NO. 101370-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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I. INTRODUCTION

Both the trial court and Division One of the Court of Appeals correctly applied well-settled precedent to conclude that Plaintiff-Respondent Justin Oakley is a transportation worker whose claims of class-wide wage theft cannot be compelled to arbitration under the Federal Arbitration Act ('FAA"), 9 U.S.C. § 1. Defendant-Appellant Domino's, Inc. does not challenge that ruling. Instead, Domino's seeks to compel arbitration under Washington law, even though the arbitration agreement it drafted expressly chose the FAA as the governing law. Relying on ample precedent from this Court, Division One correctly held that arbitration of Oakley's claims cannot be compelled under Washington law because of the arbitration agreement's non-severable class action waiver. This ruling is not appropriate for review under RAP 13.4(b)(1) because it conforms to this Court's rulings regarding the substantive unconscionability of class action waivers and the vital role that collective action plays in protecting statutory wage rights. Review under RAP 13.4(b)(4)

also is not warranted because the public interest in balancing enforcement of arbitration agreements and preserving the rights of workers to pursue collective action is already adequately informed by this Court's precedents and Division One's holding. Therefore, the Court should deny Domino's' petition for review.

The Court should, however, review Division One's determination that Washington law can be substituted for the FAA in construing the arbitration agreement in the first place. The trial court correctly held that, under this Court's precedents, it could not rewrite Domino's arbitration agreement to apply Washington law where the agreement specifically designated the FAA as the governing law. Division One disagreed. This Court should reverse Division One on this issue and reinstate the ruling of the trial court.

II. STATEMENT OF THE CASE

A. Oakley's Employment And Domino's' Arbitration Agreement.

Domino's is the self-proclaimed "world leader in pizza delivery" with approximately 6,239 stores and 760 franchise

owners in the United States. CP 235-37. Its United States revenue topped $7 billion in 2019. *Id*.

Justin Oakley worked as a commercial truck driver for Domino's' Supply Chain Services division. He transported raw materials, paper products, and other goods from Domino's' supply center in Kent, Washington to company-owned and franchised restaurants throughout a multi-state region. CP 269.

When Oakley started working for Domino's, the company asked him to sign an arbitration agreement. Although he could, in theory, opt-out of the agreement, he did not have the ability to negotiate its terms. CP 270.

By its plain terms, the agreement is governed by the FAA:

> [B]oth the Company and the Employee agree that any 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 (emphasis added). The agreement does not reference the law of Washington or any other state, nor is Washington law referenced as governing generally the employment relationship

between Oakley and Domino's in any other document. *Id*.; CP 232.

The arbitration agreement also contains an explicit waiver of class and collective claims:

> **Form of Arbitration.** In any arbitration, any claim shall be arbitrated only on an individual basis and not on a class, collective, multiple-party, or private attorney general basis. Employee and the Company expressly waive any right to arbitrate as a class representative, as a class member, in a collective action, or in or pursuant to a private attorney general capacity, and there shall be no joinder or consolidation of parties.

CP 266. The class action waiver is an essential element of the arbitration agreement. Indeed, according to the agreement's "severability clause," the entire agreement is "null and void" if the class action waiver is deemed invalid. CP 267.

B. Procedural History And Decisions Below.

Oakley filed this putative class action on behalf of himself and other commercial delivery drivers employed by Domino's in Washington state, alleging that the company failed to pay them overtime or the reasonable equivalent of overtime as required by

the Washington Minimum Wage Act ("MWA"), RCW 49.46.130. CP 1-5. Following removal to federal court and remand to state court, Domino's moved to compel individual arbitration of Oakley's claims.

In opposing Domino's' motion, Oakley submitted declarations from himself and his counsel explaining that the agreement's class action waiver would stand as a bar to pursuit of his wage theft claims. Oakley attested:

> I do not have the money to pay a lawyer to take my claims against Domino's on an individual basis. I believe it would be difficult, if not impossible, for me to find a lawyer to take my individual claims on a contingency basis because of the relatively small size of my claims and the resources that a huge corporation like Domino's could bring to bear to fight my claim.

CP 271, ¶17. His counsel explained that he typically would not take wage theft cases with individual claims less than $75,000 unless they could be pursued on a class basis:

> I have learned that handling smaller wage-only claims on an individual basis is not viable from a financial standpoint, even with the fee-shifting provisions of Washington's wage laws. In addition, clients with such claims typically have no money to

> fund the costs of litigation and can be deterred just by the expense of the court filing fee.

CP 232-33, ¶10. Oakley also cited published studies documenting that arbitration typically results in significantly worse outcomes than litigation for workers in wage theft and other employment cases and that mandatory arbitration provisions significantly deter workers and plaintiffs' attorneys from pursuing such claims, especially when accompanied by class action waivers. CP 227 (citing Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018); and Jean Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev, 1309 (2015)). Domino's offered nothing to rebut this evidence.

The trial court denied Domino's' motion, finding that Oakley is an exempt transportation worker under FAA § 1 and that Domino's could not use Washington law to force Oakley into arbitration because Domino's selected the FAA as the law governing the agreement. CP 288-90. Division One affirmed that

Oakley is a transportation worker but held that it could sever the agreement's choice of the FAA as the controlling law and apply Washington law instead. The court then concluded that the agreement's non-severable class action waiver was substantively unconscionable because it "frustrates our state's public policy of protecting workers' rights to undertake collective actions and ensure the proper payment of wages." Opinion at 17-18.

III. ANSWER TO PETITION FOR REVIEW

A. Standard Of Review.

Rule of Appellate Procedure 13.4(b) provides that this Court will accept review only on limited grounds. Here, Domino's argues that Division One's holding on the unconscionability of the class action waiver is reviewable under subsections (b)(1) and (b)(4). Review under (b)(1) is inapplicable because the holding does not conflict with any decisions of this Court, and review under (b)(4) is not warranted because this Court's existing precedents provide ample guidance on the substantive unconscionability of class action waivers under state

law. The decision of the court below was a routine application of established law and as such does not justify the extraordinary step of review by this Court.

B. Division One's Holding Does Not Conflict With Any Decisions Of This Court Regarding The Importance Of Arbitration.

Domino's first argues that the decision below conflicts with decisions of this Court recognizing a strong public policy in favor of arbitration. Domino's is wrong.

To begin, this Court has never held that the policy favoring arbitration is absolute. Rather, this Court has consistently held that "[a]rbitration agreements stand on equal footing with other contracts and may be invalidated by '[g]eneral contract defenses such as unconscionability.'" *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47, 470 P.3d 486 (2020) (quoting *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008)). As the U.S. Supreme Court recently explained, the policy is not intended to favor arbitration over other forms of dispute resolution but is merely meant "'to place such agreements upon the same footing

as other contracts.'" *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14 (2022) (internal citation omitted). The policy "is about treating arbitration contracts like all others, not about fostering arbitration." *Id.*

Here, Division One did not ignore this policy. Rather, it engaged in exactly the inquiry required by this Court's precedents, determining whether any provisions of the Domino's arbitration agreement are substantively unconscionable and void as against public policy. Its conclusion that the class action waiver is unconscionable is perfectly consistent with this Court's decisions.

Rather than pointing to a particular decision that conflicts with the determination below, Domino's offers a laundry list of cases parroting a general policy in favor of arbitration, in apparent hopes the Court will assume a conflict exists. *See* Pet. at 12-14. But most of these cases do not address

unconscionability at all[1] and none address the issue of class action waivers.[2] Therefore, they are simply inapposite to and present no conflict with the decision below.

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[1] *See Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995) (addressing standard for review of arbitration awards); *Perez v. Mid-Century Ins. Co*., 85 Wn. App. 760, 934 P.2d 731 (1997) (addressing dispute over composition of arbitral panel); *Clearwater v. Skyline Constr. Co*., 67 Wn. App. 305, 835 P.2d 257 (1992) (addressing issues regarding vacatur of arbitral award); *Munsey v. Walla Walla College*, 80 Wn. App. 92, 906 P.2d 988 (1995) (addressing whether court or arbitrator should decide whether party had breached arbitration agreement); *King County v. Boeing Co*., 18 Wn. App. 595, 570 P.2d 713 (1977) (addressing whether court or arbitrator should interpret lease clause); *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992) (addressing whether parties stipulated to arbitration or reference hearing); *Verbeek Properties, LLC v. GreenCo Env't, Inc*., 159 Wn. App. 82, 246 P.3d 205 (2010) (addressing waiver of right to compel arbitration). Further, only one of these cases, *Munsey*, arose even partly out of an employment relationship.

[2] *Zuver*, *Adler*, and *Romney* all addressed whether provisions in arbitration agreements involving the costs of arbitration, fee-shifting, and limitations on remedies are unconscionable and/or severable, but none addressed class action waivers. *See Zuver v. Airtouch Commc'ns, Inc*., 153 Wn.2d 293, 103 P.3d 753 (2004), *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004); *Romney v. Franciscan Med. Grp*., 186 Wn. App. 728, 349 P.3d 32 (2015).

C. The Ruling Does Not Conflict With Any Decision Of This Court Regarding Substantive Unconscionability Or Class Action Waivers.

Domino's next argues that Division One's decision conflicts with this Court's precedents regarding substantive unconscionability, arguing that an arbitration agreement is substantively unconscionable only when it would effectively ban a plaintiff from bringing their claims. Again, Domino's fails to show any conflict. Rather, Division One adhered to this Court's precedents in determining that a class action waiver is unconscionable when it stands as a barrier to the vindication of rights and in relying on direct evidence that Domino's' class action waiver functions as such a barrier here.

Once again, Domino's relies primarily on cases that have nothing to do with the conscionability of class action waivers, including *Zuver*, *Adler*, and *Hill v. Garda CL Northwest, Inc*., 179 Wn.2d 47, 308 P.3d 635 (2013), which addressed whether provisions in arbitration agreements that impose cost-sharing, limitations on remedies, or shortened limitations periods are

unconscionable and/or severable. Division One's decision does not conflict with these opinions because it addresses a different issue and because, as it explained, class action waivers oppress the vindication of both individual and collective wage rights in ways not implicated by those other types of provisions.

Nor do these cases support the narrow test for unconscionability that Domino's attempts to draw from them, namely, that a provision is unconscionable only when it effectively bars plaintiffs from bringing their claims. For example, the Court did not hold that the confidentiality and limitation on remedies clauses in *Zuver* were unconscionable because they banned the employee from bringing his claims, but because they excessively favored the employer, hindered the employee's ability to prove his claims, and therefore potentially discouraged him from pursuing valid claims. 153 Wn.2d at 315, 318-19. As this Court recently explained, provisions in an arbitration agreement are substantively unconscionable when "'they have the *effect of limiting an employee's ability to access*

substantive remedies or discouraging an employee from pursuing valid claims.'" *Burnett*, 196 Wn.2d at 61 (quoting *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 214, 442 P.3d 1267 (2019)) (emphasis in original). Division One correctly concluded that the class action waiver in this case had such impacts. But even accepting the standard proposed by Domino's, the record shows it is met in this case.

Oakley presented specific, unrebutted testimony that he would not be able to afford an attorney to pursue his claims on an individual basis and that it would not be financially viable for an attorney to take his claims on such basis. *See* CP 232-33, 271. More than that, Oakley cited to empirical studies documenting that employee-claimants fare significantly less well in arbitration than in the courts, losing more frequently and recovering less when they prevail. *See* Sternlight, *supra*, at 1326. As a result, employees subject to arbitration clauses are significantly less likely to even bring their claims or be able to find attorneys willing to take their cases, impacts that are exacerbated by the

inclusion of class action waivers. *See* Sternlight, *supra*, at 1329-30, 1336, 1338; Estlund, *supra*, at 696-97, 699, 702 (concluding that over 98% of expected claims by employees covered by mandatory arbitration agreements are never filed and "a very large majority of aggrieved individuals who face the prospect of mandatory arbitration give up their claims before filing"). "Employers well know … that few individual employees will bring claims, and thus, employers will protect themselves from most exposure by eliminating class actions." Sternlight, *supra*, at 1345; *see also* Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 3, 17–18 (2019); Deepak Gupta & Lina Khan, *Arbitration As Wealth Transfer*, 35 Yale L. & Pol'y Rev. 499, 512-13 (2017). In reality, "Mandatory arbitration is less of an 'alternative dispute resolution' mechanism than it is a magician's disappearing trick or a mirage." Estlund, *supra*, at 688.

Given this evidence, Division One's ruling is perfectly consistent with binding precedent declaring class action waivers

substantively unconscionable and contrary to our State's strong public policies favoring access to justice and vindication of statutory rights. *See Scott v. Cingular Wireless*, 160 Wn.2d 843, 851-57, 161 P.3d 1000 (2007); *McKee*, 164 Wn.2d at 396-97.

Domino's ignores *McKee* entirely and tries to distinguish *Scott* on the basis that Oakley's wage claim is, admittedly, significantly larger than the individual consumer claims in *Scott*.[3] This is a distinction without a difference.

In *Scott* and *McKee*, this Court recognized that class actions provide a vital mechanism for injured citizens to protect their rights and ensure accountability for corporate misconduct.

[3] Domino's also mischaracterizes *Scott* as holding that a class action waiver is unconscionable only when it would exculpate the defendant because the cost of pursuing individual claims is too high relative to the potential recovery. However, *Scott* also held that the waiver was unconscionable on the separate ground that it undermined "the legislature's intent that individual consumers act as private attorneys general by dramatically decreasing the possibility that they will be able to bring meritorious suits." 160 Wn.2d at 854. Regardless, both the public policy and exculpation grounds for finding unconscionability are present here.

Scott, 160 Wn.2d at 854; *McKee*, 164 Wn.2d at 396. Division One correctly concluded that the same principles that led this Court to find unconscionability in *Scott* and *McKee* apply with equal force here. Like the Consumer Protection Act, the Minimum Wage Act and the Wage Rebate Act grant private rights of action to employees to act as private attorneys-general in recognition that the government lacks sufficient resources to pursue all cases of wage theft. *See* RCW 49.46.005 (declaring MWA's purpose), *id.* at .090 (providing for a private right of action to enforce the MWA); RCW 49.52.070 (providing for a private right of action to enforce the WRA). The class action waiver undermines this legislative intent. And, as in *Scott*, 160 Wn.2d at 857, the class action waiver here is decidedly one-sided, because Domino's would not bring a class claim against its workers. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176 (9th Cir. 2003) (holding class active waiver "manifestly and shockingly one-sided" and "unconscionable" where "[w]e

cannot conceive of any circumstances under which an employer would bring a class proceeding against an employee").

The relatively larger size of Oakley's individual claim does not make a difference. He presented unrebutted evidence that attorneys still would not confront the resources of a multi-billion-dollar behemoth like Domino's for an individual low five-figure wage claim. Contrary to Domino's' assertion, other courts have recognized that similar potential recoveries do not provide sufficient basis for either workers or attorneys to pursue such claims on an individual basis. *See Muro v. Cornerstone Staffing Sols., Inc*., 20 Cal. App. 5th 784, 793, 229 Cal. Rptr. 3d 498 (2018) (citing cases). Nor does the possibility of fee-shifting change the equation. The Court rejected this argument in *Scott* and *McKee*, where fee-shifting was also available under the Consumer Protection Act. *Scott*, 160 Wn.2d at 856, *McKee*, 164 Wn.2d at 397. Potential fee-shifting is not a panacea when plaintiffs' attorneys (paid on contingency) are aware of the

longer odds and lower recoveries that claimants face in the arbitral forum.

Moreover, it is not just the value of Oakley's claim that must be considered, but the impact on other Washington drivers who have been harmed by Domino's' wage practices and whose individual claims might be much lower. The class action waiver effectively precludes vindication of their claims because they may not realize they even have valid claims, they may lack the resources or sophistication to pursue the claims on their own, or they may fear retaliation from their employer if they do. *See Muro*, 20 Cal. App. 5th at 794; *Waithaka v. Amazon.com*, Inc., 966 F.3d 10, 32 (1st Cir. 2020). Thus, the "realistic alternative" to a class action to vindicate the workers' wage rights is not scores or hundreds of individual claims, but zero claims. *Scott*, 160 Wn.2d at 855 (internal citation omitted); *see also McKee*, 164 Wn.2d at 397. Far from conflicting with this Court's decisions on the unconscionability of class action waivers,

Division One's decision was perfectly consistent with this precedent.

Division One's determination that Domino's' class action waiver violates the fundamental public policies of Washington state is likewise consistent with this Court's precedent. Washington has a strong public policy favoring protection of employees' wage rights. *See Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000); *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). Accordingly, in *Young v. Ferrellgas, L.P.*, the court declined to compel arbitration of a worker's statutory overtime claims. 106 Wn. App. 524, 531-32, 21 P.3d 334 (2001). As the court explained, "[a]llowing an employment contract arbitration provision to replace this statutory cause of action would thwart public policy guaranteeing fair wages." *Id.* (discussing claims under the MWA and WRA).

Additionally, RCW 49.32.020, declares that the "public policy of the state of Washington" protects concerted activity by

employees, recognizing that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his or her freedom of labor." While the United States Supreme Court has found that an employee's right to engage in "concerted activity" does not include the right to participate in a class action, *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), Washington is not bound by that determination in interpreting its own law. *See Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 755, 888 P.2d 147 (1995) ("[F]ederal authority is not controlling in interpreting state statutes."); *United Food & Commercial Workers Union Local 367 v. Canned Foods, Inc.*, 79 Wn. App. 54, 62, 900 P.2d 569 (1995) (noting that even if RCW 49.32.020 and the NLRA were identical, "the Washington State Supreme Court is not bound to follow the United States Supreme Court on matters of state law"). Thus, Division One did not contravene any precedent by concluding that public policy favors the protection of collective activity, including class action suits, by employees who are seeking to stand up to wage theft.

Finally, the decision below is consistent with this Court's repeated recognition of the importance of the class action mechanism in vindicating workers' wage rights. *See Moore v. Health Care Authority*, 181 Wn.2d 299, 309, 332 P.3d 461 (2014) (explaining the state policy favoring class action lawsuits "is to provide relief for large groups of people with the same claim, particularly when each individual claim may be too small to pursue"). As this Court recently reiterated, "[c]oncentrating ... claims into one forum and certifying this class is likely the only way that the [employees'] rights will be vindicated." *Chavez v. Our Lady of Lourdes Hospital*, 190 Wn.2d 507, 524, 415 P.3d 224 (2018); *see also Moore*, 181 Wn.2d at 309 (rejecting individualized claims process because "[c]lass members with small claims would be unlikely to pursue their [individual] claims," which would "create an unreasonable burden on class members" and "hinder our state policy underlying class action lawsuits"); *Miller v. Farmer Bros. Co*., 115 Wn. App. 815, 827, 64 P.3d 49 (2003) (rejecting a reading of Rule 23's

predominance requirement that would have the practical effect of precluding certification of wage claims because doing so would "contravene the clear policy in this state"). Even though these cases did not address the unconscionability of class action waivers, Division One correctly recognized the underlying strong public policy is the same: to protect workers' rights to undertake collective action to ensure the proper payment of wages to all.

D. The Public Interest Does Not Require Review By This Court.

Domino's fails to show any conflict between Division One's decision and any ruling of this Court, as required under RAP 13.4(b)(1). It also fails to show that the public interest warrants review under RAP 13.4(b)(4).

First, Domino's vastly overstates the number of arbitration agreements impacted by this ruling. Since class action waivers are permissible under the FAA and most employment agreements are governed by the FAA, it is only the small subset

of agreements exempted by the FAA, for transportation workers like Oakley, that will be affected.

Second, Domino's is wrong when it points to a conflict between Court of Appeals opinions. *Tjart v. Smith Barney, Inc*., 107 Wn. App. 885, 900, 28 P.3d 823 (2001), did not conflict with *Young v. Ferrellgas*. Rather, *Tjart* distinguished *Young* on the basis that Tjart's arbitration agreement was governed by the FAA while Young's was governed by state law. Thus, *Tjart* held only that Washington's public policy in favor of a judicial forum for statutory wage claims must give way to federal law in cases governed by the FAA.

Third, Domino's wrongly posits Division One's decision as an outlier in concluding that class action waivers may be unconscionable in the employment context. While Domino's cites a handful of decisions from other states permitting class action waivers in the employment context, other states have held such provisions void on public policy grounds. *E.g.*, *Muro*, 20 Cal. App. 5th at 794 (California); *Waithaka*, 966 F.3d at 32 (1st

Cir. 2020) (applying Massachusetts law);[4] *Walker v. Ryan's Fam. Steak Houses, Inc*., 289 F. Supp. 2d 916, 934 (M.D. Tenn. 2003), *aff'd*, 400 F.3d 370 (6th Cir. 2005) (finding class action waiver was one-sided term contributing to unconscionability of arbitration agreement under Tennessee law); *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 592 (6th Cir. 2014) (holding collective action waiver unenforceable under the FLSA where the countervailing public policy of the FAA was not present). In any event, the states cited by Domino's do not necessarily share "Washington's long and proud history of being a pioneer in the protection of employee rights," *Drinkwitz*, 140 Wn.2d at 300, a tradition that is already fully protected by this Court's precedents and Division One's faithful application of those rulings here.

[4] Domino's mischaracterizes *Waithaka* as holding that Washington law permits class action waivers for wage theft claims. *Waithaka* only assumed *arguendo* that Washington might permit such waivers, then held that Massachusetts would reject application of Washington law in such event because it would violate Massachusetts' fundamental public policy. *Id.* at 28, 35 n.24.

IV. CROSS-PETITIONER'S ISSUE FOR REVIEW

1. Can the courts rewrite an arbitration agreement to apply Washington law where the agreement specifies the Federal Arbitration Act as the governing law with no provision for a state law fallback and the FAA specifically exempts the subject workers from arbitration?

V. ARGUMENT

A. The Court Should Review Division One's Holding That Washington Law Could Be Used To Enforce The Arbitration Agreement.

Although the Court should deny Domino's' Petition for Review, it should review Division One's decision to substitute Washington law in place of the FAA in applying the arbitration agreement.

The agreement, drafted by Domino's, states that arbitration is "exclusively" pursuant to and governed by the FAA. CP 266. Neither the agreement nor any other document provides that Washington law will apply if the FAA does not. Division One erred in invoking the agreement's severability

clause to circumvent this choice and impermissibly rewrote the contract in conflict with this Court's precedents.

The severability clause provides: "[s]hould any term, provision, or portion thereof, be declared void or unenforceable or deemed in contravention of law, it shall be severed and/or modified by the arbitrator or court…." CP 267. However, the choice of the FAA as the governing law is not "void or unenforceable or … in contravention of law." *Id*. Rather, its application merely leads to a conclusion Domino's does not like – the exemption of Oakley from arbitration under the FAA's "transportation worker" clause. As the Ninth Circuit observed in *Rittmann v. Amazon.com, Inc.*, it is difficult "to see how the choice-of-FAA clause that [the employer] drafted is unconscionable," and therefore severable, "merely because the provision does not work as [the employer] might have intended." 971 F.3d 904, 920 n.10 (9th Cir. 2020).

Division One's decision on severability constituted an unwarranted and impermissible reformation of the agreement by

the court. A court cannot excise the parties' choice of governing law without "essentially rewriting the contract." *McKee*, 164 Wn.2d at 403; *accord Rittmann*, 971 F.3d at 920 (citing *McKee*). Moreover, by using the severability clause, Division One privileged one aspect of the agreement (to engage in arbitration within certain defined parameters) over another (to have the agreement governed by the FAA), a choice the court was not empowered to make.

Where the parties agreed that one law would govern and not another, the court cannot rewrite the agreement to alter their intent regarding the governing statute. *See Rittmann*, 971 F.3d at 920 ("Because 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."). "The parties are bound by the terms of their Agreement and … the Court declines Defendant's invitation to venture outside of the unambiguous terms of the written Agreement to compel arbitration." *Gates v. TF Final*

Mile, LLC, No. 1:16-CV-0341-RWS, 2020 WL 2026987, *7 (N.D. Ga. Apr. 27, 2020) (declining to substitute state law to compel arbitration of truck drivers' wage claims where the agreement's designation of the FAA as the governing law excluded the plaintiffs from compelled arbitration); *accord Western Daily Transport, LLC v. Vasquez*, 457 S.W.3d 458, 463 (Tex. App. 2014) (refusing to consider enforceability of arbitration agreement under Texas law where the agreement specifically provided that it would be governed by the FAA); *Owner-Operator Independent Drivers Ass'n v. C.R. England, Inc*., 325 F. Supp. 2d 1252, 1260 (D. Utah 2004) (declining to order arbitration under state law where FAA § 1 exemption applied); *Ward v. Express Messenger Systems, Inc*., 413 F. Supp. 3d 1079 (D. Colo. 2019) (same). Here, Division One erred by amending the agreement to correct Domino's' drafting or add to the agreement's express intent.

For this reason, Division One's choice of law analysis also conflicted with this Court's precedents. In *Shanghai Com. Bank*

Ltd. v. Kung Da Chang, this Court explained that the "most significant relationship" test applies only "'when resolving contractual choice-of-law problems *in which the parties did not make an express choice of law*.'" 189 Wn.2d 474, 482, 404 P.3d 62 (2017) (emphasis added) (internal citation omitted). Here, Domino's made an express choice of law when it drafted the agreement. The courts can disregard that choice only if there is an actual conflict with Washington law and if the choice of law provision is not "effective." *Id*. at 481. Neither exception applies here. There is no conflict between the FAA and Washington law, and Domino's' choice of the FAA as the governing law does not offend any fundamental policies of Washington state. *Id*. at 483. Indeed, the fact that application of the FAA exempts certain of Domino's' employees, like Oakley, from compelled arbitration is consistent with the Washington legislature's choice to exclude all employment disputes from the scope of the Washington Arbitration Act. *See* RCW 7.04A.030(4). Division One therefore strayed from this Court's precedents in excising the parties'

express choice of law and substituting Washington law in its place.

VI. CONCLUSION

The Court should deny Domino's Petition for Review, but should review Division One's application of the arbitration agreement's severability clause to apply Washington law to the agreement.

DATED this 14th day of November, 2022.

I certify that this brief contains **4956** words, in compliance with the RAP 18.17(c).

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CERTIFICATE OF SERVICE

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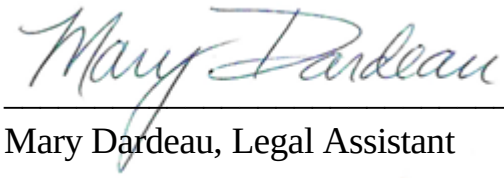

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