitration, holding that because the drivers were a "class of workers engaged in foreign or interstate commerce," their claims were exempt from the Federal Arbitration Act by 9 U.S.C. § 1. The Supreme Court granted certiorari, vacated, and remanded for reconsideration in light of *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022).

On remand, the panel stated that its prior decision squarely rested upon its reading of *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), which concerned Amazon delivery drivers. The panel found no clear conflict between *Rittmann* and *Saxon* and

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[*] The Honorable Barrington D. Parker, Jr., 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.

nothing in *Saxon* that undermined the panel's prior reasoning that because the plaintiff drivers in this case, like the Amazon package delivery drivers in *Rittmann*, transport interstate goods for the last leg to their final destinations, they are engaged in interstate commerce under § 1.

Rejecting Domino's attempts to distinguish *Rittmann*, the panel stressed that the issue was not how the purchasing order was placed, but rather whether the plaintiff drivers operate in a single, unbroken stream of interstate commerce that renders interstate commerce a central part of their job description. A pause in the journey of the goods at a warehouse did not remove the goods from the stream of interstate commerce because the goods were inevitably destined from the outset of the interstate journey for Domino's franchisees.

COUNSEL

Norman M. Leon (argued), DLA Piper LLP US, Chicago, Illinois; Steve L. Hernández, DLA Piper LLP US, Los Angeles, California; Taylor Wemmer, DLA Piper LLP US, San Diego, California; Courtney G. Saleski, DLA Piper LLP US, Philadelphia, Pennsylvania; Jacob Frasch, DLA Piper LLP US, Washington, D.C.; Gerson H. Smoger, Smoger & Associates, Dallas, Texas; for Defendant-Appellant.

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

Elizabeth B. Wydra, Brianna J. Gorod, and Smita Ghosh, Constitutional Accountability Center, Washington, D.C., for Amicus Curiae Constitutional Accountability Center.

Jeffrey R. White and Tad Thomas, American Association for Justice, Washington, D.C.; Gerson H. Smoger, Smoger & Associates, Dallas, Texas; for Amicus Curiae American Association for Justice.

OPINION

HURWITZ, Circuit Judge:

This is a putative class action by three truck drivers against their employer, Domino's Pizza. We previously affirmed the district court's denial of Domino's motion to compel arbitration, holding that because the drivers were a "class of workers engaged in foreign or interstate commerce," their claims were exempted from the Federal Arbitration Act ("FAA") by 9 U.S.C. § 1. *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627, 628 (9th Cir. 2021). The Supreme Court granted certiorari, vacated, and remanded for reconsideration in light of *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). *Domino's Pizza, LLC v. Carmona*, 143 S. Ct. 361 (2022). Upon reconsideration, we again affirm.

I.

Domino's sells ingredients used to make pizzas to its franchisees. As relevant to this case, Domino's buys those ingredients from suppliers outside of California, and they are then delivered to Domino's Southern California Supply Chain Center. At the Supply Center, Domino's employees reapportion, weigh, and package the relevant ingredients for delivery to local franchisees but do not otherwise alter them. The plaintiff drivers ("D&S drivers"), employees of Domino's, then deliver the ingredients in response to orders from Domino's California franchisees.

Three D&S drivers filed this putative class action against Domino's in 2020, alleging various violations

of California labor law. Each plaintiff's agreement with Domino's requires arbitration of "any claim, dispute, and/or controversy" between them. But the district court denied Domino's motion to compel arbitration, finding the plaintiffs exempt from the FAA under 9 U.S.C. § 1 as members of a class of transportation workers "engaged in foreign or interstate commerce." We affirmed, concluding that these last-leg truck drivers were "engaged in a single, unbroken stream of interstate commerce." *Carmona*, 21 F.4th at 629–30 (cleaned up).

II.

In *Saxon*, the Supreme Court considered whether § 1 exempted from the FAA "workers who physically load and unload cargo on and off airplanes." 142 S. Ct. at 1789. In finding these workers exempt, the Court focused on the "class of workers" at issue, an inquiry which emphasized not the employer's business but rather "the actual work that the members of the class . . . typically carry out" in that business. *Id.* at 1788. An employee whose typical duties were to clean a local office, for example, would not be a member of an exempt class simply because his employer was itself engaged in interstate commerce. *Id.* at 1792. But the Court held that an employee who "frequently loads and unloads cargo on and off airplanes that travel in interstate commerce" was engaged in interstate commerce. *Id.* at 1793. The Court held that, in assessing whether workers are engaged in interstate commerce, the critical question is whether the workers are actively "engaged in transportation" of goods in interstate commerce and play a "direct and necessary role in the free flow of goods across borders." *Id.* at 1790 (cleaned up). In finding that the cargo workers met this description, the Court specifically rejected Southwest's

argument that the cargo workers must themselves cross state lines to be engaged in interstate commerce. *Id.* at 1791.

Saxon did not address the question now before us. Rather, the Court expressly pretermitted whether "last leg" drivers like the D&S drivers in this case qualified for the exemption, stating:

> We recognize that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders. *Compare, e.g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (C.A.9 2020) (holding that a class of "last leg" delivery drivers falls within § 1's exemption), with, *e.g.*, *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (C.A.7 2020) (holding that food delivery drivers do not). In any event, we need not address those questions to resolve this case.

Id. at 1789 n.2.

III.

The Supreme Court remanded "for further consideration in light of [*Saxon*]." *Carmona*, 143 S. Ct. at 361. Our prior decision squarely rested upon our reading of *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), a case whose continued validity *Saxon* expressly declined to address. *Saxon*, 142 S. Ct. at 1789 n.2. Unless *Rittmann* is somehow "clearly irreconcilable" with *Saxon*, we are required to continue to follow it.[1]

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[1] Although we recognize that the Fifth Circuit disagrees with *Rittmann*, *see Lopez v. Cintas Corp.*, 47 F.4th 428, 432–34 (5th Cir. 2022), we are bound by it.

Miller v. Gammie, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). We find no clear conflict between *Rittmann* and *Saxon*.

Rittmann confronted whether delivery drivers who transported goods from Amazon warehouses to in-state consumers were exempt from the FAA under § 1. 971 F.3d at 915. After first analyzing the business of "the company for whom the delivery person works," *id.* at 917, we turned to what *Saxon* later confirmed is the central inquiry: what the relevant class of workers actually did, *id.* at 915 ("AmFlex workers pick up packages that have been distributed to Amazon warehouses, certainly across state lines, and transport them for the last leg of the shipment to their destination."). And we concluded that, because the Amazon goods shipped in interstate commerce were not transformed or altered at the warehouses, the entire journey represented one continuous stream of commerce. *Id.* at 915–17.

Our prior opinion held that the FAA exempted the claims in this case because the D&S drivers were part of a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1; *Carmona*, 21 F.4th at 628. Although we noted that the "nature of the business for which a class of workers performed their activities" was a "critical factor" in the § 1 analysis, *id.* at 629 (cleaned up), we in the end focused heavily on what the class of workers to which the plaintiffs belonged actually did. Relying on *Rittmann*, we stressed that because "the D&S drivers, like the Amazon package delivery drivers, transport [interstate] goods for the last leg to their final destinations," they are engaged in interstate commerce under § 1. *Id.* at 630 (cleaned up). Nothing in *Saxon* undermines that reasoning.

Our prior opinion also squarely rejected Domino's attempts to distinguish *Rittmann*. *Id.* We find them no more persuasive the second time around. Domino's primarily argues that *Rittmann* does not control because, unlike Amazon customers, Domino's franchisees do not order the goods until after they arrive at the warehouse. But we previously stressed that "[t]he 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." *Id.* (cleaned up). Indeed, the Supreme Court has long rejected the notion that the timing of an order is itself dispositive of whether goods remain in the stream of interstate commerce. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570 (1943) ("We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' . . . .").

Nor does the pause in the journey of the goods at the warehouse alone remove them from the stream of interstate commerce. *See id.* at 568 ("The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey."); *id.* ("[I]f the halt in the movement of goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points."); *see also Fraga v. Premium Retail Servs., Inc.*, 61 F.4th 228, 241 (1st Cir. 2023) (holding that an employer's "use of its own employees to carry the materials for the last part of each interstate journey does not turn the journey into two unconnected trips"). Because the goods in this case

were inevitably destined from the outset of the interstate journey for Domino's franchisees, it matters not that they briefly paused that journey at the Supply Center.

Citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), Domino's also argues that the interstate journey ended at the Supply Center because the goods were repackaged there. But in contrast to *Schechter*, which involved chickens slaughtered at the poultry company and only then delivered to local buyers, *id.* at 520–21, the relevant ingredients in this case are unaltered from the time they arrive in the Supply Center until they are delivered to franchisees. *Immediato v. Postmates, Inc.*, 54 F.4th 67 (1st Cir. 2022), upon which Domino's also relies, is similarly inapposite: the products delivered in that case were transformed from their constituent ingredients into meals before the plaintiff drivers delivered them. *Id.* at 78.

IV.

We conclude that *Saxon* is not inconsistent, let alone clearly irreconcilable, with *Rittmann*, which continues to control our analysis. We therefore AFFIRM the order of the district court.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 21–1572

DOMINO'S PIZZA, LLC

Petitioner

v.

EDMOND CARMONA

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court in this cause is vacated with costs, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Southwest Airlines Co.* v. *Saxon*, 596 U.S. ___ (2022).

IT IS FURTHER ORDERED that the petitioner, Domino's Pizza, LLP, recover from Edmond Carmona, Three Hundred Dollars ($300.00) for costs herein expended.

October 17, 2022

Clerk's costs: $300.00

[Supreme Court Seal]
A True copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States
/s/ Scott S. Harris

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55009

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

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

OPINION

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

Norman M. Leon (argued), DLA Piper LLP (US), Chicago, Illinois; Steve L. Hernández, DLA Piper LLP (US), Los Angeles, California; Taylor Wemmer, DLA Piper (US) LLP, San Diego, California; for Defendant-Appellant.

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 D

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 E

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

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* 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.