No. 21-55009

In the United States Court of Appeals for the Ninth Circuit

EDMOND CARMONA,

Plaintiff-Appellee,

and

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

Plaintiffs,

v.

DOMINO'S PIZZA, LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring meaningful access to the courts and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) exempts from its scope workers "engaged in . . . interstate commerce." 9 U.S.C. § 1. Just last Term, in *Southwest Airlines Co. v. Saxon*, the Supreme Court held that workers who are "directly involved" in "transporting goods across state or international borders" fall within that exemption. 142 S. Ct. 1783, 1789 (2022). Domino's argues that their drivers are not "directly involved" in "transporting goods across state or international lines," even though they transport pizza ingredients that originated out-of-state from the California Supply Center to local Domino's franchises. Def. Suppl. Br. 1-2. According to Domino's, these drivers are not directly involved in interstate commerce because, in Domino's view, the "interstate journey" of the pizza ingredients ends at the Supply Center. *Id.* at 2.

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Neither *Saxon* nor the cases upon which it relies supports Domino's argument. *Saxon* instructs courts to look to the "ordinary, contemporary, common meaning" of § 1's language at the time of the FAA's passage to interpret its scope. *See Saxon*, 142 S. Ct. at 1788 (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)). In 1925, courts understood the phrase "interstate commerce" to refer to the "continuous movement" of goods to their ultimate, intended destinations, *Phila. & Reading Ry. Co. v. Hancock*, 253 U.S. 284, 286 (1920), and held that workers were "engaged in interstate commerce" when they were directly involved in any part of this continuous movement—even if they were involved only in an intrastate leg of the journey, *see id.*, and even if the journey involved an "interruption" at a port or warehouse for manipulation or a change of carrier, *R.R. Comm'n v. Tex. & Pac. Ry.*, 229 U.S. 336, 340-42 (1913).

Furthermore, while Domino's suggests otherwise, the Supreme Court has never required "prior orders or contracts" to demonstrate that goods are in continuous interstate transportation. *See* Def. Suppl. Br. 11 (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943)). Rather, the Court has looked for "practical continuity in transit," *Walling*, 317 U.S. at 570, relying on a shipper's intention and "course of business" to determine when an interstate journey begins and ends, *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). Applying that test here, the Domino's drivers are engaged in interstate commerce.

ARGUMENT

I. In 1925, "Interstate Commerce" Referred to the Continuous Movement of Goods from One State to Their Intended Destinations in Another.

A. When the FAA was passed, the phrase "interstate commerce" referred to the transportation of goods from one state to their "real and ultimate destinations" in another. *Hancock*, 253 U.S. at 286. A worker was engaged in interstate commerce if he or she was closely involved in any "step" of that transportation, including an intrastate leg of the journey. *Id.*; *see Balt. & Ohio Sw. R.R. Co. v. Burtch*, 263 U.S. 540, 544 (1924) (observing that workers were engaged in interstate commerce under FELA when their work was "so closely related to interstate transportation as to be practically a part of it"); W.W. Thornton, *A Treatise on the Federal Employers' Liability Act and Safety Appliance Acts* 79 (3rd ed. 1916) (worker can be engaged in interstate commerce even if the worker did not "personally cross a state line").

A case involving the Federal Employers' Liability Act (FELA) provides an instructive example. *See Saxon*, 142 S. Ct. at 1789 (citing *Burtch*, 263 U.S. at 544, a FELA case). FELA required railroads to compensate employees who were injured while the railroad was "engaging in commerce between any of the several States" and the employee was "employed by [the railroad] in such commerce." Federal Employers' Liability Act of 1908, ch. 149, 35 Stat. 65; *see Burtch*, 263 U.S. at 542 (assessing whether the facts "establish that at the time of the injury [the employees] were engaged in interstate commerce"). In *Philadelphia Railway Co. v. Hancock*, a

railroad worker was killed in an accident while operating a train carrying coal between two points in Pennsylvania. 253 U.S. at 285. The Court rejected the proposition that the coal "did not become part of interstate commerce" until it reached a transit point in Pennsylvania where it was "inspected, weighed, and billed to specifically designated consignees in another state." *Id.* at 286. Instead, the Court reasoned that "the coal was in the course of transportation to another State when the cars left the mine," and the worker was engaged in interstate commerce because he was "directly involved" in one "step" of that journey. *Id.*; *see Annotation: Federal Employers' Liability—Employees*, 10 Am. L. Rep. Ann. 1184, 1221 (1921) ("The employee is engaged in interstate commerce if he is assisting in the operation of a train hauling cars or freight destined for another state.").

B. As *Hancock* itself makes clear, when the FAA was enacted, a brief pause in the interstate transportation of goods was not viewed as disrupting the "continuous movement" of goods in interstate commerce, even when the goods were stored, measured, or manipulated during the break. *Hancock*, 253 U.S. at 286; Thornton, *supra*, at 349-50 ("The interstate character of a shipment attaches when it begins to move as an article of interstate commerce, and continues until its ultimate destination is reached. . . . Temporary stoppage of a car, even for repairs, does not withdraw it from the use of interstate commerce.").

In *Sabine*, the Court determined that the Sabine Company's transportation of lumber from its Texas mill to a Texas port for eventual export to Europe was "foreign commerce" for the purpose of tariff charges. *Tex. & New Orleans R.R. Co. v. Sabine Tram Co*., 227 U.S. 111, 114 (1913). It rejected the argument that the Texas journey was a separate, intrastate voyage, even though lumber was "delay[ed]" at the port for further shipping, *id.* at 130, and the Sabine Company had "no connection . . . or concern" with the goods after that point, *id*. at 126. Instead, the Court looked to the lumber's "real and ultimate destination," reasoning that "[i]t was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped." *Id.*

When assessing a trip's "interstate character" for purposes of determining whether the Interstate Commerce Commission (ICC) had jurisdiction, courts also looked to a journey's "ultimate destination," *id.*—or "where the parties intended the movement should finally end." 1 Clyde Aitchison, *Interstate Commerce Acts Annotated* 170 (1930). Goods in transit did not lose their interstate character simply because they were delayed or modified to prepare for further shipment, so long as they were still "destined for export." *See S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 525-27 (1911) (ICC had jurisdiction over company that transported cottonseed cakes from various points in Texas to the Galveston port, where it "manufactured [the cakes] into meal . . . for intermediate and sometimes for

future delivery" to Europe and then transmitted the meal to separate shippers); *R.R. Comm'n,* 229 U.S. at 340-41 (ICC had jurisdiction over railroad that shipped logs to New Orleans and held them for 20 days "until they could accumulate cargo to fill their export orders and arrange for transportation").

C. According to Domino's, the "Supreme Court has 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,'" Def. Suppl. Br. 11 (quoting *Walling*, 317 U.S. at 569), and those that are destined for "general local disposition," *id*. (quoting *McLeod v. Threlkeld*, 319 U.S. 491, 494 (1943)). But the Court has never drawn such a line.

Instead, the Court has looked to the "practical and essential" features of commerce to determine its interstate character. *Newberry v. United States*, 256 U.S. 232, 282 (1921) (Pitney, J., concurring). By 1925, it had "recognize[d] that a transportation of merchandise, incidentally interrupted for a temporary purpose, or proceeding under successive bills of lading or means of transport, some operating wholly intrastate, was none the less interstate commerce." *Id*.; *Sabine*, 227 U.S. at 126 (an intrastate shipment under "separate bills of lading" was still "essentially foreign"); *So. Pac*., 219 U.S. at 527 (because cotton meal was "destined for export," it made "no difference" that shipments were not made on "through bills"); Aitchison,

supra, at 172 ("an original and continuing intention to ship goods from one state to another . . . is not changed by the mere accidents or incidents of billing").

Similarly, when adjudicating FELA cases, courts looked to the "character of the transaction," rather than billing documents, to determine whether an employee was engaged in interstate commerce. *Cott v. Erie R.R. Co.*, 231 N.Y. 67, 71 (N.Y. 1921) (Cardozo, J.); *Employers' Liability Act—Lack of Knowledge of Destination Immaterial in Determining Interstate Status of Shipment*, 31 Yale L.J. 96, 97 (1921) ("The interstate or foreign status of a shipment cannot be determined by the mere forms of billing or contract . . . ."). In *Cott*, the court held that FELA applied to a train conductor who was killed while operating a local engine carrying beef from Buffalo to an East Buffalo depot because the beef would subsequently be shipped to Canada. The local railroad had contended that the conductor was not employed in interstate commerce because the company had not "been notified in advance of the point of ultimate destination," *Cott*, 231 N.Y. at 68, and was billed only for an in-state journey, *id.* at 71. The court disagreed, holding that it made no difference that the subsequent shipping was to be done by another company under a separate bill, *id.* at 70, because the local journey "was known from the beginning to be a step . . . in a movement that was to follow," *id.* at 73.

McLeod and *Walling*—cases on which Domino's relies—postdate the FAA's enactment by decades and, in any event, are not to the contrary. Both cases involved

the Fair Labor Standards Act (FLSA)'s application to "employees who [are] engaged in commerce." *McLeod*, 319 U.S. at 493; *Walling*, 317 U.S. at 567. In *Walling*, the Court held that the FLSA applied to employees who worked in a warehouse that "constantly receiv[ed] merchandise on interstate shipments and distribut[ed] it" to customers, but did not cross state lines. *Id.* at 565-66. The Court rejected the argument that the goods were "no longer 'in commerce'" when they entered the warehouse, reasoning that there was a "practical continuity of movement" from out-of-state suppliers to the warehouse and then to local customers. *Id.* at 569. While Domino's implies otherwise, *see* Def. Suppl. Br. 11, the Court explicitly acknowledged that prior orders were not required to establish this "practical continuity," noting that "a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might . . . at times be sufficient to . . . to keep a movement of goods 'in commerce' within the meaning of the Act," *Walling*, 317 U.S. at 570, because "commerce among the states is not a technical legal conception, but a practical one," *id.* (quoting *Swift*, 196 U.S. at 398).

The Court again applied this practical test in *McLeod*. In *McLeod*, the Court held that cooks who furnished food to in-state railroad workers were "outside of [interstate] movement" because the food was consumed "apart from [the railroad workers'] work," *McLeod*, 319 U.S. at 498, akin to goods destined "for general local

distribution," *id*. at 494. The Court used similar reasoning in *Schechter Poultry*, which Domino's also cites. Def. Suppl. Br. 11. There, it distinguished between live poultry shipped from out of state, which came "to a permanent rest" upon arriving in New York for "slaughter and local sale," and "goods [that] come to rest within a state temporarily" while in "practical continuity of [interstate] movement." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935).

II. The Domino's Drivers Are Engaged in Interstate Commerce.

No less than the actors in the cases just discussed, the Domino's drivers are "directly involved" in the transport of goods across state lines. The drivers participate in the transportation of pizza ingredients on an interstate journey that begins with out-of-state suppliers and ends when the ingredients reach their "real and ultimate destinations"—the Domino's franchisees. *Hancock*, 253 U.S. at 286. Their work is "closely related" to one step of this journey, *Burtch*, 263 U.S. at 544, and therefore constitutes engagement in interstate commerce.

The fact that the goods remain in the Supply Center to await "*potential*, *future* orders by the in-state franchisees," Def. Suppl. Br. 8 (emphasis in original), does not destroy the "practical continuity of movement," *Schechter Poultry*, 295 U.S. at 543, of the pizza ingredients from out-of-state suppliers to the local franchisees.[2] Nor

[2] Domino's emphasizes that only *some* of the ingredients originate outside California. But that is of no consequence. Under FELA, for example, even the carriage of a "single car load" *en route* from another state was enough to "convert

does the "transform[ation] and reapportion[ment]" of the goods at the Supply Center have that effect, Def. Suppl. Br. 3, because the goods are still "destined for . . . delivery" to the franchisees, despite any "concentration and manufactur[ing]" that occurs along the way, *S. Pac.* 219 U.S. at 526.

The "essential character" of this journey has always been to "supply the demand" of franchisees, *Sabine,* 227 U.S. at 126. The ingredients would serve no purpose if they did not leave the Supply Center—they would not be sold for "local disposition," or otherwise "commingled with the mass of property within the state," *Schechter Poultry*, 295 U.S. at 543. Domino's has "known from the beginning" that the Supply Center was a "step . . . in a movement that was to follow." *Cott*, 231 N.Y. at 73. "[P]ractical" reality, based on a company's "course of business," *Swift*, 196 U.S. at 398, has always controlled the interstate commerce inquiry. It should do so here.

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the entire train into an interstate commerce relation." Thornton, *supra*, at 46; *see Annotation*, *supra*, at 1224 (noting that FELA applied to "[a] brakeman working on a train running between points in a state . . . composed *partly* of interstate cars" (emphasis added)).

CONCLUSION

For the foregoing reasons, this Court should affirm the denial of the motion to compel.

Respectfully submitted,

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Dated: January 30, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 2,478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this January 30, 2023.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: January 30, 2023

/s/ Elizabeth B. Wydra
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