No. 101370-1
[Court of Appeals No. 82659-0-I]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

No. 82659-0-I
King County Superior Court No. 20-2-14563-7 KNT

JUSTIN L. OAKLEY, individually and on behalf of all those similarly situated,

Plaintiff-Respondent,

v.

DOMINO'S PIZZA LLC, a foreign limited liability company,

Defendant-Appellant.

APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Defendant-Appellant Domino's Pizza, LLC ("Domino's") asks this court to accept review of the Court of Appeals decision terminating review designated in Section II of this petition.

II. COURT OF APPEALS DECISION

Defendant-Appellant seeks review of the decision of Division I of the Court of Appeals, *Oakley v. Domino's Pizza LLC*, No. 82659-0-I, 2022 WL 4128652, entered on August 15, 2022 and later published on September 12, 2022, and attached hereto as Appendix A (the "Decision" or "Op.").

In the Decision, the Court of Appeals refused to enforce an arbitration agreement between Respondent Justin Oakley ("Respondent") on the grounds that the class action waiver found in his arbitration agreement with Domino's was unconscionable, rendering the entire agreement unenforceable. The Court of Appeals specifically held that the class action waiver violated the state's public policy of protecting workers'

rights to undertake collective actions and ensure payment of wages. By doing so, this Court rejected the state's long standing public policy in favor of arbitration. The Court, in holding that the class action waiver itself was unconscionable, greatly expanded a doctrine that was previously only found in the consumer dispute context. The Court also rejected well-settled authority that the party arguing against a valid agreement to arbitrate must provide specific evidence about why an agreement to arbitrate would prevent him or her from bringing claims.

The Decision dangerously expands the application of substantive unconscionability to include class action waivers in the employment context. In doing so, the Decision creates serious problems for Washington state employers. Employers who have entered into class action waivers with employees may need to litigate all disputes in court. If allowed to stand, the Decision could invalidate thousands (if not hundreds of

thousands) of employee arbitration agreements throughout the state of Washington.

III. ISSUES PRESENTED FOR REVIEW

Is it substantively unconscionable for an employee to agree to an arbitration provision containing a class action waiver?

IV. STATEMENT OF THE CASE

Respondent was a Delivery and Service driver with Domino's from November 13, 2018 until his termination on January 17, 2020. Clerk's Papers ("CP") 208. Respondent, who is a Washington resident, worked out of the Domino's supply chain center located in Kent, Washington (the "Kent Supply Chain Center"), delivering pizza supply ingredients from the Kent Supply Chain Center to various Domino's franchise stores primarily located in Washington. CP 2, 211.

A. The Arbitration Agreement

Prior to his employment, Respondent signed Domino's Arbitration Agreement (the "Agreement") on November 13,

2018. CP 264-68. Pursuant to the Agreement, Respondent and Domino's agreed:

> [A]ny claim, dispute, and/or controversy that the Employee or the Company may have against the other shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

CP 266. The Agreement expressly applies to all employment related claims, including wage claims:

> This specifically includes any claim … Employee may have against the Company, which would otherwise require or allow access to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with Employee's seeking employment with, employment by, termination of employment, or other association with the Company, whether in contract, in tort, pursuant to statute, regulation, or ordinance, or in equity or otherwise (including, but not limited to, any claims related to wages, reimbursements, …).

Id. The Agreement to arbitrate "specifically includes any claim, dispute, and/or controversy relating to the scope, validity, or enforceability of this Arbitration Agreement." *Id.* The Agreement also contains a class action waiver. *Id.* ("Employee

and the Company expressly waive any right to arbitrate as a class representative, as a class member, in a collective action"). The sole exceptions to arbitration are claims arising under the National Labor Relations Act and brought before the National Labor Relations Board, claims for medical and disability benefits under workers' compensation, claims for unemployment compensation filed with the state, individual claims brought in small claims court, and claims arising out of a contract specifically providing for resolution in court. *Id.*

The Agreement contains an additional clause in bolded and capitalized letters, affirming that "EMPLOYEE AND THE COMPANY UNDERSTAND THAT BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH GIVE UP THEIR RIGHT TO TRIAL BY JURY OF ANY INDIVIDUAL, CLASS, COLLECTIVE ACTION … ." CP 267 (emphasis in original).

Respondent did not have to agree to arbitrate. The Agreement contains an opt-out provision, which gave

Respondent the opportunity to opt out of the Agreement by simply sending notice of the decision to opt out via email or regular mail within 30 days of signing the Agreement. *Id.* Just before the signature line designated for Respondent's signature, the Agreement again reminded him in bold and capitalized font that unless he sent the opt-out notice, he would be required to arbitrate all covered disputes. CP 268.

Further, when Domino's presented the Agreement to Respondent, it was accompanied by a cover letter and a summary sheet titled "SIGNIFICANT FEATURES OF THE DOMINO'S PIZZA ARBITRATION PROGRAM." CP 264-65 (emphasis in original). The cover letter alerted Respondent he had "30 calendar days from the date you sign the Arbitration Agreement to opt out of the duty to arbitrate through the procedures described in the Agreement." CP 264. Respondent signed the agreement on November 13, 2018 and he did not subsequently opt out of it. CP 268, 208.

The Agreement designates the governing rules as those of the American Arbitration Association ("AAA"), which require employers like Domino's to fund the majority of the arbitration and place a $300 cap on an employee's associated fees.[1] *Id*.

On September 30, 2020, Respondent filed a putative class action complaint against Domino's alleging: (1) failure to

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[1] In the event that an employee files a claim against Domino's, the AAA rules require that Domino's pay a filing fee of $1,900 and a case management fee of $750, and the employee only pay a $300 filing fee. *See Employment/Workplace Fee Schedule: Costs of Arbitration*, American Arbitration Association (last visited Oct. 12, 2022), https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf. In the event that Domino's initiates the dispute, Domino's is required to pay the full filing fee of $2,000 and a case management fee of $750. *Id.* Domino's is also responsible for the arbitrator's compensation, arbitrator expenses (such as travel), and hearing room rental. *Id*. at 2. In sum, the employee's total out-of-pocket expense for an arbitration that the employee initiates is $300. If Domino's initiates the arbitration, the employee has no arbitration expense whatsoever. The employee's filing fee may be waived by the arbitrator in the event of extreme hardship. *See* Rule 43, *Employment Arbitration Rules and Mediation Procedures*, American Arbitration Association (last visited Oct. 12, 2022), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf.

pay putative class members overtime wages and (2) willfully withholding wages. CP 1. Respondent brought the action on behalf of "all individuals employed by [Domino's] at any time from September 30, 2017 and thereafter as commercial delivery and service drivers or in any other position with similar duties based out of Washington state." CP 3.

B. Domino's Motion to Compel Arbitration

Pursuant to the Agreement, in response to Respondent's Complaint, Domino's filed a Motion to Compel Arbitration on March 22, 2021, seeking to compel arbitration under both the FAA and Washington law. CP 185.

After the parties fully briefed the issue, the Court issued an order denying Domino's Motion to Compel Arbitration (the "Order") on May 5, 2021. CP 288. The Court's reasoning was based on two conclusions. First, the Court held that the FAA did not apply to this dispute because Respondent "was a worker engaged in interstate commerce within the meaning of § 1 of

the Federal Arbitration Act."[2] CP 289. Second, the Court held that there could be no agreement to arbitrate because, if the FAA did not apply, the arbitration clause was void. RP at 51:6-11. The Court held that "[t]he arbitration provision's choice of the FAA as its governing law cannot be severed from the agreement." CP 289.

Domino's appealed, and the Superior Court stayed proceedings pending appellate review. The appeal was decided by an opinion on August 15, 2022, which was published on September 12, 2022. *See* Appendix A. The Court of Appeals held that Respondent was excluded from the FAA's scope as a transportation worker engaged in interstate commerce, but that the FAA choice of law provision was severable under the Agreement's severability clause.[3] Op. at 1. Nonetheless, the Court of Appeals affirmed the trial court's denial of Domino's

[2] Domino's is not seeking review of this holding.
[3] Domino's is not seeking review of this holding.

Motion to Compel Arbitration on the grounds that the class waiver was unconscionable. *Id*. This petition follows.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Standard of Review

"A party may seek discretionary review by the Supreme Court of any decision of the Court of Appeals which is not a ruling including" "[a]ny decision terminating review." RAP 13.3(a)(1). The Washington Supreme Court may accept a petition for review if "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court," or "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1), (4). This Court "engage[s] in de novo review of a trial court's decision to grant a motion to compel or deny arbitration." *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). "The party opposing arbitration bears the burden of showing that the [arbitration] agreement is not enforceable." *Id.*

B. The Decision conflicts with published Supreme Court decisions regarding the importance of arbitration in Washington State.

Federal law has long recognized the strong public policy favoring arbitration. *See, e.g.*, 9 U.S.C §§ 1-161; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (explaining FAA "establishes 'a liberal federal policy favoring arbitration agreements'"); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms"). Recent decisions from the United States Supreme Court have emphasized the strength of this public policy and the validity of arbitration agreements specifically in the employment setting. In *Epic Sys. Corp.*, the court addressed the question of whether "employees and employers [should] be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" 138 S. Ct. at 1619. The Court held that "as a matter of law the answer is clear," because "[i]n the Federal Arbitration Act,

Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.*; *see also Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923-24 (2022) (holding FAA preempted California law's prohibition on contractual waivers of right for one party to unite multiple claims of other parties in a single action under PAGA).

Washington courts agree. As this Court has noted, "[b]oth state and federal courts must enforce this body of substantive arbitrability law" and "[c]ourts must indulge every presumption 'in favor of arbitration … .'" *Zuver*, 153 Wn.2d at 301; *see also Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341-42 (2004) (noting the same in employment dispute); *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 734, 349 P.3d 32 (2015) (same). Washington courts have repeatedly emphasized the importance of favoring arbitration in the resolution of disputes. *See Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995) (noting "[e]ncouraging parties to voluntarily

submit their disputes to arbitration is an increasingly important objective in our ever more litigious society"); *Perez v. Mid-Century Ins. Co*., 85 Wn. App. 760, 765, 934 P.2d 731 (1997) (stating "[t]here is a strong public policy in Washington state favoring arbitration of disputes"); *Clearwater v. Skyline Constr. Co*., 67 Wn. App. 305, 314, 835 P.2d 257 (1992), *rev. denied*, 121 Wn.2d 1005, 848 P.2d 1263 (1993) ("In Washington, settlement of controversies by arbitration is a highly favored method of dispute resolution."); *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (noting strong public policy favoring arbitration, which "eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation"); *King County v. Boeing Co*., 18 Wn. App. 595, 602-03, 570 P.2d 713 (1977) (same); *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (noting the object of arbitration "is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation"); *Verbeek Props., LLC v.*

GreenCo Envt'l., Inc., 159 Wn. App. 82, 87, 246 P.3d 205, 207 (2010) ("Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). By finding Domino's arbitration agreement unconscionable based on the fact it contains a class action waiver, the Decision rejects Washington's long-standing public policy favoring arbitration.

C. The Decision is in conflict with published Supreme Court decisions regarding substantive unconscionability.

The Court of Appeals decision conflicts with this Court's decisions in *Alder*, 153 Wn.2d 331, Z*uver*, 153 Wn.2d 293, and *Scott v. Cingular Wireless*, 160 Wn.2d 843, 161 P.3d 1000 (2007) regarding substantively unconscionable arbitration agreements.

Substantive unconscionability exists when a provision in a contract is one-sided. *Alder*, 153 Wn.2d at 334. To determine if a contractual provision is one-sided or overly harsh, courts

look at whether the provision is "'[s]hocking to the conscience,' 'monstrously harsh,' and 'exceedingly calloused.'" *Id.* at 344–45 (internal quotation marks omitted) (quoting *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)).

When determining whether an agreement to arbitrate is substantively unconscionable, Washington Supreme Court precedent has held that the burden is on the plaintiff to put forth evidence that the arbitration agreement would effectively ban the plaintiff from bringing his or her claims. *See Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 3078 P.3d 635 (2013); *Alder*, 153 Wn.2d at 334; Z*uver*, 153 Wn.2d at 293. In *Alder*, for example, the arbitration agreement at issue contained a fee-splitting provision that the plaintiff argued would "effectively bar him from bringing his claims." *Id*. at 352-3. The Court held that the plaintiff had "not met his burden" to show that the fee-splitting provision was substantively unconscionable because he "failed to provide any specific information about the arbitration fees he will be required to share and why such fees

would effectively prohibit him from bringing his claims." *Id*. at 353. Similarly, in *Zuver*, this Court held that when a party seeks to invalidate an arbitration agreement on the ground that it is prohibitively expensive, that party bears the burden of showing the likelihood of such costs. 153 Wn.2d at 308. [4]

This Court has also applied this reasoning to class action waivers. In *Scott*, this Court held that the defendant's class action waiver was substantively unconscionable because it effectively prevented a consumer from pursuing a valid claim, therefore exculpating the defendant from potential liability on small claims, no matter how widespread. 160 Wn.2d at 855 ("[c]laims as small as those in this case are impracticable to pursue on an individual basis even in small claims court, and particularly in arbitration."). As in *Alder* and *Zuver*, the plaintiff in *Scott* had presented evidence that the prohibitive cost

[4] In any event, even if *Alder* and *Zuver* reached opposite conclusions (which they do not), the Domino's Agreement is distinguishable because it requires Domino's to fund the totality of the arbitration costs other than the $300 filing fee.

prevented consumer claims. *Id*. at 856. The Court was presented with evidence that no Washington consumers had brought claims to arbitration against the defendant in the past six years. *Id*.; *see also Hill*, 179 Wn.2d at 57 (holding employees presented evidence setting forth the high costs of arbitration and "uncontroverted evidence that no employee has availed him- or herself of the arbitration process in recent memory").

The Decision conflicts with the reasoning of these cases for two overarching reasons. First, *Scott* is distinguishable because employment-related claims for wages are not the same as a $45 consumer overdraft fee claim.[5] Employment-related claims for wages are inherently more valuable to an attorney than a $45 consumer overdraft fee. Wage claims can involve double damages and attorneys' fees, making them particularly

[5] *Scott* is also distinguishable because, unlike the agreement in *Scott*, Domino's agreement contains an opt-out provision, which gave Respondent 30 days to opt-out of the arbitration provision after he signed it. CP 264. Respondent did not opt out.

enticing cases to take on as a lawyer. *See* RCW 49.52.070 (providing for double damages for willful violation for the failure to pay wages earned, along with costs of suit and attorney's fees).

Second, Respondent has not met his burden of proving that the Agreement effectively bars him from bringing his claims. Respondent has presented no evidence that the prohibitive cost of arbitration would have prevented his claims or evidence that Domino's employees have ceased bringing arbitration claims against Domino's in the past because of the agreement to arbitrate.

The Court of Appeals inexplicably reached its conclusion that Respondent would not be able to pay a lawyer to bring this lawsuit on an individual basis without any factual basis for such a conclusion. It appears that the Court of Appeals was relying on Respondent's counsel's single statement at oral argument that *Respondent's counsel* would not accept such a case if it was a single plaintiff matter. Op. at 17. Specifically, the

Decision states that the record "does indicate that Oakley would have not been able to pay a lawyer to bring the suit on an individual basis" and notes the premise for such a conclusion was Respondent's counsel's single statement that "he generally does not take cases like this one, 'with only smaller wage and hour claims against large entities like Domino's unless they can be filed on a class action basis,' based on his experience that 'handling smaller wage-only claims on an individual basis is not viable from a financial standpoint.'" *Id*. This statement does not mean that no employment lawyer would reject Respondent's claim, just that a class action lawyer would not take such a claim.

Moreover, the Court of Appeals incorrectly stated that the record did not establish how extensive Oakley's damages were when in fact the record reveals that Respondent's damages are in excess of $17,500. During removal proceedings for this case, a federal court calculated Respondent's individual damages as $17,887. *Oakley v. Domino's Pizza LLC*, No. C20-

1711, 2021 WL 509208, at *2 (W.D. Wash. Feb. 11, 2021). There is no case law that holds that a claimant with a claim of this value would effectively be barred from bringing that claim on an individual basis. There are certainly employment lawyers who would take on a case with potential damages of $17,500, especially considering Respondent would also be entitled to attorneys' fees if he prevails. Because the Decision erroneously concluded that Respondent met his burden of proving that the Agreement would prohibitively prevent him from bringing his claims, this Court should accept review and correct these errors.

D. This petition involves an issue of substantial public interest that should be determined by the Supreme Court because it concerns the enforceability of class action waivers in arbitration employment agreements in Washington State.

The Decision impacts thousands of arbitration agreements throughout the state of Washington. Given the prevalence of employee arbitration agreements in the workforce, it is problematic that Washington employers do not have clear guidance on the enforceability of arbitration

agreements in the employment context. Conflicting Court of Appeals decisions about the arbitrability of employment-related disputes muddy the waters, causing confusion and inconsistency at the lower court level. Additionally, there is no clear guidance on the enforceability of class action waivers in the employment context, causing confusion amongst the lower courts.

The Decision relied on *Young v. Ferrellgas, LP*, stating that "[t]he class action waiver therefore frustrates our state's public policy of protecting workers' rights to undertake collective actions and ensure the proper payment of wages." Op. at 17-18; 106 Wn. App. 524, 527, 21 P.3d 334, 335 (2001). In *Young*, the Court of Appeals held that an employment arbitration provision that replaced a statutory cause of action would thwart public policy guaranteeing fair wages. *Id.* at 532. Specifically, the Court stated that "[a]llowing an employment contract arbitration provision to replace this statutory cause of action would thwart public policy guaranteeing fair wages,

codified by our Legislature." *Id.* Accordingly, the Court determined that the plaintiff's claim for a violation of overtime provisions could not be subject to arbitration.

However, the reasoning in *Young* directly contradicts the Court of Appeal's reasoning in *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 901, 28 P.3d 823, 831 (2001). In *Tjart*, the Court of Appeals found that an arbitration agreement was enforceable in the context of the employee's discrimination claim under the Washington Law Against Discrimination (WLAD), despite the Legislature's strong public policy to be free from workplace discrimination and wrongful termination. WLAD is also a non-negotiable right—employers obviously cannot contract away the right of employees to be free from discrimination at the workplace. Despite this, the Court of Appeals held that WLAD cases can be subject to arbitration. Applying *Tjart's* reasoning to *Young*, it would follow that even though there is a public policy to guarantee employee fair wages and employers obviously cannot contract

this away, a dispute for fair wages can still be decided via arbitration. This Court should accept review to clarify the confusion clearly impacting lower courts.

Moreover, no Washington Court has explicitly stated that a class action waiver in an employment context is unenforceable. The Decision relied on reasoning from a collective bargaining statute to determine that class action waivers are unenforceable, expressly admitting that it "need not address whether this statute [RCW 49.32.020] specifically includes class actions as a concerted activity." Additionally, the Court of Appeals likened the instant case to the scenario in *Chavez v. Our Lady of Lourdes Hospital*, 190 Wn.2d 507, 524, 415 P.3d 224 (2018). In *Chavez*, this Court was determining whether the trial court abused its discretion in ruling that the nurses failed to satisfy the predominance and superiority requirements of CR 23(b)(2). *Id*. at 513. This Court did not address whether a class action waiver in the context of an employment agreement was unconscionable.

As mentioned in the preceding section, *Scott* is the only recent case that has discussed class action waivers in the context of an arbitration agreement. The Decision here seemed to ignore the analysis in *Scott* and its distinctions when applied to this case. Specifically, it is hard to imagine how a court could find that Respondent would need the class action procedure in order to properly avail himself of his rights under the law, given the monetary threshold of his claims. Again, the federal court during removal procedures calculated Respondent's individual damages as **$17,887**. *Oakley*, 2021 WL 509208, at *2. Unlike a consumer class action, Respondent's own claimed damages alone are substantial and do not require the protections of a consumer class action.

E. Other jurisdictions analyzing employment-related class action waivers reinforce the need for clarity on this topic in Washington State.

The law in other jurisdictions regarding the validity of class action waivers in the employment context further compels review of the Decision. Domino's is unaware of any case where

a state supreme court has held that a class action waiver in the employment context was unenforceable under state law. Many other jurisdictions have held that class action waivers in employment-related disputes are valid and enforceable. *See, e.g.*, *D'Antuono v. Serv. Road Corp.*, 789 F. Supp. 2d 308, 314 (D. Conn. 2011) (where exotic dancers sued for unpaid wages, "the Court concludes that there is no ground under either Connecticut law or under the federal common law of arbitrability that permits the Court to invalidate [plaintiffs'] agreement, including the provision requiring them to arbitrate their claims on an individual basis"); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (upholding class action waiver in employment contract in a class action for unpaid wages under Georgia law); *Colon v. Strategic Delivery Sols., LLC*, 459 N.J. Super. 349, 363 (2019) (in wage and hour lawsuit, upholding class action waiver in agreement between company and its independent contractors and noting difference between this agreement and consumer

contracts under New Jersey law); *Castro v. TCA Logistics Corp.*, No. 20-CV-2004(JS)(ARL), 2021 WL 7287305, at *6 (E.D.N.Y. Mar. 31, 2021) (in unpaid wages lawsuit, upholding independent contractor agreement's class action waiver under New York law); *Nelson v. Gobrands, Inc.*, No. 20-cv-5424, 2021 WL 4262325, at *8 (E.D. Pa. Sept. 20, 2021) (in unpaid wages lawsuit, holding class action waiver in employment agreement was not unconscionable under Pennsylvania law because agreement "provided Plaintiffs with an opportunity to opt-out" and "Plaintiffs potential damage recovery could easily justify resolution by individual arbitration"); *Parr v. Stevens Transport, Inc.*, No. 3:19-CV-2378, 2020 WL 2200858, at *5 (N.D. Tex. May 5, 2020) (in unpaid wages action, holding "Texas courts routinely compel cases to individual arbitration where, as here, '[t]he clear language of the parties' agreement expressly forbids class' actions"). This Court should accept review to resolve the uncertainty created by the Decision about

whether class action waivers in the context of an arbitration provision are unconscionable.

In addition, one out of state federal court examining class action waivers under Washington law in the employment context assumed that Washington law would *not* invalidate employment-related class action waivers. *See Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). In *Waithaka*, the First Circuit analyzed whether a delivery driver was required to arbitrate his claims for unpaid wages on an individual basis pursuant to an employment contract. *Id.* at 15-16. The First Circuit refused to enforce the Washington choice-of-law clause in the employment contract, even after admitting that Washington law was the "default choice of law for assessing the arbitration and class waiver provisions of the parties," based on the assumption that Washington courts would likely enforce the class action waiver. *Id.* at *27-28 (noting that "assuming for purposes of deciding whether arbitration can be compelled here that Washington law would permit the class

waiver provisions in the Agreement"). The Court ultimately held that Massachusetts law was in conflict with Washington law insofar as Massachusetts law would not allow for the enforcement of the class waiver provision, but Washington law would.

This Court should accept review in order to address this important issue and, at a minimum, to clarify for courts within and outside of Washington whether such waivers may be enforced, and, if so, on what bases and for what reasons.

VI. CONCLUSION

For the foregoing reasons, the petition should be granted.

CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief contains 4,458 words, in compliance with the word limits set forth in RAP 18.17.

Respectfully submitted this 12th day of October, 2022.

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CERTIFICATE OF SERVICE

I declare that on October 12, 2022, I caused a true and correct copy of the foregoing **Appellant's Petition for Review** to be served on the following in the manner indicated:

James B. Pizl, WSBA No. 28969 ENTENTE LAW PLLC 315 Thirty-Ninth Avenue SW, Suite 14 Puyallup, Washington 98373-3690 Tel: 253.446.7668 E-mail: jim@ententelaw.com *Attorney for Plaintiff-Respondent Justin L. Oakley*	☐ Via Hand Delivery ☐ Via U.S. Mail ☑ Via E-mail ☑ Via the Court's E-Service Device
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 12th day of October, 2022.

s/ Paige Plassmeyer
Paige Plassmeyer, Legal Practice Specialist

APPENDIX A

FILED
8/15/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUSTIN L. OAKLEY, individually and on behalf of all those similarly situated, Respondent, v. DOMINO'S PIZZA LLC, a foreign limited liability company, Appellant.	No. 82659-0-I DIVISION ONE UNPUBLISHED OPINION

SMITH, A.C.J. — Justin Oakley, a former delivery and service driver at the Domino's Pizza supply chain center in Kent, filed a class action complaint against Domino's for violations of the Washington Minimum Wage Act[1] and wage rebate act.[2] Domino's appeals the trial court's denial of its motion to compel arbitration under the parties' arbitration agreement. The court concluded that the agreement's choice of the Federal Arbitration Act[3] (FAA) as its governing law was ineffective because Oakley was excluded from the FAA's scope as a transportation worker engaged in interstate commerce, and that the agreement's choice of the FAA could not be severed from the agreement. We agree that the choice of the FAA is ineffective, but conclude that this provision is severable.

[1] RCW 49.46.
[2] RCW 49.52.
[3] 9 U.S.C. §§ 1-14.

Nonetheless, because we conclude that the arbitration agreement's class action waiver is unconscionable, we affirm the trial court's denial of the motion to compel arbitration.

FACTS

Justin Oakley worked as a Delivery and Service driver at the Domino's Pizza supply chain center in Kent from November 2018 to January 2020. The Kent supply chain center is part of the Domino's supply chain division, which consists of a "network of 19 domestic and 5 Canadian Supply Chain Centers, a vegetable processing facility, a pressed product plant, and an Equipment & Supply Center." The supply chain division supplies more than 225 types of products, such as dough balls, pizza toppings, napkins, and cleaning supplies, to 99 percent of Domino's stores, of which there are some 15,000 worldwide. While most of these supplies are brought to the supply chain centers and then perhaps reapportioned before being delivered to Domino's restaurants, the supply chain centers also create the dough balls for the restaurants from raw ingredients.

As a Class A driver,[4] Oakley drove a semi-truck with a refrigerated trailer on a multi-state route that usually included deliveries to Washington and Oregon and occasionally to Idaho, Montana, and Wyoming. Oakley's shifts all started and ended in Kent, and most of Oakley's deliveries were inside the state of

[4] Oakley was required to have a Class A Commercial Driver's License for his job.

Washington.[5] Most Class A drivers "also routinely delivered supplies across state lines."

When Oakley began his employment, he signed an arbitration agreement. The agreement provided that disputes would be submitted to "binding arbitration under the Federal Arbitration Act," including disputes "relating to the scope, validity, or enforceability of this Arbitration Agreement." The agreement also specified that disputes would "be arbitrated only on an individual basis and not on a class, collective, multi-party, or private attorney general basis." It included a severability clause permitting the arbitrator or court to sever any term or provision deemed void, unenforceable, or in contravention of law, except that if the prohibition on class-wide actions was deemed invalid, then the entire arbitration agreement "shall be null and void." The agreement included an opt-out provision permitting Oakley to opt out within 30 days of signing the agreement. Oakley did not opt out.

On September 30, 2020, Oakley filed a class action complaint for damages, claiming that Domino's had violated the Washington Minimum Wage Act and wage rebate act. Domino's removed the case to federal court based on diversity jurisdiction, but the federal court remanded the case to superior court on

[5] Domino's submitted a declaration in the trial court contending that Oakley only "occasionally" travelled out-of-state and that he primarily delivered products inside Washington. However, at oral argument, Domino's contended that this was not inconsistent with Oakley's claim that his routes "usually involved deliveries to Oregon," by explaining that "you could make deliveries at five Washington locations and one Oregon, and he'd still be correct that he might usually do that. . . . The bottom line is most of his deliveries were to Washington locations."

February 11, 2021. Domino's then filed a motion to compel arbitration. The court denied the motion, concluding that Oakley was exempt from the FAA and that the agreement's choice of the FAA could not be severed from the agreement. Domino's appeals.

ANALYSIS

"We review a trial court's decision to grant a motion to compel or deny arbitration de novo." Walters v. A.A.A. Waterproofing, Inc., 151 Wn. App. 316, 320, 211 P.3d 454 (2009). "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

Jurisdiction

As an initial matter, Domino's contends that the court does not have the authority to address this case because the arbitration agreement requires referring any disputes "relating to the scope, validity, or enforceability" of the agreement to arbitration. We conclude that we have limited jurisdiction to hear this case.[6]

Generally, "[c]ourts, not arbitrators, determine the threshold matter of whether an arbitration clause is valid and enforceable." Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 376, 292 P.3d 108 (2013). However, under both

[6] Domino's raises this issue for the first time on appeal, but because it concerns our jurisdiction over the case, we address it under RAP 2.5(a)(1). See Gorden v. Lloyd Ward & Assocs., PC, 180 Wn. App. 552, 563, 323 P.3d 1074 (2014) (court had subject matter jurisdiction to determine enforceability of arbitration agreement where issue had not been clearly and unmistakably delegated to the arbitrator).

federal and Washington law, questions about the validity of an arbitration question may be delegated to the arbitrator if the parties' agreement "clearly and unmistakably" provides that they should be. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986); Hill v. Garda CL Nw., Inc., 179 Wn.2d 47, 53, 308 P.3d 635 (2013). Nonetheless, and notwithstanding such a delegation clause, the question of whether an arbitration agreement falls within the scope of the transportation worker exception of 9 U.S.C. § 1 is a question for the courts. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538, 202 L. Ed. 2d 536 (2019) ("[A] court may use §§ 3 and 4 to enforce a delegation clause only if . . . . the contract in which the clause appears doesn't trigger § 1's 'contracts of employment' exception."). See also 9 U.S.C. § 3 (court should stay proceedings and refer a case to arbitration only "upon being satisfied that the issue involved" in the case "is referable to arbitration").

Here, the arbitration agreement refers "any . . . dispute . . . relating to the scope, validity, or enforceability" of the agreement to binding arbitration. This is a clear and unmistakable delegation of these issues to the arbitrator. Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc., 138 Wn. App. 203, 215, 156 P.3d 293 (2007) (clause referring "all disputes" to arbitration did not clearly and unmistakably delegate issue of arbitrability to arbitrator); Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC, 199 Wn. App. 534, 538, 541, 400 P.3d 347 (2017) (arbitration agreement's requirement that arbitration be conducted in accordance with Maritime Arbitration Association (MAA) rules,

which provide that arbitrator has jurisdiction over " 'any issues with respect to . . . the existence, scope or validity of the underlying arbitration agreement,' " was clear and unmistakable delegation of those issues to arbitrator (quoting MAA 9(a)). Notwithstanding this delegation, Oakley contends that he falls into the transportation worker exemption of the FAA, which is a question for the courts under New Prime.[7] 139 S. Ct. at 538. Therefore, we first address the applicability of the FAA.

Applicability of the FAA

Next, Domino's contends that the court erred by concluding that the FAA's transportation worker exception applied to Oakley's employment. We disagree.

The FAA provides that it does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In Circuit City Stores, Inc. v. Adams, the U.S. Supreme Court held that a narrow interpretation of this language was appropriate given "the location of the phrase 'any other class of workers engaged in . . . commerce' in a residual provision, after specific categories of [transportation] workers have been enumerated," and given the narrow meaning

[7] While the language in the FAA on which New Prime's holding relies focuses on federal courts, see 139 S. Ct. at 538; 9 U.S.C. §§ 3, 4, Congress did not intend "to limit the [FAA] to disputes subject only to *federal* court jurisdiction." Southland Corp. v. Keating, 465 U.S. 1, 15, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). Other state courts have accordingly relied on New Prime for the proposition that they should determine whether a contract falls within the scope of the FAA before enforcing a delegation provision. Theroff v. Dollar Tree Stores, Inc., 591 S.W.3d 432, 440 (Mo. 2020), reh'g denied (Jan. 30, 2020), aff'd (Jan. 14, 2020); Smith v. HOVENSA, LLC, 74 V.I. 57, 67 (Super. Ct. 2021); Nelson v. Superior Court, D075542, 2019 WL 5412107, at *4 (Cal. Ct. App. Oct. 23, 2019) (unpublished).

of the words "engaged in commerce" relative to "the more open-ended formulations 'affecting commerce' and 'involving commerce.' " 532 U.S. 105, 118, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) (alteration in original) (quoting 9 U.S.C. § 1). Accordingly, the Court concluded that this language "exempts from the FAA only contracts of employment of transportation workers." Circuit City, 532 U.S. at 119. More recently, the court held that "any class of workers directly involved in transporting goods across state or international borders" falls within this exemption. Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789, 596 U.S. __ (2022).

The Circuit Courts have defined the test for whether an employee fits within the transportation exemption in various, generally complementary ways. "To determine whether a class of workers meets that definition, we consider 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).[8] "[T]o fall within the 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, 970 F.3d at 802 (Grubhub food delivery workers were not exempt from the FAA even though the food they delivered may have previously moved in interstate commerce; that interstate movement was not part of the transaction the workers were involved in); McWilliams v. Logicon, Inc., 143 F.3d

[8] See Home Ins. Co. of New York v. N. Pac. Ry. Co., 18 Wn.2d 798, 808, 140 P.2d 507 (1943) ("When a federal statute is construed by a United States Court of Appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, but it is not binding on us if we do not deem it logical or sound.").

573, 576 (10th Cir. 1998) (§ 1 exemption applies only to "employees actually engaged in the channels of foreign or interstate commerce."). The Ninth Circuit recently held that the exemption applies to a "worker employed to deliver goods that originate out-of-state to an in-state destination" regardless of whether the worker personally travels between states, as long as the goods remain in the channel of interstate commerce. Rittmann v. Amazon.com, Inc., 971 F.3d 904, 910 (9th Cir. 2020), cert. denied, 141 S. Ct. 1374, 209 L. Ed. 2d 121 (2021). However, it held that the exception does not apply to workers, such as Uber drivers, whose work primarily consists of intrastate transportation but includes occasional, incidental, interstate trips that are not a " 'central part of the class members' job description.' " Capriole v. Uber Techs., Inc., 7 F.4th 854, 864-65 (9th Cir. 2021) (quoting Wallace, 970 F.3d at 801).[9]

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[9] The Eighth Circuit has also put forth several factors relevant to the determination of whether the transportation worker exemption applies:

> [F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).

Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352 (8th Cir. 2005). The Fifth Circuit declined to adopt this test on the grounds that it "unduly adds to the complexity of the analysis." Eastus v. ISS Facility Servs., Inc., 960 F.3d 207, 211 (5th Cir.

In Rittmann, the court held that workers employed by Amazon.com to transport packages for the last mile of the shipment, from Amazon warehouses to their destination, were exempt from the FAA's application. 971 F.3d at 915. Even though the workers' journeys were generally intrastate, the packages generally traveled across state lines to get to the warehouses and "remain[ed] in the stream of interstate commerce until they [were] delivered." 971 F.3d at 915. The court distinguished A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 543, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), in which the Supreme Court held that the slaughtering and sale of poultry by a slaughterhouse to local retail dealers and butchers were not "transactions in interstate commerce." Although the poultry was transported from other states, those interstate transactions ended when the poultry arrived at the slaughterhouse, and "flow in interstate commerce . . . ceased." Schechter Poultry, 295 U.S. at 543. The Rittmann court noted that the Amazon packages, by contrast, did not come to rest at Amazon warehouses, but instead the warehouses were "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." 971 F.3d at 916. Therefore, the workers fell within the § 1 exemption. See also Waithaka v. Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020), cert. denied, 141 S. Ct. 2886, 210 L. Ed. 2d 1001 (2021) (1st Circuit case also holding that Amazon "last mile" delivery drivers were exempt from FAA under § 1).

2020). While the parties did not brief these factors, it appears that most of them support Oakley's status as a transportation worker.

Here, Domino's employees such as Oakley are transportation workers within the meaning of 9 U.S.C. § 1 because they are "directly involved in transporting goods across state or international borders." Saxon, 142 S. Ct. at 1789. The transportation of goods from the Kent supply chain center to Domino's restaurants is the last step in a continuous channel of interstate transportation. Unlike the slaughterhouse in Schechter Poultry, the supply chain center does not mark the end of interstate transactions and the beginning of separate local transactions, but instead, as the name suggests, it is one stop in a larger supply chain. As the Domino's team member handbook describes it, "each Supply Chain facility *acts as a channel of support* for the stores it services." (Emphasis supplied.) Therefore, like an Amazon warehouse, the supply chain centers are "simply part of a process" by which Domino's supplies its stores. Rittmann, 971 F.3d at 916.

Moreover, even if Domino's products did exit interstate commerce when they arrived at the supply chain center, they would reenter interstate commerce when delivery drivers like Oakley transport them on interstate routes. While Domino's contends that Oakley "primarily delivered . . . supplies or products inside the state of Washington," it does not dispute that Oakley's routes "usually involved deliveries to Oregon" and that "most of the Class A drivers operating out of the Domino's Kent supply center also routinely delivered supplies across state lines." Unlike an Uber driver or local taxi driver, this interstate transportation appears to be a central part of the Class A delivery drivers' job descriptions. This fact substantiates the conclusion that delivery drivers in Oakley's position are

"actually engaged in the channels of foreign or interstate commerce." McWilliams, 143 F.3d at 576; see also Wallace, 970 F.3d at 802 (determination that "truckers who drive an interstate route" are members of a class engaged in the movement of goods in interstate commerce is "easy to make").

Domino's attempts to liken its supply chain centers to the slaughterhouse in Schechter Poultry, by emphasizing the reapportionment of goods and production of dough from raw ingredients that takes place at the centers. But these situations are not comparable. First, while the slaughterhouse was an independent entity that purchased poultry from out-of-state producers and then entered separate transactions with local purchasers, the supply chain centers are merely one stop in the larger Domino's supply chain. Second, even if the supply chain centers mark the end of an interstate transaction for the dough ingredients and the beginning of subsequent transactions involving the dough itself, the dough is only one of "more than 225 different types of products" provided by the supply chain division. For the rest of those products, the supply chain center is "simply part of a process" by which Domino's supplies its stores. Rittmann, 971 F.3d at 916.

Because Oakley is a transportation worker under 9 U.S.C. § 1, Oakley's employment contract is exempted from the FAA.

Severability and Choice of Law

Having concluded that Oakley's employment is exempt from the FAA, we next consider whether the choice of the FAA is severable from the arbitration agreement and whether a different law can govern arbitration instead. We

conclude that the reference to the FAA is severable and that Washington law governs the arbitration agreement.[10]

"Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties." Zuver, 153 Wn.2d at 320. "Consequently, when parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending . . . provisions to preserve the contract's essential term of arbitration." Id. However, where the offending provisions "permeate an agreement . . . such that severance would essentially require us to rewrite the dispute resolution agreement," we strike the entire agreement or section. McKee v. AT & T Corp., 164 Wn.2d 372, 402-03, 191 P.3d 845 (2008) (citations omitted) (concluding that four unconscionable terms tainted the entire dispute resolution section and that terms were therefore not severable); see also Zuver, 153 Wn.2d at 320 (concluding that there were only two unconscionable provisions which could easily be severed).

In Rittmann, the Ninth Circuit noted that it was not convinced the agreement's severability clause was triggered. 971 F.3d at 920 n.10. The

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[10] Before reaching this question, it is worth returning first to the threshold question of this court's jurisdiction. As noted above, the arbitration agreement's clear delegation of disputes over the validity of the agreement, after resolution of the FAA question, is binding. However, the purpose of New Prime's requirement that courts verify whether § 1's exemption applies before compelling arbitration is to determine whether the court has the authority to stay litigation and compel arbitration under §§ 3 and 4 of the FAA. 139 S. Ct. at 538. Therefore, we reach the issue of severability because if the designation of the FAA is not severable, then the FAA would control and prevent this court from taking any further action. See, e.g., Arafa v. Health Express Corp., 243 N.J. 147, 155, 166, 233 A.3d 495 (2020) (addressing whether New Jersey arbitration law would apply to an agreement that was exempt from the FAA, despite arbitration agreement containing a delegation clause).

severability clause provided for severing "any provision . . . [that was] determined to be unenforceable." Id. at 908. The court stated that it "fail[ed] to see how the choice-of-FAA clause that Amazon drafted is unconscionable merely because the provision does not work as Amazon might have intended." Id. at 920 n.10. However, assuming that the severability clause did apply, the court ruled that the choice of the FAA was not severable: the agreement provided that "These Terms are governed by the law of the state of Washington without regard to its conflict of laws principles, except for Section 11 of this Agreement, which is governed by the Federal Arbitration Act and applicable federal law." Id. at 920. Excising the reference to the FAA would essentially rewrite the contract because the arbitration provision was treated expressly differently from the rest of the agreement. Id. The court also applied Washington law, noting that "[b]ecause it is not clear that the parties intended to apply Washington law to the arbitration provision in the event the FAA did not apply, we construe ambiguity in the contract against Amazon to avoid that result." Id.

Here, the arbitration agreement contains a severability clause providing for the severance or modification of any term or provision that is "declared void or unenforceable or deemed in contravention of law." In light of the foregoing discussion, we conclude that the agreement's requirement that disputes be "determined exclusively by binding arbitration under the Federal Arbitration Act" is unenforceable.[11] Therefore, we must determine whether the requirement that

[11] Oakley contends that, in accordance with the court's note in Rittmann, the severability clause is not triggered because the FAA provision is not void or unenforceable, but instead merely "leads to a conclusion Domino's does not like."

arbitration be "under the Federal Arbitration Act" is severable. We conclude that it is—unlike the choice-of-law provision in Rittmann, the agreement does not "expressly treat[ ] the arbitration provision differently."[12] 971 F.3d at 920. The choice of the FAA does not permeate the agreement such that severing the provision would require rewriting the agreement.

Having determined that the provision is severable, we next conclude that Washington law applies. "In the absence of an effective choice of law by the parties, the validity and effect of a contract are governed by the law of the state having the most significant relationship with the contract." Shanghai Commercial Bank Ltd. v. Chang, 189 Wn.2d 474, 484-85, 404 P.3d 62 (2017) (quoting Pac. Gamble Robinson Co. v. Lapp, 95 Wn.2d 341, 343, 622 P.2d 850 (1980)). The determination of which state has the most significant relationship turns on " '(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.' " Chang, 189 Wn.2d at 485 (quoting RESTATEMENT (SECOND) OF

We disagree. The Rittmann court's note that the choice of the FAA was not *unconscionable* failed to address the question of whether the choice of the FAA was *unenforceable*. 971 F.3d at 908, 920 n.10.

[12] Oakley cites various cases in which courts found that the FAA did not apply and either declined to address severability or found that state law could not apply before declining to compel arbitration; however, with the exception of Rittmann, none of these cases were applying Washington law. See W. Dairy Transp., LLC v. Vasquez, 457 S.W.3d 458, 467 (Tex. App. 2014); Ward v. Express Messenger Sys., Inc., 413 F. Supp. 3d 1079, 1087 (D. Colo. 2019); Hamrick v. Partsfleet, LLC, 411 F. Supp. 3d 1298, 1302 (M.D. Fla. 2019), rev'd in part, appeal dismissed in part, 1 F.4th 1337 (11th Cir. 2021); Gates v. TF Final Mile, LLC, 1:16-CV-0341-RWS, 2020 WL 2026987, at *7 (N.D. Ga. Apr. 27, 2020).

CONFLICT OF LAWS § 188). Although Domino's is a Michigan company, every other factor points toward Washington—Oakley is a Washington resident, Domino's does business in Washington, and Oakley's employment with Domino's was based in Washington. And both parties conceded at oral argument that there was no dispute that Washington is the state with the most significant relationship to the contract.[13] Therefore, we conclude that the contract is controlled by Washington law.

Unconscionability

Next, we apply Washington law to determine that the arbitration agreement is unconscionable.[14]

"An agreement that has a tendency 'to be against the public good, or to be injurious to the public' violates public policy." Scott v. Cingular Wireless, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (internal quotation marks omitted) (quoting King v. Riveland, 125 Wn.2d 500, 511, 886 P.2d 160 (1994)). "An

[13] Domino's contended that the choice of law issue was a factual issue that should be addressed by the court on remand. But given the evidence in the record and the parties' agreement that Washington is the state with the most significant contacts, we conclude that we may make this determination on appeal. See, e.g., FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 966-70, 331 P.3d 29 (2014) (reversing trial court's dismissal of the case and reaching the issue of which state had the most significant relationship to the dispute).

[14] At oral argument, Domino's conceded—and Oakley urged—that this court could reach the issue of conscionability if we decided that Washington law applies. Wash. Ct. of Appeals oral argument, Oakley v. Domino's Pizza, LLC, No. 82659-0-I (Mar. 10, 2022) at 6 min., 22 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/watch/?eventID=2022031073. Because the severability clause specifically provides that the entire arbitration agreement is void if the class action waiver is deemed invalid, we agree that it is appropriate for us to address the conscionability of the class action waiver.

agreement that violates public policy may be void and unenforceable." Scott, 160 Wn.2d at 851. "Like any other contract, an arbitration agreement may be substantively unconscionable when it is used as a tool of oppression to prevent vindication of small but widespread claims." McKee, 164 Wn.2d 372, 395, 191 P.3d 845 (2008). "[W]hen wrongs are small but widespread, class actions are often the only effective way to address them." McKee, 164 Wn.2d at 397.

Because "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his or her freedom of labor," Washington public policy requires a worker to be "free from interference . . . in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protections."[15] RCW 49.32.020. While we need not address whether this statute specifically includes class actions as a concerted activity, class action suits uphold this same public policy. Our Supreme Court has noted in a different employment context that "[c]oncentrating . . . claims into one forum and certifying this class is likely the only way that the [employees'] rights will be vindicated" because individual employees "likely do not have the bargaining power to

[15] In a 2015 order, the National Labor Relations Board (NLRB) ordered Domino's to "[c]ease and desist from . . . [m]aintaining an Arbitration Agreement . . . that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums." Domino's Pizza, LLC & Fast Food Workers Comm., 363 NLRB 692, 693 (N.L.R.B. 2015). The NLRB found that this violated the National Labor Relations Act's prohibition on restraining employees' right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. In 2018, however, the Supreme Court held that, contrary to the NLRB's interpretation, § 157 did not prohibit class action waivers in arbitration agreements that were controlled by the FAA. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889 (2018). Ultimately, this issue is not before us because neither the FAA nor the NLRA are at issue here.

achieve systemic victories." Chavez v. Our Lady of Lourdes Hospital, 190 Wn.2d 507, 524, 415 P.3d 224 (2018). Moreover, " '[t]he Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages' " in the Minimum Wage Act, creating a "substantive, nonnegotiable, statutorily-guaranteed right." Young v. Ferrellgas, LP, 106 Wn. App. 524, 531-32, 21 P.3d 334 (2001) (quoting Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co., 139 Wn.2d 824, 830, 991 P.2d 1126 (2000)). "Allowing an employment contract arbitration provision to replace this statutory cause of action would thwart public policy guaranteeing fair wages, codified by our Legislature." Id. at 532.

In this case, the record does not establish how extensive Oakley's claimed damages were, but it does indicate that Oakley would not have been able to pay a lawyer to bring the suit on an individual basis. Oakley's attorney noted that he generally does not take cases like this one, "with only smaller wage and hour claims against large entities like Domino's unless they can be filed on a class action basis," based on his experience that "handling smaller wage-only claims on an individual basis is not viable from a financial standpoint." Moreover, the prohibition on class actions may prevent Domino's employees from seeking restitution for Minimum Wage Act violations, even if they are able to afford a lawyer to represent them individually, because "individual [employees] may be reluctant to sue their employers." Chavez, 190 Wn.2d at 524. The class action waiver therefore frustrates our state's public policy of protecting workers' rights to

undertake collective actions and ensure the proper payment of wages. We are therefore persuaded that the class action waiver is substantively unconscionable.

Because the class action waiver is unenforceable, under the terms of the severability clause, the entire arbitration agreement is unenforceable.

Therefore, we affirm the trial court's denial of the motion to compel arbitration and remand for further proceedings.[16]

Smith, A.C.J.

WE CONCUR:

Coburn, J.

[illegible], J.

[16] Oakley makes a request for attorney fees on appeal to "preserve his right to recover" these fees at the conclusion of this case. Oakley will only be entitled to attorney fees under RCW 49.46.090, RCW 49.48.030, and RCW 49.52.070 if he ultimately prevails on the substantive issues in this case. Oakley does not cite any law establishing that his request at this stage is necessary to preserve his right to request fees later. Oakley will be eligible for fees if he ultimately prevails.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JUSTIN L. OAKLEY, individually and on behalf of all those similarly situated, Respondent, v. DOMINO'S PIZZA LLC, a foreign limited liability company, Appellant.	No. 82659-0-I ORDER GRANTING MOTION TO PUBLISH

Respondent Justin Oakley moved for publication of the opinion filed on August 15, 2022. Appellant Domino's Pizza LLC has filed an answer. A panel of the court has reconsidered its prior determination not to publish the opinion for the above entitled matter and has found that it is of precedential value and should be published.

Now, therefore it is hereby

ORDERED that the written opinion filed on August 15, 2022 shall be published and printed in the Washington Appellate Reports.

For the Court:

Judge

APPENDIX B

West's Revised Code of Washington Annotated
Title 49. Labor Regulations (Refs & Annos)
Chapter 49.52. Wages--Deductions--Contributions--Rebates (Refs & Annos)

West's RCWA 49.52.070

49.52.070. Civil liability for double damages

Effective: June 10, 2010
Currentness

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

Credits
[2010 c 8 § 12056, eff. June 10, 2010; 1939 c 195 § 3; RRS § 7612-23.]

Notes of Decisions (185)

West's RCWA 49.52.070, WA ST 49.52.070
Current with all legislation from the 2022 Regular Session of the Washington Legislature. Some statute sections may be more current, see credits for details.

End of Document

DLA PIPER LLP (US)

October 12, 2022 - 3:55 PM

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