No. 25-2712

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MADRIGAL,
individually, and on behalf of others similarly situated,

Plaintiff- Appellee,

v.

FERGUSON ENTERPRISES, LLC,
California limited liability company

Defendant-Appellant.

On Appeal from the U.S. District Court for the Central District of California
No. 2:24-cv-00733-MRA-JPR · The Honorable Monica Ramirez Almandani

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

Karen I. Gold
Marissa Mayhood
Noam Reiffman
Sara Pezeshkpour
BLACKSTONE LAW, APC
8383 Wilshire Blvd., Suite 745
Beverly Hills, CA 90211
(310) 622-4278
kgold@blackstonepc.com
mmayhood@blackstonepc.com
nreiffman@blackstonepc.com
spezeshkpour@blackstonepc.com

Hannah M. Kieschnick
PUBLIC JUSTICE
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8150
hkieschnick@publicjustice.net

Leah M. Nicholls
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
lnicholls@publicjustice.net

Attorneys for Appellee Jose Madrigal

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court correctly conclude that, as a delivery driver who completed the intrastate delivery of Ferguson Enterprises, LLC's goods traveling in interstate commerce, Jose Madrigal is a member of a class of workers engaged in interstate commerce whose contract of employment is exempt from the Federal Arbitration Act?

INTRODUCTION

Ferguson Enterprises, LLC prides itself on its sophisticated global supply chain and national distribution system that moves plumbing, HVAC, and other products from its suppliers to its strategically located warehouses and, ultimately, to its retail stores and trade customers. This system enables Ferguson to fulfill the needs of its stores and customers, almost always in a single day. To achieve this feat, Ferguson relies on a fleet of drivers like Jose Madrigal to quickly transport Ferguson's goods on the last leg of this complex system.

Because, Mr. Madrigal alleges, Ferguson doesn't pay hourly employees like him in accordance with the law, he brought a putative class action to challenge Ferguson's illegal wage abuses. Rather than face those claims on the merits, Ferguson moved to compel Mr. Madrigal into individual arbitration under the Federal Arbitration Act (FAA). That Act, however, exempts from its scope the "contracts of employment" of transportation workers "engaged in . . . interstate

commerce." 9 U.S.C. § 1. As the district court correctly held, Mr. Madrigal and drivers like him do just that kind of work.

The district court relied on the fact that this Court has held, multiple times, that workers who complete the intrastate delivery of goods traveling in interstate commerce fall within the FAA's transportation-worker exemption. Ferguson's only argument to the contrary is that the facts here are somehow materially different. They are not. For more than a century, the general rule has been that goods remain in interstate commerce until they reach their final intended destination, even when that journey involves an intermediate stop along the way. It has also long been the rule that workers transporting such goods remaining in interstate commerce are themselves engaged in interstate commerce, even if their specific contribution is confined to a single state.

Ferguson seeks shelter in the efficiency of its supply chain, protesting that drivers like Mr. Madrigal get involved after the interstate journey of Ferguson's pipes, valves, and fittings has supposedly ended because, it asserts, its retail branches and trade customers place orders for those products only after they arrive at the closest distribution center. But if Ferguson's argument sounds familiar, it's because this Court already rejected it in *Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023). Regardless of "the timing of an order," *id.* at 1138, a product retains its "interstate character . . . at least until [it] reaches the point where the parties

originally intended that the movement should finally end." *Ill. Cent. R.R. Co. v. De Fuentes*, 236 U.S. 157, 163 (1915). Ferguson can't seriously dispute that it intends its products to go to its retail stores and trade customers, not to sit idly on warehouse shelves.

In short, under the general rules in place since before the FAA's passage in 1925, as well as this Court's more recent caselaw, Mr. Madrigal belongs to a class of workers engaged in interstate commerce. As a result, this Court should affirm the district court's holding that the FAA does not apply to Mr. Madrigal's claims and denying Ferguson's motion to compel arbitration.

STATEMENT OF THE CASE

I. Mr. Madrigal's role delivering Ferguson's goods to its retail branches and customers was a necessary part of Ferguson's global supply chain and nationwide distribution system.

Ferguson is one of the largest distributors of plumbing, HVAC, and similar products in the United States, and its business depends on its ability to efficiently move those products between ports, distribution centers, retail branches, and end-customers. *See* ER-96-97 (discussing the importance of Ferguson's "global supply chain" to its success); Ferguson plc, Annual Report FY2023 at X, 3, 5 ("2023 Annual Report") (similar);[1] *see also* Steve Banker, *The Best Supply Chain Company You*

[1] https://tinyurl.com/asa6x94d.

Have Never Heard Of, Forbes (July 8, 2022).[2] It uses its extensive network to provide "same-day and next-day product availability" to its retail branches and to customers, most of whom are trade professionals, general contractors, developers, engineers, and the like. 2023 Annual Report at II, 3; ER-100. Ferguson has described its overall supply chain and distribution system as a "competitive advantage" that will "accelerate market share growth." 2023 Annual Report at X, XIII.[3]

Ferguson sources plumbing, HVAC, and other goods from around the United States and the globe, moving thousands of containers of products through dozens of ports. *Id.* at 4 ("We source, distribute and sell products from domestic and international suppliers."); ER-11 n.5 (finding that Ferguson did "not meaningfully dispute that the goods at issue originated from outside of California"); ER-87, Madrigal Decl. ¶ 5 (describing delivering goods originating from outside the United States and shipped through the Port of Long Beach).

As part of its extensive distribution network, Ferguson has ten regional distribution centers, including one in Pomona, California, and more than 1,700 retail

[2] https://tinyurl.com/4svt8pjz.

[3] While some of these sources were not cited in the district court, they are available in the public record, and thus subject to judicial notice, and are consistent with the district court's decision. *See, e.g.*, *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (SEC filings subject to judicial notice). Moreover, the Craven Declaration, on which Ferguson relies, was not submitted until its reply in support of its motion to compel arbitration, precluding Mr. Madrigal from responding with additional evidence in the normal course.

branches nationwide. ER-51, Craven Decl. ¶ 3 (describing the Pomona distribution center); 2023 Annual Report at 4 (describing Ferguson's "network" of distribution centers and retail branches); *id.* at X (describing "1,700+ branch locations" as of 2023); ER-96 (same). This network "places [Ferguson] within 60 miles of 95% of [its] customers in North America." ER-97. Ferguson "orders" and "receives" goods at warehouses like the Pomona distribution center "in anticipation of replenishing the stock at Ferguson's smaller local branches where customers can purchase or pick up product in-person" and "in anticipation of potential orders from local customers." ER-51, Craven Decl. ¶ 4; *see also* Banker ("Ferguson built their supply chain around the needs of their customers who require access to a wide variety of products, high fill-rates, and speed of delivery."). The Pomona distribution center also sometimes "receives shipments of customers' special-order products" for "specific customers," and those products are stored at the warehouse until the customer requests delivery. ER-53, Craven Decl. ¶ 9.[4]

[4] Ferguson repeatedly states that its products spend an "average" of 64 days in the Pomona distribution center. Opening Br. at 1, 2, 4, 8, 12, 13, 21, 25, 26, 28, 32; *see* ER-52, Craven Decl. ¶ 8. Not only is that unhelpful to their legal argument for the reasons explained below, *see* Part III(B), *infra*, but it also likely does not reflect the *typical* amount of time a product is in the warehouse. The arithmetic mean, what Ferguson appears to have calculated, is more sensitive to outliers, such as products stored in the warehouse for significantly longer than most other products because, for example, they are needed less frequently or only in emergencies. Although the *median* amount of time a product spends in the distribution center would be a more telling metric, Ferguson has not submitted that information.

Ferguson employs a fleet of thousands of "final-mile" delivery drivers to transport goods from its distribution centers to its thousands of retail branches in the area as well as directly to customers at, for example, construction sites. 2023 Annual Report at X; *id.* at 4 (Ferguson has "5,700 fleet vehicles, 1,762 branches and approximately 35,000 associates"); ER-96 (similar); *see also* ER-53, Craven Decl. ¶ 10 (describing process of delivering product from the Pomona distribution center "to Ferguson's satellite branches or other smaller Ferguson facilities . . . , or sometimes to local construction sites").

Jose Madrigal was one of those drivers. He was employed by Ferguson as a delivery driver from 2007 to 2023 at its Pomona distribution center. ER-87, Madrigal Decl. ¶¶ 4, 6. In that role, Mr. Madrigal was frequently responsible for delivering Ferguson's goods from the distribution center to Ferguson's retail branches in California. ER-53, Craven Decl. ¶ 11. He also delivered goods from the distribution center directly to Ferguson's California customers. ER-53, Craven Decl. ¶ 11; ER-87, Madrigal Decl. ¶ 4. And he occasionally delivered "special-order" products to local customers as well. ER-54, Craven Decl. ¶ 14.

Presumably, Ferguson's sophisticated supply chain, including its ability to track inventory levels and what products its retail branches sell, prevents most products from unnecessarily idling on warehouse shelves. *See* 2023 Annual Report at 16 (listing "[i]nventory levels in excess of customer demand" as a risk to business success).

II. The district court found that Ferguson delivery drivers like Mr. Madrigal are transportation workers who play a necessary role in interstate commerce.

Mr. Madrigal brought this putative class action against Ferguson in California state court, alleging that Ferguson engaged in illegal wage abuses against its hourly employees, including requiring its employees to work off-the-clock without being paid, failing to pay overtime, failing to pay minimum wage, failing to provide meal and rest breaks, and failing to timely pay wages. ER-5-6. After removing the case to federal court, ER-279, Ferguson moved to compel individual arbitration of Mr. Madrigal's claims pursuant to the FAA and based on an arbitration agreement it says was mailed to Mr. Madrigal halfway through his employment. ER-107-33.

Mr. Madrigal opposed Ferguson's motion on multiple grounds. First, he argued that his claims could not be compelled into arbitration under the FAA because he was a transportation worker engaged in interstate commerce whose contract is exempt from the statute. ER-76-79. And, in the absence of the FAA, California law applied and prohibited the enforcement of the agreement's class action waiver. ER-79-81. Finally, he contended that he didn't agree to arbitration because, among other reasons, he never received the arbitration agreement. ER-81-85.

While the district court found that the parties had consented to arbitration, ER-6-9, it agreed with Mr. Madrigal that Ferguson delivery drivers like him belong to a class of transportation workers who play a direct and necessary role in the free flow

of goods across borders for purposes of the FAA's § 1 exemption. ER-9-12. Hewing closely to this Court's precedents, the district court reasoned that Ferguson's delivery drivers moved Ferguson's goods on the final intrastate leg of their interstate journey from Ferguson's suppliers. ER-10-11. Following Ninth Circuit caselaw, it rejected Ferguson's argument that the goods' pause at the Pomona distribution center ended their interstate journey. ER-11. Instead, the court explained, the goods were still in interstate commerce while at the distribution center because their mid-journey storage was simply "a convenient intermediate step in the process of getting them to their final destinations"—Ferguson retail branches and customers. ER-12 (quoting *Carmona*, 73 F.4th at 1138).

After concluding that it could not compel arbitration under the FAA, the district court agreed with Mr. Madrigal that Ferguson's class-action waiver is unenforceable as a matter of California law and denied Ferguson's motion to compel individual arbitration. ER-12-16.

On appeal, Ferguson has challenged only the district court's conclusion that Mr. Madrigal's claims cannot be compelled into arbitration under the FAA. The company has not appealed the district court's holding that its class waiver is unenforceable as a matter of California law. *See* Opening Br. 41-43.

SUMMARY OF ARGUMENT

I. The Supreme Court has been asked, repeatedly, to narrow the scope of the FAA's transportation-worker exemption. It has declined each time. In doing so, the Court has cautioned against paving over the text of the statute in favor of a purported policy preference for arbitration. Instead, the exemption must be interpreted as it would have been understood by Congress at the time the FAA was enacted in 1925. Following its own instructions, the Supreme Court has held that the exemption is not limited to the contracts of workers who themselves cross state lines. Rather, it applies to those who play "a direct and necessary role in the free flow of goods across borders." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (citation modified).

II. Mr. Madrigal and drivers like him deliver Ferguson's goods from the company's distribution centers to its retail branches and trade customers. In 1925, it would have been well-understood that these types of drivers play a direct and necessary role in moving goods on their interstate journey by completing the last intrastate leg of that journey.

It has been the rule for more than a century that goods remain in "interstate commerce" until they are delivered to their intended destination. Countless Supreme Court cases confirm that's the rule even when the journey includes an intermediate stop in a stockyard, in a rail station, and, yes, in a warehouse. The Supreme Court has likewise recognized for just as long that workers responsible for transporting

goods still in interstate commerce are themselves "engaged in" interstate commerce, even when the work they do is confined to a single state.

Every court, including this one, to apply this framework to modern last-mile drivers like Mr. Madrigal has concluded that they are workers engaged in interstate commerce. Ferguson tries to resist the bevy of last-mile cases as inconsistent with the Supreme Court's instruction to focus on the "actual work" workers do, perhaps suggesting that transportation workers can only be engaged in interstate commerce when they themselves transport the goods across state lines. The Supreme Court and this Court have repeatedly rejected such an interpretation, and this Court should do so again. The district court focused on Mr. Madrigal's actual work as completing the intrastate delivery of Ferguson's out-of-state goods and, applying this Court's precedent, correctly concluded that Mr. Madrigal therefore belongs to a class of workers engaged in interstate commerce.

III. Ferguson cannot escape this historical precedent and modern-day consensus. To start, the company claims its goods exit the stream of commerce once they arrive at its distribution centers because it's only then that Ferguson's retail stores and customers order their plumbing and HVAC supplies. Not only is the record less than clear on this point, but the Supreme Court and this Court have expressly rejected the argument that the timing of an order is dipositive of whether goods remain in the stream of interstate commerce.

Ferguson services and stocks its 1,700-plus retail branches using a network of national distribution centers and thousands of delivery drivers, at the ready to provide same-day and next-day product availability. When faced with similar facts to those here, courts of appeal across the country have held that workers who transport goods intrastate from a company's warehouse to its own local retail outlets are engaged in interstate commerce, even when those deliveries aren't made pursuant to advanced orders. This Court held the same recently, concluding that drivers completing the intrastate delivery of supplies from Domino's distribution centers to its local franchisees were engaged in interstate commerce—even though franchisees didn't place orders for ingredients and non-perishable packaging until after those goods arrived in-state.

Ferguson ignores the retail branch portion of its distribution network, instead focusing solely on Mr. Madrigal's deliveries from its warehouses directly to customers. But that type of work is also in interstate commerce where, as here, a distributor like Ferguson ships its goods in advance of specific orders to meet identifiable demand—a practice that ensures, not disrupts, the "practical continuity of movement of goods until they reach the customers for whom they were intended." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943). Indeed, citing same-day and next-day product availability as the source of its competitive advantage,

Ferguson has designed its entire distribution system to anticipate potential orders, ensure adequate inventory, and deliver as quickly as possible.

The company also claims that a supposedly long wait time at its distribution center—an average of 64 days—removes products from the flow of interstate commerce. But the length of any intermediate stop, which Ferguson likely overstates, is not legally salient. Rather, as has been the rule for more than a century, whether goods remain in interstate commerce depends on the parties' intended destination. That's why courts across the country have consistently found goods to remain in interstate commerce even with a pitstop of up to six months in a warehouse—much longer than what Ferguson says the average wait time is here.

Finally, claiming the lines are too hard to draw, Ferguson urges this Court to collapse last-mile drivers like Mr. Madrigal into the category of local couriers, like restaurant delivery drivers, who complete purely local deliveries of items like freshly prepared meals. But this Court and others have found and applied a clear line: Goods remain in interstate commerce until the goods reach the shipping parties' final intended destinations. After they reach that destination and then are sold in a separate transaction or transformed into a different good, a new, often local, journey begins. Applying that principle here, drivers like Mr. Madrigal transporting Ferguson's goods from Ferguson's distribution centers to its retail branches and customers complete the intrastate delivery of out-of-state goods. Whatever happens after that

delivery—a plumber buys a part and brings it to a worksite, a contractor installs a pipe as part of a major infrastructure project—is a separate transaction unrelated to what came before.

This Court should affirm.

ARGUMENT

I. The contracts of transportation workers engaged in interstate commerce are exempt from the FAA.

The FAA generally requires that arbitration agreements be enforced to the same extent as other contracts, but the statute expressly excludes from its coverage the contracts of "transportation workers" engaged in interstate commerce. *New Prime Inc. v. Oliveira*, 586 U.S. 105, 108 (2019). Specifically, the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Because a court's power to compel arbitration under the FAA is limited to those contracts covered by the statute, whether a worker's contract is exempt from the FAA is a threshold question that must be decided by the court before compelling arbitration of any disputes, including disputes about arbitrability. *New Prime*, 586 U.S. at 110-12.

The Supreme Court first addressed this exemption—commonly referred to as the transportation-worker exemption—in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *Circuit City* held that the exemption is limited to "transportation

workers" engaged in interstate commerce, rejecting the argument that it applies to all workers covered by Congress' commerce power. *Id.* at 119. The Court reasoned that the text of the statute reflected Congress' "demonstrated concern with transportation workers and their necessary role in the free flow of goods." *Id.* at 121.

Since *Circuit City*, the Supreme Court has thrice addressed when transportation workers play a necessary role in the free flow of goods across borders and therefore are engaged in interstate commerce. Although Ferguson portrays the Supreme Court as continuing to narrow the exemption, the opposite is true: The Court has declined to narrow the scope of the exemption each time the issue has come before it. In *New Prime*, the Supreme Court held that the contracts of truck drivers who were purported to be independent contractors were included within the exemption. 586 U.S. at 121. In rejecting the argument that the exemption is limited to contracts reflecting an employer-employee relationship, the Court looked to the meaning of the statutory terms "at the time of the Act's adoption in 1925." *Id.* at 114. The Congress that enacted the FAA, the Court explained, would have understood the phrase "contract of employment" to mean "an agreement to perform work" regardless of the formalities of the relationship—a conclusion reinforced by Congress's use of "workers" later in the text. *Id.* at 114-16. *New Prime* expressly declined to "pave over" the text of the exemption in the name of any purported policy

favoring arbitration, a holding that precludes Ferguson's argument (at 39) that that purported policy plays a role in interpreting the exemption. 586 U.S. at 120-21.[5]

Next, in *Saxon*, the Court clarified that a worker need not themselves cross state lines to qualify for the exemption. 596 U.S. at 461. First, *Saxon* explained, the FAA's text requires a court to look to "the actual work that the members of the class, as a whole, typically carry out." *Id.* at 456. Then, *Saxon* focused on the congressional concerns reflected in the text of the exemption and discussed in *Circuit City*: whether the class of workers to which the worker belongs is "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* at 458 (quoting *Circuit City*, 532 U.S. at 121).

Applying that test, the Court easily found that the worker in *Saxon*, who "belongs to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis," was a transportation worker "engaged in . . . interstate commerce" entitled to the exemption. *Id.* at 456. Relying on cases contemporary to the passage of the FAA, the Court emphasized that workers do not need to cross borders; instead, they must play a "direct and necessary role in the free flow of goods" that do. *Id.* at 458-59 (citation modified). Under that principle, the Court

[5] Moreover, since *New Prime*, the Supreme Court has further clarified that the so-called federal policy favoring arbitration just means that arbitration agreements are treated the same as other contracts, not that arbitration is favored. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

found it "'too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it.'" *Id.* at 457 (quoting *Balt. & Ohio Sw. R.R. Co. v. Burtch*, 263 U.S. 540, 544 (1924)). The Court went on to explain that because there was "no doubt that interstate transportation [was] still in progress" when workers loaded and unloaded cargo on and off planes traveling between states, they were "intimately involved" with the transportation of those goods and therefore engaged in interstate commerce. *Id.* at 458-59 (quoting *Erie R.R. Co. v. Shuart*, 250 U.S. 465, 468 (1919)) (citation modified).

Most recently, in *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024), the Court held that the exemption is not limited to the contracts of workers in the transportation industry. *Id.* at 256. Rather, consistent with the text of the FAA and *Saxon*, the coverage of the exemption turns on the actual work of the workers regardless of industry. *Id.* at 255. And, contrary to Ferguson's implication (at 11-12, 27-28) that *Bissonnette* changed what it means to be engaged in interstate commerce, the Court reiterated and reaffirmed *Saxon* and *Circuit City*'s standard for when a worker's contract is exempt: "As we held in *Saxon*, [an exempt] transportation worker is one who is actively engaged in transportation of goods across borders via the channels of foreign or interstate commerce. In other words, any exempt worker must at least play a direct and necessary role in the free flow of goods across

borders." 601 U.S. at 256 (quoting *Saxon*, 596 U.S. at 458 (quoting *Circuit City*, 532 U.S. at 121)) (citation modified).

Consistent with the principles articulated by the Supreme Court, the Ninth Circuit has concluded that drivers delivering packages from Amazon warehouses to customers, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916-17 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021), drivers delivering pizza ingredients and packaging from a Domino's distribution center to its franchisees, *Carmona*, 73 F.4th at 1137-38, *cert. denied*, 144 S. Ct. 1391 (2024), workers moving goods within a distribution warehouse, *Ortiz v. Randstad Inhouse Servs., LLC*, 95 F.4th 1152, 1162 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 165 (2024), and workers fueling airplanes, *Lopez v. Aircraft Serv. Int'l, Inc.*, 107 F.4th 1096, 1101 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1063 (2025), are all classes of transportation workers actively engaged in the transportation of goods across borders whose contracts fall with § 1's exemption. For the reasons explained below, applying those same principles, the contracts of workers like Mr. Madrigal are likewise exempt from the FAA.

II. Because Mr. Madrigal belongs to a class of workers who complete the intrastate delivery of goods traveling in interstate commerce, he is a transportation worker engaged in interstate commerce.

Mr. Madrigal and drivers like him deliver Ferguson's goods from Ferguson's warehouse to its retail branches and trade customers. They therefore play a direct and necessary role in moving those goods on their interstate journey from Ferguson's

national and international suppliers to their intended final destinations by completing the last intrastate leg of the journey. For that reason, Mr. Madrigal belongs to a class of workers engaged in interstate commerce and his contract is exempt from the FAA. The conclusion that last-mile drivers like Mr. Madrigal fall within the exemption is consistent with how Congress would have understood its scope in 1925 as well as how modern courts, including this one, apply the exemption.

Both the Supreme Court and this Court look to early 20th century cases to determine what constituted "interstate commerce" and what it meant to be "engaged in" interstate commerce in 1925 when Congress enacted the FAA. *See Saxon*, 596 U.S. at 457-59; *see Lopez*, 107 F.4th at 1102-03; *see also New Prime*, 586 U.S. at 114 (looking to the meaning of § 1's terms "at the time of the Act's adoption in 1925"). That's because courts "normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010).

At the time the FAA was enacted, courts, and therefore Congress, understood that goods remain in "interstate commerce" until they are delivered to their intended destination, even when that journey includes an intermediate stop. As a corollary, it has also long been the case that workers transporting goods that remain in interstate commerce are themselves engaged in interstate commerce, even when their work takes place in a single state. So, taking these rules together, courts contemporary to

the FAA and today have concluded, as the district court correctly did below, that workers responsible for the final leg of an interstate delivery of goods are "engaged in . . . interstate commerce." 9 U.S.C. § 1. Mr. Madrigal is just such a worker.

A. Goods remain in interstate commerce until they are delivered to their intended destination, regardless of intermediate stops.

Since before the FAA's enactment in 1925, the "general rule" has been that, once "transportation has acquired an interstate character," that character "continues at least until the load reaches the point where the parties originally intended that movement should finally end." *Binderup v. Pathe Exchange Inc.*, 263 U.S. 291, 309 (1923) (citation modified); *De Fuentes*, 236 U.S. at 163 (similar). The inquiry into the parties' intent is "practical" and not overly "technical," *Swift v. United States*, 196 U.S. 375, 398 (1905), focused on the "essential nature of the movement" and not technicalities like "the form of the bill of lading," *De Fuentes*, 236 U.S. at 163, or "title," *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 113 (1918) ("[D]etermining the character" of goods in transit is based on "[p]ractice, intent and the typical course" rather than "title or niceties of form.") (describing *Tex. & New Orleans R.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913)).

So, for example, in *Swift*, the Supreme Court considered whether the distribution of cattle across state lines was interstate commerce, notwithstanding an "interruption" of that journey in the stockyards of the second state to "find a purchaser." 196 U.S. at 398-99. Looking to the parties' "expectation" that the cattle

would "end their transit, after purchase, in another" state from where the shipment began, *id.*, the Court easily concluded that the "*whole* transaction was one in interstate commerce." *Binderup*, 263 U.S. at 310 (describing *Swift*, 196 U.S. at 398) (emphasis added).

Similarly, the Supreme Court in *Binderup* considered whether a New York film distributor was "engaged" in "interstate commerce" when it shipped films to local agencies in other states, where they would be "held until delivery" to movie theaters "in the same state." *Id.* at 309. The Court rejected the argument that the "intermediate" stop at the local agencies "put an end to the interstate character of the transaction." *Id.* Instead, as in *Swift*, the "whole transaction" was interstate commerce based on the films' intended "final destination": movie theaters in states other than New York. *Id.* at 309-10; *see also Balt. & Ohio Sw. R.R. Co. v. Settle*, 260 U.S. 166, 173-74 (1922) (emphasizing the "original and persisting intention of the shippers" when concluding that lumber remained in interstate commerce when it was "received on interstate movement" and then "reshipped by the consignee, after a brief interval" to intrastate destinations).

Like these stops at stockyards, local agencies, and trainyards, a stop at a warehouse need not end an interstate journey. Rather, there is a "practical continuity of movement" when goods enter a warehouse as "a convenient intermediate step in the process of getting them to their final destinations"; then, those goods "remain 'in

commerce' until they reach those points." *Jacksonville Paper Co.*, 317 U.S. at 568. "Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce." *Id.*; *see also Heymann v. S. Ry. Co.*, 203 U.S. 270, 272, 276 (1906) (Even when goods are "placed in the warehouse" after being transported across state lines, "the interstate transportation of the goods" does not end until they are "delivered" to their final destinations.).

Modern cases are in accord, holding that goods remain in interstate commerce even where they make an intermediate stop at a warehouse on their way to their intended destination. For example, in *Ortiz*, this Court held that Adidas products "were still moving in interstate commerce when the employee interacted with them" within a warehouse. 95 F.4th at 1162. Closer to the "end of an interstate or international supply chain," *id.* at 1161, in *Rittmann*, this Court held that Amazon packages "remain in the stream of interstate commerce until they are delivered" even though those packages were stored in Amazon's warehouses along the way. 971 F.3d at 915; *accord Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020). Using the same reasoning, this Court also concluded that a stop at a Domino's distribution center on the way to Domino's franchisees—the intended destination—did not "remove" pizza ingredients and packaging supplies "from the stream of interstate commerce." *Carmona*, 73 F.4th at 1138.

B. Workers who complete the intrastate delivery of goods traveling in interstate commerce are themselves engaged in interstate commerce.

Ferguson claims that drivers like Mr. Madrigal can't be engaged in interstate commerce because, put simply, they aren't "directly" involved in border crossings. Opening Br. at 20-21; *see also* Amicus Br. at 10, 12. *Saxon* already rejected that argument. Instead, against the backdrop of what interstate commerce meant at the time the FAA was enacted, *Saxon* confirmed that the workers transporting goods still in interstate commerce are themselves "engaged in" interstate commerce, even when their transportation work is in a single state. 596 U.S. at 458-59.

Early 20th century cases prove the point.[6] Take *Rearick v. Pennsylvania*, 203 U.S. 507, 512-13 (1906), in which a worker who delivered brooms shipped from Ohio to customers in Pennsylvania was "engaged in interstate commerce"—even though he only completed the Pennsylvania leg of the brooms' journeys. Or consider *Philadelphia & Reading Railway Co. v. Hancock*, 253 U.S. 284 (1920). There, a railroad worker was engaged in interstate commerce when he was injured because

[6] Both the Supreme Court and this Court have repeatedly looked to "non-FAA cases" addressing what it means to be engaged in interstate commerce under other statutes, including the Federal Employers Liability Act (FELA), the Fair Labor Standards Act (FLSA), and the Clayton and Robinson-Patman Acts to "interpret the FAA's text." *Lopez*, 107 F.4th at 1102; *Rittmann*, 971 F.3d at 912-13 & n.2. As this Court has explained, by "incorporating almost exactly the same phraseology into the Arbitration Act of 1925" as in these statutes, "its draftsmen and the Congress which enacted it must have had in mind this current construction of the language which they used." *Lopez*, 107 F.4th at 1100 (quoting *Rittmann*, 971 F.3d at 913).

his work—"operating a train of loaded cars" from a mine to a local storage yard a few miles away, all within Pennsylvania—"was but a step in the transportation of the coal to real and ultimate destinations" outside Pennsylvania. *Id.* at 285-86.

In keeping with the understanding Congress had in 1925, every circuit to have applied this framework to modern last-mile drivers has concluded that they too are engaged in interstate commerce and therefore exempted from the FAA. *See Rittmann*, 971 F.3d at 915-17; *Waithaka*, 966 F.3d at 13; *Adler v. Gruma Corp.*, 135 F.4th 55, 68-69 (3d Cir. 2025); *Brock v. Flowers Foods, Inc.*, 121 F.4th 753, 761, 764 (10th Cir. 2024). In *Rittmann*, which this Court has repeatedly reaffirmed, *see Carmona*, 73 F.4th at 1137; *Lopez*, 107 F.4th at 1100-01, this Court concluded that Amazon delivery drivers who deliver packages from Amazon warehouses to customers were "transportation workers engaged in the movement of interstate commerce," *Rittmann*, 971 F.3d at 915, "even if they do not cross state lines to make their deliveries." *Id.* at 919. That was because they were hired "to complete the delivery" of goods that were moving in interstate commerce and would remain in interstate commerce until they reached their intended destinations. *Id.* at 917.

Ferguson and its amici claim these last-mile cases improperly focus on "where the goods have been," Opening Br. at 15 (quoting *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020)), contrary to *Saxon*'s instruction to focus on the "actual work," *id.* at 20; *see also* Amicus Br. at 12-13. But *Saxon*'s instruction

was in response to an argument that *all* airline workers, from baggage handlers to ticket takers to website designers, are exempt under § 1, and the Court sought to make clear that a worker's work—as opposed to their employer's industry—is the relevant factor. *Saxon*, 596 U.S. at 455-56. It shouldn't be taken to mean that the journey of goods being transported has nothing to do with the analysis. Indeed, *Saxon* itself took into account where the goods came from and where they were going. *See id.* at 457 (emphasizing that the baggage handlers were "unloading . . . an interstate shipment"); *see also id.* at 453-54, 457-58. And the Supreme Court has been considering the origins and destinations of goods since before the passage of the FAA. *See, e.g.*, *Hancock*, 253 U.S. at 286 (rejecting argument, in 1920, that coal transported on a local railway was not part of interstate commerce because the "determining circumstance is that the shipment was but a step in the transportation of the coal to the real and ultimate destinations in another state"). That makes sense when the "actual work" is the transportation of goods. A court *must* determine whether the goods being transported remain in interstate commerce to then determine whether the work class members do by transporting those goods means they're "engaged in" interstate commerce.[7]

[7] Ferguson's amici go a step further, urging this Court to conclude its last-mile cases were "wrongly decided" because, they say, only those workers who themselves cross state lines or "load or unload goods from carriers that transported them across state lines," *i.e.*, the class of workers addressed in *Saxon*, can be engaged

In a futile attempt to shore up their argument, Ferguson and its amici cite the approaches of the Fifth and Eleventh Circuits, which they say have declined to treat last-mile drivers as engaged in interstate commerce because their "actual work" was purely intrastate. But in *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022), the plaintiff spent little time doing "last-mile" driving and most of his time meeting with customers, negotiating contracts, and restocking goods rather than making deliveries, *see* 2021 WL 230335, at *1 (S.D. Tex. Jan. 21, 2021). And while *Lopez* didn't squarely present the last-mile question, the Fifth Circuit did recently hold that last-mile drivers *are* engaged in interstate commerce for purposes of the Motor Carrier Act. *See Ash v. Flowers Foods, Inc.*, 2024 WL 1329970, at *2 (5th Cir. Mar. 28, 2024).

Nor does *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021), help, as the Eleventh Circuit's conclusion that "final-mile delivery drivers" are not covered by § 1 relied on the transportation-industry requirement since rejected by the Supreme Court, *id.* at 1340, 1351; *Bissonnette*, 601 U.S. at 256; *see* Part I, *supra*.

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in interstate commerce. Amicus Br. at 18, 21-22. But that can't be, as both the sound reasoning in *Saxon* and the case law contemporaneous to the passage of the FAA makes clear. *See* Parts I & II(B), *supra*.

C. Ferguson's last-mile delivery drivers frequently transport goods that remain in interstate commerce and therefore are engaged in interstate commerce.

Consistent with the historical understanding of interstate commerce, as well as this Court's modern precedent, Ferguson's delivery drivers completing the final intrastate delivery of goods still moving in interstate commerce are engaged in interstate commerce and are therefore exempt from the FAA.

As one of the largest distributors of plumbing, HVAC, and similar products in the United States, Ferguson's business depends on its ability to move products, most of which come from out of state, ER-11 n.5; 2023 Annual Report at 4, to distribution centers and, ultimately, to its thousands of local retail branches and trade customers. *See* ER-96-97, 100; 2023 Annual Report at 3-4; *see generally* Banker. Ferguson "orders" and "receives" goods at distribution centers to "replenish[] the stock" at its "smaller local branches" as well as "in anticipation of potential orders from local customers." ER-51, Craven Decl. ¶ 4. Its sophisticated supply chain and distribution system enables Ferguson to calibrate its warehouse inventory to demand and to offer same- and next-day product availability to its retail branches and direct customers. ER-100; 2023 Annual Report at 3, 16. Indeed, in a recent interview, a Ferguson executive touted its supply chain as its "core competency" and emphasized that its success was attributable to speed, with "about 99.5% of every order that comes in" being "picked and shipped" within the day. Project44, *What It Takes to Build a*

Customer-Centric Supply Chain with Michael Jacobs: Supply Chain Champions at 1:14-1:16, 4:11-4:21, YouTube (Mar. 12, 2025) (interview with Michael Jacobs, Senior Vice President of Supply Chain at Ferguson Enterprises)[8]; *see also* 2023 Annual Report at 3 (describing its ability to "provide same-day and next-day product availability" as Ferguson's "competitive advantage").

Ferguson uses a dedicated fleet of thousands of drivers to make its distribution system work. Delivery drivers like Mr. Madrigal are responsible for the "last mile" of Ferguson's fulfillment process. *See* ER-53, Craven Decl. ¶ 10; 2023 Annual Report at X (describing "fleet of 5,700 vehicles for final-mile delivery"); ER-97 (explaining that Ferguson's "network [] places [it] within 60 miles of 95% of [its] customers in North America"). They pick up packages that have been shipped to distribution centers to meet local demand and transport them for the last leg of the shipment to their intended destinations. ER-53, Craven Decl. ¶ 10; ER-100; 2023 Annual Report at X, 3-4. These goods are still in interstate commerce while at Ferguson's distribution centers because their temporary storage there is simply an intermediate part of the process by which the company transfers the packages for the last leg of their interstate journey to Ferguson's intended destination—which is obviously not the distribution center itself, but rather Ferguson's retail branches and trade customers.

[8] https://www.youtube.com/watch?v=QvChkLtx94Y.

Under a straightforward application of well-settled principles, then, Mr. Madrigal belongs to a class of workers "actively" engaged in interstate transportation by playing a "direct and necessary role in the free flow of [Ferguson's] goods" from its national and international suppliers to its ultimate intended destinations of retail branches and customers in California. *See Bissonnette*, 601 U.S. at 256 (quoting *Saxon*, 596 U.S. at 458).

III. Ferguson's arguments as to why its drivers supposedly are not engaged in interstate commerce fail.

According to Ferguson, its drivers do not operate as part of a single, unbroken stream of interstate commerce because by the time drivers like Mr. Madrigal get involved, the goods have "come to rest" as "general inventory" in Ferguson's distribution centers. Opening Br. at 12, 21-23, 25; *see also* Amicus Br. at 8, 11-12. It offers two reasons why: (1) Ferguson retail branches and customers supposedly order their plumbing, HVAC, and similar supplies only after those supplies arrive at a distribution center and (2) those supplies may be held at a distribution center for some amount of time rather than immediately delivered. Even assuming these assertions are factually accurate (and it's not clear they are), neither takes Ferguson's goods outside the stream of interstate commerce.

A. Goods do not lose their interstate character because they were shipped based on the actual or anticipated needs of a wholesaler's retail branches and customers.

That Ferguson may anticipate the needs of its retail branches and those of its trade customers does not change the interstate nature of its goods' transportation.

To start, Ferguson has offered only ambiguous evidence as to whether and to what extent goods destined for its retail branches are "earmarked or pre-ordered in advance" of those goods arriving at the distribution center. *See* Opening Br. at 2. That is, although the logistics manager for Ferguson's Pomona distribution center states that "[g]eneral inventory products are not earmarked or pre-ordered in advance for delivery to *specific customers*," ER-52, Craven Decl. ¶ 5 (emphasis added), he does not say the same of products destined for its *own retail branches*. *See also* ER-51, Craven Decl. ¶ 4 (similarly emphasizing products "for delivery to specific customers"). All Ferguson has to say about its own stores is that the company orders goods "in anticipation of replenishing the[ir] stock," ER-51, Craven Decl. ¶ 4, but not that all or even most goods that go to its stores are ordered in that way. Elsewhere, Ferguson's logistics manager does suggest that its "general inventory" includes goods destined for both trade customers and retail branches, but that same paragraph in his declaration still emphasizes only "customer[s] plac[ing] an order for their delivery" rather than Ferguson's retail branches. ER-52, Craven Decl. ¶ 6.

But even if Ferguson anticipatorily ships all products ultimately destined for both its retail stores and its trade customers, that still wouldn't change the interstate nature of its goods. As this Court recently emphasized, "the Supreme Court has long rejected the notion that the timing of an order is itself dispositive of whether goods remain in interstate commerce." *Carmona*, 74 F.4th at 1138. Remember *Swift*: Two decades before the FAA's enactment, the Supreme Court held that cattle remained in interstate commerce from the time they were "sent for sale from a place in one state . . . to find a purchaser at the stockyards" until "*after* purchase" in those stockyards in another state. 196 U.S. at 398-99 (emphasis added). Or take *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), in which the Supreme Court considered when the interstate journey of live poultry ended and their intrastate journey began. The live poultry weren't shipped across state lines pursuant to a previous order. *See id.* at 520-21. Even so, they remained in interstate commerce from the time they were shipped from other states to rail terminals in New York, where they were sold to slaughterhouses, and then "trucked to [those] slaughterhouses," also in New York. *Id.* at 542-43. Only at the slaughterhouses, where the poultry was sold to local "retail dealers and butchers" and then slaughtered and processed, did the "interstate transactions in relation to that poultry then end[]" and the poultry come "to a permanent rest." *Id.* at 543. So, while Ferguson cites *A.L.A. Schechter Poultry* to analogize to the slaughterhouse workers who were not

engaged in interstate commerce, *see* Opening Br. at 34-35, it's focused on the wrong workers: After the poultry arrived in New York, and then was purchased by the slaughterhouse, the drivers who "trucked" the live poultry intrastate from the terminals to the slaughterhouse *were* engaged in interstate commerce. Mr. Madrigal and other last-mile drivers like him are like the truckers, delivering goods to their intended destinations after crossing state lines, not like the slaughterhouse workers, handling those goods pursuant to a separate intrastate transaction.[9] *See also* Part III(C), *infra*.

A short while after *A.L.A. Schechter Poultry*, the Supreme Court confirmed that an independent "wholesaler's course of business based on *anticipation* of needs of specific customers, rather than on prior orders or contracts" *can* "be sufficient to establish that practical continuity necessary to keep a movement of goods 'in commerce.'" *Jacksonville Paper*, 317 U.S. at 570 (emphasis added).[10] Together,

[9] When this Court in *Rittmann* contrasted the Amazon goods delivered by last-mile drivers in that case with goods that had been "held at warehouses for later sales to local retailers," it was referencing the circumstance it had just distinguished: *A.L.A. Schechter Poultry* and the slaughterhouse workers who sold slaughtered poultry to local retailers and butchers. *See Rittmann*, 971 F.3d at 916. So, just as Ferguson's drivers are not like those slaughterhouse workers, this case is not what Ferguson terms (at 22) *Rittmann*'s "counter-factual."

[10] Even while acknowledging that such anticipatory shipping *could* be part of interstate commerce, the Supreme Court found wanting the evidence that the paper company actually had a basis to ship its paper ahead of time. *Id.* at 569-70. That's not a problem here where Ferguson employs sophisticated supply-chain analytics to

these cases stand for the straightforward proposition that when goods are shipped in "anticipation" of identifiable needs, they remain in interstate commerce until they arrive at their intended destination—even if the order or sale comes *after* the goods arrive intrastate. In other words, they need not be, as Ferguson contends, pre-ordered by specific customers *before* getting to the company's distribution centers.

Though *Jacksonville Paper* addressed an independent wholesaler, early FLSA cases relied on this principle when faced with facts similar to those here involving workers who transport goods intrastate from a company's warehouse to its own local retail outlets. These early cases consistently found, like the district court did below, that those workers are actively "engaged in interstate commerce." *Walling v. American Stores Co.*, 133 F.2d 840 (3d Cir. 1943), is a good example. In that case, the Third Circuit concluded that drivers completing the intrastate delivery of goods for a large grocery chain were engaged in interstate commerce for purposes of FLSA. *Id.* at 846. As the court explained, the chain was running an "entire operation" for the "efficient distribution of goods [] to its local retail outlets," *id.*—an operation that is uncanny in its similarities to Ferguson's own sophisticated supply chain and distribution system, *see* pp. 36-37, *infra*. This operation included avoiding "over-stocking" by "order[ing] in anticipation of the regular and continuous requirements

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ensure its distribution centers maintain adequate, but not too much, inventory that can be delivered to customers and retail branches in a single day. *See* pp. 36-37, 39-40, *infra*.

of [its] stores" as "guided by past experience," "seasonable factors and merchandising programs." *Id.* at 845; *id.* at 845-46 (finding this evidence sufficient under *Jacksonville Paper*). As a result, the "maintenance of the warehouse" did not "break" the "practical continuity of movement of the goods" from when they were shipped from the chain's out-of-state manufacturing facilities "until they reach the defendant's retail stores." *Id.* at 846.

Walling v. American Stores Co. is not an outlier. In *A.H. Phillips, Inc. v. Walling*, 144 F.2d 102 (1st Cir. 1944), a different grocery chain would order goods from out of state to its warehouse "to meet the *prospective* demand from the stores." *Id.* at 103-04 (emphasis added). There, too, the goods' "entry in the warehouse was but a temporary pause in their interstate journey," and because those goods "remain[ed] in interstate commerce until they [were] delivered at the retail stores," the grocery chain's warehouse workers, *id.* at 104, as well as the drivers making those final deliveries, were themselves engaged in interstate commerce, 50 F. Supp. 749, 752 (D. Mass. 1943) (describing as "settled" that chain's "truck drivers . . . were engaged in transporting goods in interstate commerce").

Similarly, in *McComb v. Wyandotte Furniture Co.*, 169 F.2d 766 (8th Cir. 1948), the Eighth Circuit emphasized that "[g]oods purchased by a [furniture] chain store system outside the state, as *intended stock* for its various stores, are not taken out of the stream of commerce by being sent temporarily to a warehouse, as a means

of facilitating their systematic distribution to the several stores in accordance with regular needs." *Id.* at 768 (emphasis added). As a final example, take *Mitchell v. C&P Shoe Corp.*, 286 F.2d 109 (5th Cir. 1960), which relied on *Jacksonville Paper* to conclude there was a "practical continuity of movement" of shoes through a shoe manufacturer's warehouses "to its wholly-owned retail stores." *Id.* at 112-13; *see also id.* at 113 n.7. And, again citing *Jacksonville Paper*, the Fifth Circuit rejected an argument similar to Ferguson's claim that goods must have been pre-ordered by or earmarked for a specific customer to remain in interstate commerce after being warehoused: While it might be "reasonable to look for formal orders, contracts and understandings between the parties" when it comes to a wholesaler distributing to "numerous independent retailers," it doesn't make sense to do so when the "retail units are owned by the wholesaler" and the company is well-situated to know which products it carries in which stores and how often they must be restocked. *Id.* at 112.

Consistent with these cases and similarly relying on *Jacksonville Paper*, this Court in *Carmona* concluded that delivery drivers transporting pizza ingredients and packaging materials, which had been sent from outside California and then stored at an in-state warehouse, to local Domino's franchisees were engaged in interstate commerce, and their contracts were therefore exempt from the FAA. 73 F.4th at 1137-38. Like Ferguson here, Domino's argued that its drivers were not exempt from the FAA because "Domino's franchisees do not order the goods until after they

arrive at the warehouse." *Id.* at 1138. This Court rejected that argument: Whether a delivery driver is engaged in interstate commerce is not affected by "how the purchasing order is placed, but rather whether the [] drivers operate in a single, unbroken stream of interstate commerce." *Id.* (citing *Jacksonville Paper*, 317 U.S. at 570). There, the drivers did so operate because the supplies "were inevitably destined from the outset of the interstate journey for Domino's franchisees," notwithstanding the timing of their orders or their "pause . . . at the warehouse" along the way. *Id.*

Ferguson would confine *Carmona* to cases involving "perishable" goods transported "in a race against time." Opening Br. at 26-27 & n.3. But there's no indication that the perishable nature of Domino's ingredients is what drove the Court's decision, particularly because the drivers also transported non-perishable items like "boxes" and "trays." *See* Answering Br. of Plaintiffs-Appellees, *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021), *vacated & remanded on other grounds by* 143 S. Ct. 361 (2022) (Mem) (No. 21-55009), 2021 WL 2407815, at *4.[11] Instead, consistent with the long-standing precedents described above, this

[11] Moreover, many of the early FLSA cases did not involve perishable items, instead addressing the distribution of products like shoes and furniture. And even in the grocery context, courts noted that the products being warehoused before delivery were often shelf-stable items like "canned" and "bottled" goods whereas perishable items, like "bread, pastry and milk," were "received directly by the retail stores from local sources." *See A.H. Phillips*, 144 F.2d at 103-04.

Court focused on the intent, all along, that the goods be delivered to and used by franchisees. *See also Carmona*, 21 F.4th at 630 (emphasizing that "the relevant goods . . . were procured out-of-state by Domino's to be sold to a Domino's franchisee, not to an unrelated third party"). That, of course, accords with the rule since before the FAA's enactment that "determining the character" of goods in transit is based on "[p]ractice, intent and the typical course" rather than technicalities like "title or niceties of form." *Foster*, 247 U.S. at 113; *see* Part II(A), *supra*.

That Mr. Madrigal is a worker engaged in interstate commerce flows from *Jacksonville Paper* and the retail chain cases and falls squarely within *Carmona*. Ferguson "orders" and "receives" goods to its distribution center not to sit in a warehouse but to supply the demand of its local retail branches. *See* ER-51, Craven Decl. ¶ 4. So, while Ferguson's amici try to distinguish *Carmona* on the ground that Domino's goods "were 'inevitably destined' for a known, fixed group of customers (Domino's franchisees)," Amicus Br. at 16 (quoting *Carmona*, 73 F.4th at 1138), Ferguson's local retail branches are a "known, fixed group" too. As in the retail chain cases, Ferguson is running an "entire operation" for the "efficient distribution of [its] goods," including "to its local retail outlets." *See Am. Stores*, 133 F.2d at 846. Even if Ferguson's retail branches do not order goods until after they arrive at the distribution centers, the company has those goods sent there "in anticipation of replenishing the stock at Ferguson's smaller local branches." ER-51, Craven Decl.

¶ 4. As the owner of the retail branches, moreover, Ferguson presumably knows—even better than Domino's with respect to its franchisees in *Carmona*—which products it carries and how often they must be restocked. Indeed, Ferguson boasts of its ability to "manage[] appropriate inventory levels" to best service its retail branches by using what it calls "resource planning systems" to accurately predict the "needs within each end market" and "optimize the supply chain and branch network." 2023 Annual Report at 16. Thus, because Ferguson uses the Pomona distribution center as a "convenient intermediate step," *see Jacksonville Paper*, 317 U.S. at 568, the temporary "maintenance" of goods in that center does not "break" the "practical continuity of movement of the goods until they reach the defendant's retail stores." *See Am. Stores*, 133 F.2d at 846. Mr. Madrigal's frequent delivery of these goods from Ferguson's distribution center to its retail branches means he is engaged in interstate commerce, and this Court can affirm the district court's § 1 holding on this ground alone.

Ferguson completely overlooks this retail-branch aspect of its distribution system and Mr. Madrigal's work, instead focusing solely on the deliveries to customers, contending that the goods Mr. Madrigal delivered were "akin to those acquired and held by a local merchant for local disposition." Opening Br. at 31 (citation modified). But those deliveries, too, are in interstate commerce because the goods being delivered remain en route to their intended destination, and this Court

should not permit Ferguson to hide behind the complexity or efficiency of its distribution system. In support of its argument to the contrary, Ferguson turns to *Watkins v. Ameripride Services*, 375 F.3d 821 (9th Cir. 2004), and *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228 (1st Cir. 2023). Neither supports its cause.

Starting with *Watkins*, in which a local driver was not engaged in interstate commerce for purposes of their state overtime pay claim. In reaching that conclusion, this Court followed the general principles articulated in *Jacksonville Paper*, *see Watkins*, 375 F.3d at 825-27, noting that "[i]ndefinite storage in a warehouse *may* transform goods shipped from out-of-state into intrastate deliveries." *Id.* at 826 (quoting *S. Pac. Transp. Co. v. Interstate Com. Comm'n*, 565 F.2d 615, 618 (9th Cir. 1977)) (emphasis added). This Court explained that the "inter-state or intrastate character of the shipment is determined only after considering the entire panoply of 'facts and circumstances surrounding the transportation.'" *Id.* at 825 (quoting *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997)). Examining "the entire panoply of facts and circumstances" before it, this Court concluded there was no evidence that the driver was delivering goods to specific customers, either pursuant to prior orders or based on quantifiable or anticipated needs, *see id.* at 825-27. As a result, *Watkins* declined to treat as interstate commerce the "transportation chain" from a uniform and laundry company's "orders with an-out-of-state vendor, with delivery to the company's intrastate warehouse for future delivery to customers

yet to be identified" all the way to "delivery to the customer." *Id.* at 826. That was particularly the case where the plaintiff testified that he delivered new uniforms to customers along his route just three percent of the time, *id.* at 826; the rest of the time, he delivered used uniform rentals from the company's warehouse to customers and picked up their soiled laundry and brought it back to the warehouse, *id.*—a closed ecosystem sounding more in local retail than interstate commerce.

By contrast, where there *is* evidence that goods are transported "based on *anticipation* of needs," *see Jacksonville Paper*, 317 U.S. at 570 (emphasis added), contemporary courts have concluded that drivers like Mr. Madrigal making last-mile deliveries to customers are engaged in interstate commerce, not merely transporting goods held for "local disposition." *See id.* For example, in *Collins v. Heritage Wine Cellars, Ltd.*, 589 F.3d 895 (7th Cir. 2009), the Seventh Circuit held that drivers for a wholesale importer and distributor of wine who delivered wine from the company's Illinois warehouse to independent local retail stores were engaged in interstate commerce for purposes of FLSA. *Id.* at 896-97, 898. This was so even though most "of the wine sits in the warehouse" during its "Heritage-controlled journey to the retail outlet" until the wholesaler "has found a buyer" in part because the wine had "been purchased and shipped . . . on the basis of its estimates of customer demand." *Id.* at 898.

As in *Collins* and like the hypothetical wholesaler in *Jacksonville Paper* who anticipatorily ships goods based on identifiable demand, Ferguson orders and receives goods at its distribution centers "in anticipation of potential orders from local customers." ER-51, Craven Decl. ¶ 4. Controlling the entire journey from import to warehousing to final delivery, Ferguson orders the products it does based on its sophisticated tracking and estimates of customer demand. That is, by using the "resource planning systems" discussed above to "identify" the "wants, preferences and expectations" of a particular market, Ferguson is able to "offer more localized assortments of [its] products," maintain "appropriate inventory levels," and "optimize the supply chain" to provide same- and next-day delivery. 2023 Annual Report at 16; *see also* Press Release, Ferguson, *How technology helped Ferguson meet community demand in Texas* (Mar. 4, 2021)[12] (prioritizing "quick and efficient" transactions by using "real-time inventory calculations to ensure that the products [Ferguson's] customers need are readily available"). Indeed, Ferguson frequently cites its ability to fulfill customer orders within a day or two as its main "competitive advantage." *See* 2023 Annual Report at 3. Its advance shipping to make that efficiency possible ensures, not breaks, the "practical continuity of movement of the

[12] https://tinyurl.com/mj87stmf.

goods until they reach the customers for whom they were intended." *Jacksonville Paper*, 317 U.S. at 568.[13]

In addition to *Watkins*, Ferguson also cites *Fraga*, which, it says, held that goods only remain in interstate commerce for a final intrastate delivery within the meaning of the FAA if they were "earmarked at the outset for a particular recipient." Opening Br. at 36. The First Circuit held no such thing. In *Fraga*, the court considered whether merchandisers were engaged in interstate commerce under § 1 of the FAA when they received, at their homes, promotional materials from the out-of-state defendant and then delivered those materials to various retail stores along their in-state route. *Fraga*, 61 F.4th at 240. The court thought it likely that these materials were moving as part of an "integrated interstate journey" based on the "contractual relationship" between the defendant and the retail stores that included "the delivery of [promotional] materials," and remanded to the district court for further factual findings. *Id.* As a secondary point, the court said this likely conclusion also comported with "common sense," *id.*, because there was record evidence that "one could determine" at the time of shipment "which materials were destined for which stores." *Id.* at 241. But that point wasn't, as Ferguson asserts, dispositive;

[13] If this Court determines there is not sufficient evidence to show that Ferguson ships its plumbing and HVAC supplies in advance of anticipated demand from its retail stores and other customers, this Court should remand for discovery regarding Ferguson's supply chain and distribution system rather than vacate and remand with instructions to compel Mr. Madrigal into arbitration.

instead, it was merely *relevant* to the overall "circumstances" the court considered when evaluating the goods' interstate journey. *See id.*

That was also the case in *Bissonnette v. LePage Bakeries Park St., LLC*, 123 F.4th 103 (2d Cir. 2024) (cited at Opening Br. at 37). Following the Supreme Court's rejection of a transportation-industry requirement, the Second Circuit remanded to the district court to consider in the first instance whether the drivers there delivered goods "in a continuous interstate journey or as part of multiple independent transactions." *Id.* at 106 (quoting *Brock*, 121 F.4th at 762). The court then pointed to various "factors" other circuits have looked to when making that determination, including the "key" factor—the "buyer-seller relationship" between the defendant and local retailers. *Id.* (citation modified). While the court suggested that whether "particular goods are earmarked at various times" "*may*" be "[r]elevant" to that factor, it didn't say that earmarking was dispositive and in fact listed a host of other potentially relevant evidence. *Id.* at 106-07 (emphasis added).

Of course, that goods were ordered by a particular customer and shipped pursuant to that order is evidence that the intended destination of the goods is the customer, and, therefore, that those goods remain in interstate commerce until that customer receives them. But, as *Jacksonville Paper*, *Swift*, the early FLSA cases, and this Court's decision in *Carmona* all confirm, a mid-journey order does not, on its own, take goods out of the stream of interstate commerce. So long as goods have

not reached their intended interstate destination, formalities such as changes in the title or bill of lading due to a mid-stream purchase or order do not destroy the interstate nature of the journey.

B. The interstate character of goods does not depend on the length of pause at a warehouse en route to their final destinations.

Ferguson next argues that the length of pause at its warehouse takes its goods out of the stream of interstate commerce. *See, e.g.*, Opening Br. at 21, 25; *see also* Amicus Br. at 17-18. This argument fails as a matter of fact and a matter of law.

As a matter of fact, Ferguson likely overstates the length of the intermediate stop, claiming that its goods wait in its Pomona distribution center for, on "average," 64 days. ER-52, Craven Decl. ¶ 8. Ferguson doesn't explain how it reached this statistic, including whether it included the products that, it admits, never sell. *See* ER-52, Craven Decl. ¶ 6. Whether it includes those products or not, this number likely doesn't reflect the typical amount of time a product spends in the warehouse because an arithmetic average, or "mean," is more sensitive to outliers such as rarely used items that nevertheless must remain stocked and ready. The median, or middle value, amount of time a product spends in the distribution center would likely be a more telling metric, but Ferguson hasn't submitted that information.

Even taking Ferguson's two-month period at face value, the company fails to explain why the Court should draw a line based on the length of an intermediate stop, let alone what the line should be, before a stop takes a good out of interstate

commerce. With good reason: The length of time in a warehouse is irrelevant. As explained, early 20th century cases focused on the parties' intended destination. *See* Part II(A), *supra*. This focus explains why courts have found that pauses of up to six months in a warehouse did not take the goods out of the stream of interstate commerce where there was evidence that the shipper intended to "ship the [product] beyond" its warehouse. *See Roberts v. Levine*, 921 F.2d 804, 807, 814 (8th Cir. 1990); *see also, e.g.*, *Ehrlich v. Rich Prods. Corp.*, 767 F. App'x 845, 849-50 (11th Cir. 2019) (finding that goods remained in interstate commerce even though "some of Rich's products actually remained at the warehouse for a period of several months" because there remained an "intent to ship the products to retailers"); *Collins*, 589 F.3d at 898 (finding that wine "sit[ting] in the warehouse" for "approximately" one "month" remained in interstate commerce); *Siller v. L & F Distribs., Ltd.*, 1997 WL 114907, at *3 (5th Cir. Feb. 18, 1997) (per curiam) (finding that beer remained in interstate commerce when traveling from "out-of-state breweries to [brewer's] in-state retail customers, via a distributor, with a temporary stop" of up to 28 days "at its own warehouse to facilitate the interstate movement" because the intended destination "persisted as the shipment crossed state lines"). Here, too, even a purported two-month average pause would not transform the interstate character of Ferguson's goods, which it orders to stock its own retail stores

and based on quantifiable customer demand. In other words, there is no basis for Ferguson's argument that length of time is a relevant or dispositive factor.

C. Last-mile drivers like Mr. Madrigal are easily distinguishable from local couriers transporting goods traveling on purely intrastate journeys.

Finally, Ferguson and its amici try to conflate this case with ones involving food delivery, ride sharing, and other local couriers, saying that all involve local delivery after goods have already "come to rest" within the state—that is, that the local delivery takes place after goods' interstate journey has ended. *See* Opening Br. at 40-41; Amicus Br. at 20-22. But every court of appeal to consider the issue, including this one, has explained why those local couriers are differently situated than last-mile drivers completing the intrastate delivery of goods to their final intended destinations. Put simply, goods retain their "interstate character" while traveling to their intended destination, after which they are often sold as part of a new and separate local transaction or transformed into another form. Here, Ferguson's intended final destination for its goods is its retail branches and customers, not its warehouses, and its goods do not "come to rest" until they reach those intended destinations; what, if anything, follows, would be a separate and likely intrastate transaction.

Return to the example of *A.L.A. Schechter Poultry*. Though the live poultry remained in interstate commerce during its intrastate journey from the New York

stations where they arrived to the New York slaughterhouses that purchased them, the "the flow in interstate commerce ceased," 295 U.S. at 543, when the live poultry was then "sold" by slaughterhouses, this time to local "retail poultry dealers and butchers," and "immediately slaughtered." *Id.* at 521. Similarly, in *Immediato v. Postmates, Inc.*, 54 F.4th 67 (1st Cir. 2022) (cited at Amicus Br. at 20), the First Circuit explained that goods lose their interstate character when they are sold and then transported as part of a "separate transaction" from the interstate journey. *Id.* at 78. As the court explained, users of food delivery platforms like Postmates buy takeout meals and other goods directly from local restaurants and retailers, and then the company arranges for a local courier to pick up and deliver the order. *Id.* at 72. But Postmates doesn't arrange the original import of ingredients and other goods; instead, that is a "separate transaction" between the maker of those items and the restaurants and retailers. *See id.* at 78. So, the original "interstate journey terminates when the goods arrive at the local restaurants and retailers to which they were shipped" before the raw goods are transformed into meals and a second "entirely new and separate transaction[]" takes place between customers and those local restaurants and retailers. *Id.*

The First Circuit contrasted that type of local delivery resulting from an "entirely new and separate transaction" with the work of a last-mile driver, who completes the intrastate delivery of but one interstate transaction: "[C]ustomers

bought goods directly from Amazon, which orchestrated the interstate movement of those goods and arranged, as part of the purchase, for their delivery directly to the customer." *Id.* As a result, the last-mile delivery was a "constituent part of the interstate delivery service that Amazon agreed to provide its customers." *Id.* at 76.

Here, too, Ferguson's fleet of delivery drivers is a "constituent part of the interstate delivery service" that Ferguson provides because it's *Ferguson* that "orchestrate[s] the interstate movement" of its plumbing and HVAC supplies from global and national suppliers all the way to its retail branches and trade customers. *See id.* at 78. Indeed, Ferguson has never disputed that its goods remain within its control and direction both while at its distribution centers and as to subsequent deliveries. *See also Collins*, 589 F.3d at 898 (emphasizing that transportation of wine occurred pursuant to a "[company]-controlled journey to the retail outlet"). So, Ferguson's pipes, valves, and fittings are akin to the ingredients shipped to a restaurant *before* they're turned into meals. If a plumber later buys one of those products at a Ferguson retail branch and brings it to a nearby worksite, that's an "entirely new and separate transaction" and a purely local intrastate journey akin to the journey of the takeout meal bought through the Postmates app and delivered by a local courier. Or, to put it using facts familiar to this Court, there is a difference between the driver who delivers ingredients from a Domino's supply center to a Domino's franchisee, and the driver who delivers a freshly made pizza using those

ingredients from a Domino's franchisee to a customer waiting at home. *Cf. Carmona*, 73 F.4th at 1138. Mr. Madrigal and other last-mile drivers for Ferguson are like the former driver, and not, as Ferguson suggests, the latter.[14]

In *Carmona*, this Court also acknowledged that goods can lose their interstate character when they are transformed into something else along the way. In holding that last-mile drivers for Domino's were engaged in interstate commerce, this Court emphasized that, even though the pizza ingredients were "repackaged" at the Domino's supply center, they remained "unaltered . . . until they are delivered to franchisees." *Carmona*, 73 F.4th at 1138. This Court contrasted these ingredients with those that go into the takeout meals delivered by local couriers in cases like *Immediato*: The "products delivered in [*Immediato*] were transformed from their constituent ingredients into meals before the plaintiff drivers delivered them." *Id.*; *see also Collins*, 589 F.3d at 899 (emphasizing that "no processing or substantial product modification of substance occurs at the warehouse") (citation modified). Here, of course, Ferguson has not contended that its goods are altered or transformed in any way during their intermediate stops at its distribution centers.

[14] For this reason, Ferguson misses the mark in relying extensively on then-Judge Barrett's decision in *Wallace*, which, like *Immediato*, addressed the entirely new and separate transaction that takes place when local couriers deliver takeout ordered via an online and mobile platform connecting hungry customers with local restaurants. 970 F.3d at 799.

These cases demonstrate not only that last-mile drivers like Mr. Madrigal are differently situated than the local couriers Ferguson and its amici cite, but also that courts are more than capable of drawing lines between different kinds of drivers making different kinds of deliveries. Construing the exemption to reach last-mile drivers like Mr. Madrigal under the facts present here does not, therefore, risk the fabricated confusion Ferguson predicts (at 38-39).

CONCLUSION

For the foregoing reasons, Mr. Madrigal respectfully asks this Court to affirm the order of the district court denying Ferguson's motion to compel arbitration.

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/s/ Hannah M. Kieschnick
Hannah M. Kieschnick
PUBLIC JUSTICE
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8150
hkieschnick@publicjustice.net

Leah M. Nicholls
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
lnicholls@publicjustice.net

Karen I. Gold
Marissa Mayhood
Noam Reiffman
Sara Pezeshkpour
BLACKSTONE LAW, APC
8383 Wilshire Blvd., Suite 745
Beverly Hills, CA 90211
(310) 622-4278
kgold@blackstonepc.com
mmayhood@blackstonepc.com
nreiffman@blackstonepc.com
spezeshkpour@blackstonepc.com

Attorneys for Appellee Jose Madrigal

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