No. 21-1572

In the Supreme Court of the United States

DOMINO'S PIZZA LLC,

Petitioner,

v.

EDMOND CARMONA, ABRAHAM MENDOZA, and ROGER NOGUERIA, on behalf of themselves and all others similarly situated,

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with litigation in court. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. Based on the policy embodied in the Federal Arbitration Act (FAA), the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

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[1] Pursuant to Rule 37.6, the Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice of the Chamber's intention to file this brief more than 10 days before the due date and all parties consented to its filing.

The Ninth Circuit's decision holding that the FAA does not apply to workers who are several steps removed from the actual movement of goods in interstate commerce conflicts with rulings by other courts of appeals and cannot be squared with either the text or historical context of the FAA. The decision improperly limits the FAA's protections and will engender costly and protracted disputes over the application of the FAA, consequences that harm both businesses and workers. The Chamber therefore has a strong interest in this Court's review, and reversal, of the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Federal Arbitration Act in 1925 "in response to judicial hostility to arbitration." *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906, 1917 (2022). The Act implements Congress's strong commitment to protecting the enforceability of arbitration agreements.

To that end, Section 2 of the FAA broadly protects arbitration agreements "evidencing a transaction involving commerce." 9 U.S.C. § 2. This Court has held that the phrase "involving commerce" "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 277 (1995).

Arbitration opponents increasingly have tried to avoid the FAA's protections by invoking the limited exemption in Section 1, which excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any *other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). As a result, this Court has been called

upon in recent years—including last Term—to resolve circuit splits involving the meaning of Section 1's residual clause. See *Southwest Airlines Co.* v. *Saxon*, 142 S. Ct. 1783 (2022); *New Prime, Inc.* v. *Oliveira*, 139 S. Ct. 532 (2019); see also *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001).

This case presents a question that the Court left open in *Southwest Airlines* and that has also divided the courts of appeals: whether a class of workers is "engaged in foreign or interstate commerce" when it "carries out duties further removed from the channels of interstate commerce or the actual crossing of borders" than the cargo loaders in *Southwest*. 142 S. Ct. at 1789 & n.2.

Respondents belong to a class of workers that make in-state deliveries of pizza dough, ingredients, and other goods from an in-state Domino's supply center to the in-state Domino's franchisees who order goods from that supply center. Pet. App. 4a, 6a. Petitioner explains that these workers neither cross state lines themselves nor load or unload shipments that move interstate. Pet. 5.

Notwithstanding the purely intrastate character of these workers' responsibilities, the Ninth Circuit held that the Section 1 exclusion applied. It rested that decision entirely on Domino's overall involvement in "the procurement and delivery of interstate goods" and the longer supply chain in which those goods traveled. The court held that because of Domino's activities, the class of workers were part of "a single, unbroken stream of interstate commerce." Pet. App. 7a (quotation marks omitted).

The Ninth Circuit's erroneous decision only emphasizes the urgent need for this Court's review of the issue left open in *Southwest Airlines*. Plaintiffs in this and other cases have promoted an expansive conception of "engaged in interstate commerce" in order to exclude large categories of contracts from the FAA's protection. As the petition demonstrates, the circuits are in conflict over this conception. Particularly in the context of the FAA, uniform national standards are essential. Yet today, application of the statute depends on where particular workers are employed.

If this conflict is allowed to persist, it will generate significant litigation over whether the FAA applies to a broad and indeterminate array of workers. Businesses and workers will face uncertainty over whether the FAA requires enforcement of their arbitration agreements. And even if a court ultimately decides that such agreements are enforceable, businesses and workers will have faced delay in the process. As a result, wide sectors of the economy could be deprived of the benefits secured by the FAA, including lower costs and greater efficiency in the resolution of employment disputes. Worse, the increased costs of litigating both the applicability of the Section 1 exemption, and, if necessary, the merits of underlying disputes, would be passed on in the form of decreased payments to workers or increased costs to consumers.

None of these consequences should occur. More than two decades ago, this Court instructed that Section 1's exemption must be given a "narrow construction" and "precise reading." *Circuit City*, 532 U.S. at 118, 119. The Court has repeatedly interpreted Section 1 according to its "contemporary, common mean-

ing" at the time the FAA was enacted—which included a circumscribed view of what it meant to be "engaged in * * * commerce." *Southwest Airlines*, 142 S. Ct. at 1788 (quotation marks omitted). The Court also has looked to the "context" of the related provisions of the statute and the structure of the FAA. *Ibid.*; *New Prime*, 139 S. Ct. at 539. The relevant language in Section 1—"other class of workers engaged in foreign or interstate commerce"—is cabined by "the application of the maxim *ejusdem generis*" because it is a "residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Circuit City*, 532 U.S. at 114; see *Southwest Airlines*, 142 S. Ct. at 1790.

The broad interpretation of "engaged in interstate commerce" employed by the Ninth Circuit here expands Section 1's residual clause far beyond workers "directly involved in transporting goods across state or international borders." *Southwest Airlines*, 142 S. Ct. at 1789; see also, *e.g.*, *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021); *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.). The Ninth Circuit erroneously focused on "what [Domino's] does generally," rather than the "the actual *work*" that respondents and other members of the class of workers perform "at [Domino's]." *Southwest Airlines*, 142 S. Ct. at 1788 (emphasis added). The reason is obvious. Had the court below looked at the workers here—who performed purely intrastate duties and did not load or unload interstate shipments—it could not reasonably have concluded that these workers were engaged in interstate commerce within the meaning of Section 1.

For all of these reasons, the Court should grant the petition. At a minimum, given the substantial tension between the decision below and *Southwest Airlines*, if the Court does not grant plenary review, it should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Southwest Airlines*.

ARGUMENT

A. The Petition Presents A Question Of Substantial Importance That Has Divided The Lower Courts.

This Court's review is warranted for at least three reasons.

First, the conflict among the courts of appeals yields different treatment of identically-situated workers based solely on geography. Second, the expansive reading of the Section 1 exemption, if unaddressed, will only increase the already time-consuming and costly litigation over the FAA's application that we have seen in the last decade—thereby undermining one of Congress's key goals in enacting the FAA. Third, the decision below will prevent businesses and individuals from securing the benefits of arbitration protected by the FAA.

1. As the petition explains (at 7-12), the Ninth Circuit's interpretation of Section 1's residual clause conflicts with decisions by other courts of appeals.

If respondents worked in Florida or Georgia, their arbitration agreements would have been protected by the FAA. In addressing the applicability of Section 1 to "drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse," the Eleventh Circuit held that the

district court erred by "[f]ocusing on the movement of the goods" rather than whether the class of workers, "in the main, actually engages in interstate commerce," meaning the transportation of goods "across state lines." *Hamrick*, 1 F.4th at 1340, 1346, 1350-52. It held that workers who move goods from one in-state location to another do not fall within the Section 1 exemption just because the goods "had been previously transported interstate." *Id.* at 1349 (quotation marks omitted). The Ninth Circuit has reached the opposite conclusion.

Writing for the Seventh Circuit, then-Judge Barrett similarly rejected the argument that the Section 1 "exemption is not so much about what the worker does as about where the goods have been." *Wallace*, 970 F.3d at 802. That court held that workers engage in foreign or interstate commerce within the meaning of Section 1 when they are "connected not simply to the goods, but to the *act of moving those goods across* state or national borders." *Ibid.* (emphasis added). The Seventh Circuit therefore ruled that local food delivery drivers who deliver meals and packaged items from restaurants to diners do not fall within the Section 1 exemption, because "the interstate movement of goods" was not "a central part of the job description of the class of workers." *Id.* at 803.

The Eleventh Circuit would have found the Section 1 exclusion inapplicable for a second, independent reason: respondents do not work in the "transportation industry"—and that court has held the exclusion limited to employees of transportation businesses. *Hamrick*, 1 F.4th at 1346 (quoting *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005)). As the district court in this case recognized, "Domino's

is a pizza company and not a transportation or delivery company." Pet. App. 17a.

This patchwork quilt of conflicting approaches and results is untenable. The Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce*, 513 U.S. at 272. Yet the deep division among the circuits regarding the scope of the FAA's Section 1 exemption undermines that reliance, producing different outcomes depending on where workers happen to be located.

That non-uniformity makes it enormously difficult for nationwide businesses, such as Domino's, to structure contractual relationships with their employees. One set of workers—in Florida, New York, or Illinois—is subject to the FAA, permitting reliance on enforceable arbitration agreements to resolve any employer-employee disputes that might arise. But those same agreements would not be enforceable with respect to workers in California with the very same duties. As a result, Domino's will have to tailor its dispute resolution methods state-by-state rather than be able to rely on the FAA's federal protection of arbitration agreements.

2. The Court has long recognized "Congress' clear intent, in the [Federal] Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Straightforward, easily administrable rules are therefore especially important in the context of the FAA.

As a result, the *Circuit City* Court emphasized that Section 1 should not be interpreted in a manner

that introduces "considerable complexity and uncertainty * * *, in the process," because that would "undermin[e] the FAA's proarbitration purposes and 'breed[] litigation from a statute that seeks to avoid it.'" 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

Interpreting the residual clause in accordance with its plain meaning—so that it applies when the class of workers "typically" is "*directly* involved in transporting goods across state or international borders" (*Southwest Airlines*, 142 S. Ct. at 1788-89 (emphasis added))—should not require protracted litigation.

The Ninth Circuit's approach, however, requires complicated line-drawing. See Pet. App. 10a. Even when classes of workers primarily (or even, as here, entirely) carry out their work within a single state, the Ninth Circuit requires courts to decide whether those workers nevertheless are somehow sufficiently bound up with interstate movement of goods to fall within the residual clause. And that court has offered no standard for making that determination.

For example, the decision below relied on the Ninth Circuit's prior decision in *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), cert. denied, 141 S. Ct. 1374 (2021), which held that contracts of "last leg" delivery drivers performing work for Amazon are exempt from the FAA under Section 1 on the theory the goods are still in interstate commerce until they reach the Amazon customer who ordered them from out of state. Pet. App. 6a-7a; see also *Southwest Airlines*, 142 S. Ct. at 1787 n.2 (leaving open the question whether last mile drivers fall within the Section 1 exemption).

Rittmann was erroneous, but the decision here made the situation in the Ninth Circuit even worse, significantly expanding *Rittmann*. The panel acknowledged and dismissed several "factual differences" between this case and that one. Pet. App. 7a. The Ninth Circuit panel found it irrelevant, for example, that the Domino's franchisees were not ordering the goods from out of state and that the goods come to rest at the in-state Domino's supply center before they are ordered by the franchisees and delivered by respondents. It characterized these facts as "distinction[s] without a difference," instead asserting that the workers are nonetheless "operat[ing] in a single, unbroken stream of interstate commerce" because they are transporting "interstate *goods*." Pet. App. 7a (emphasis added; quotation marks omitted).

The decision below, if allowed to stand, would necessitate detailed factual assessments of the goods' origin and movement across state lines, even when the relevant class of workers does not primarily engage in that movement of the goods.

Interpreting Section 1's residual clause to require such an inquiry produces "serious problems of practical application." *Rittmann*, 971 F.3d at 936 (Bress, J., dissenting). And "[u]ndertaking such confounding inquiries in the context of the FAA is particularly undesirable when the result will inevitably mean more complex civil litigation over the availability of a private dispute resolution mechanism that is supposed to itself reduce costs." *Id.* at 937 (Bress, J., dissenting) (citing *Circuit City*, 532 U.S. at 123; *Allied-Bruce*, 513 U.S. at 275).

Further compounding the costs and delays associated with resolving the FAA's application under an overly expansive reading of the Section 1 exemption is

the risk of court-ordered discovery that threatens to drag on for months. See *Singh* v. *Uber Techs. Inc.*, 939 F.3d 210, 227-28 (3d Cir. 2019); *Golightly* v. *Uber Techs., Inc.*, 2021 WL 3539146, at *3-4 (S.D.N.Y. Aug. 11, 2021); see also *Singh* v. *Uber Techs., Inc.*, --- F. Supp. 3d ---, 2021 WL 5494439, at *14 (D.N.J. Nov. 23, 2021) (concluding, over two years after the Third Circuit's remand and after months of discovery, that rideshare drivers "are not exempt from the FAA" under the residual clause), *appeal docketed*, No. 21-3234 (3d Cir. Dec. 6, 2021).

3. The Ninth Circuit's failure to give Section 1 its proper narrow construction produces another significant adverse consequence. It prevents businesses and individuals from obtaining the benefits of arbitration secured by the FAA. The overall result will be that more disputes are forced into court rather than resolved through arbitration, because the FAA's protection against state-law rules that disfavor arbitration will no longer apply.

This Court has repeatedly recognized the "real benefits" of "enforcement of arbitration provisions," *Circuit City*, 532 U.S. at 122-23, which include "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)); accord *Allied-Bruce*, 513 U.S. at 280 (one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted); *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

These advantages extend to agreements between businesses and workers. See *Circuit City*, 532 U.S. at 123 (rejecting the "supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context"). The lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Ibid.*

Empirical research confirms those observations. Scholars and researchers agree, for example, that the average employment dispute is resolved up to twice as quickly in arbitration as in court. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998) (average resolution time for employment arbitration was 8.6 months—approximately half the average resolution time in court); see also, *e.g.*, Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics 5-6, 15 (March 2022), https://bit.ly/3yiU23A (reporting that average resolution for arbitration was approximately two months faster than litigation); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003–Jan. 2004) (reporting findings that arbitration was 33% faster than analogous litigation); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research,* 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies reaching similar conclusions).

Further, "there is no evidence that plaintiffs fare significantly better in litigation." Sherwyn, *supra*, 57 Stanford L. Rev. at 1578. To the contrary, a recent study released by the Chamber's Institute for Legal Reform found that employees were nearly *four times* more likely to win in arbitration than in court. Pham, *supra*, 4-5, 12, 17 (surveying more than 25,000 employment arbitration cases and 260,000 employment litigation cases resolved between 2014 to 2021 and reporting a 37.7% win rate in arbitration versus 10.8% in litigation).

The same study found that the median monetary award for employees who prevailed in arbitration was over double the award that employees received in cases won in court. Pham, *supra*, at 4-5, 14 ($142,332 in arbitration versus $68,956 in litigation); see also Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

Earlier scholarship similarly found a higher employee-win rate in arbitration than in court. See Sherwyn, *supra*, 57 Stanford L. Rev. at 1568-69 (observing that, once dispositive motions are taken into account, the actual employee-win rate in court is "only 12% [to] 15%") (citing Maltby, *supra*, 30 Colum. Hum. Rts. L. Rev. at 47) (of dispositive motions granted in court, 98% are granted for the employer); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), https://bit.ly/3IVddnP (concluding that employees were 19% more likely to win in arbitration than in court).

Thus, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." St. Antoine, *supra*, 32 Ohio St. J. on Disp. Resol. at 16 (quotation marks omitted; alteration in original). Rather, arbitration is generally "favorable to employees as compared with court litigation." *Ibid.*; see also Maltby, *supra*, 30 Colum. Hum. Rts. L. Rev. at 46.

In sum, the Ninth Circuit's overbroad reading of Section 1 imposes real costs on businesses and workers. It disrupts uniform national application of the FAA. It will produce expensive disputes over the enforceability of arbitration agreements with workers, yielding uncertainty and delay. And these increased litigation costs deprive businesses and workers of the benefits secured by the FAA, including lower costs and greater efficiency.

This Court should grant review to restore uniform national application of the FAA on the important question presented in this case.

B. The Decision Below Is Wrong.

Review is also warranted because the Ninth Circuit's interpretation of Section 1 is starkly inconsistent with the statutory text and context and with this Court's precedents.

1. The FAA's principal substantive provision, Section 2, provides that an arbitration agreement in "a contract evidencing a transaction *involving commerce* * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). This Court has instructed that Section 2's "involving commerce" language must be read "expansively" to reach all arbitration agreements within Congress's commerce power. *Allied-Bruce,* 513 U.S. at 274.

Section 1, by contrast, creates a very limited exception to Section 2's broad coverage, providing that the FAA's federal-law protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers *engaged in* foreign or interstate *commerce*." 9 U.S.C. § 1. (emphasis added). This Court has instructed that the Section 1 "engaged in * * * commerce" exemption requires a "narrow construction" and "precise reading." *Circuit City*, 532 U.S. at 118-19.

The Court's recent decision in *Southwest Airlines* reaffirms three interpretive principles that inform the proper "narrow" and "precise reading."

First, the Section 1 exemption must be interpreted based on the "ordinary, contemporary, common meaning" of the statutory text at the time Congress enacted the FAA in 1925. *Southwest Airlines*, 142 S. Ct. at 1788 (quotation marks omitted); accord *New Prime*, 139 S. Ct. at 539.

Second, the words of the statute must be interpreted "'in their context.'" *Southwest Airlines*, 142 S. Ct. at 1788 (quoting *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019)).

Third, with respect to Section 1's residual clause in particular, the Court has instructed that "under the *ejusdem generis* canon," the clause should be "'controlled and defined by reference' to the specific classes of 'seamen' and 'railroad employees' that precede it." *Southwest Airlines*, 142 S. Ct. at 1789-90 (quoting *Circuit City*, 532 U.S. at 114-15). In other words, the residual clause must be construed narrowly to reach only classes of workers that are similar—in terms of

their engagement with foreign or interstate commerce—to the enumerated groups of "seamen" and "railroad employees."

Applying these three principles, the Court in *Southwest Airlines* held that a class of workers must be "directly involved in transporting goods across state or international borders" in order to be "engaged in foreign or interstate commerce" within the meaning of Section 1's residual clause. *Southwest Airlines*, 142 S. Ct. at 1789; see *id.* at 1790 ("Put another way, transportation workers must be actively engaged in transportation of those goods across borders via the channels of foreign or interstate commerce.") (quotation marks omitted).

2. The class of workers that includes respondents does not come close to satisfying that standard. These workers make in-state deliveries from an in-state supply center to in-state customers. Unlike the cargo loaders in *Southwest Airlines*, the workers have no involvement in the interstate movement of the goods, much less a "direct" or "actively engaged" role in that movement.

For instance, they do not load or unload goods from the carriers that transported them across state lines. Cf. *Southwest Airlines*, 142 S. Ct. at 1790 (comparing cargo loading to "wharfage," which Section 1 refers to as a "matter[] in foreign commerce") (quoting 9 U.S.C. § 1). And the workers do not even engage in the "last leg" of a single interstate journey, because the goods come to rest at the in-state warehouse before the Domino's franchisee orders them and workers such as respondents deliver them. See Pet. 14.

In concluding that respondents nonetheless belong to a class of workers engaged in interstate commerce,

the court below committed at least two fundamental errors.

The Ninth Circuit disregarded the particular responsibilities of the class of workers, including respondents, in light of its view of *Domino's* activities. It stated that "Domino's is involved in the process from beginning to the ultimate delivery of the goods to their destinations" and that "Domino's is directly involved in the procurement and delivery of interstate goods." Pet. App. 7a.

But the fact that Domino's is engaged in those activities cannot resolve the question whether the particular class of workers is engaged in interstate commerce. Rather, Section 1 uses the word "workers" and thereby "directs the interpreter's attention to 'the *performance* of work.'" *Southwest Airlines*, 142 S. Ct. at 1788 (quoting *New Prime*, 139 S. Ct. at 540-41). In addition, "the word 'engaged'" "similarly emphasizes the *actual work* that the members of the class, as a whole, typically carry out." *Ibid.* (emphasis added).

While it might be possible to determine from a business's activities that its workers do not perform certain types of work—for example, a business that engages in no interstate commerce likewise will not have any employees engaged in interstate commerce—the inverse is not true. That is why the Court determined that the Southwest Airlines workers who loaded cargo onto planes traveling interstate fell within the Section 1 exemption, rather than relying upon those workers' mere employment by Southwest Airlines. 142 S. Ct. at 1788.

The Ninth Circuit compounded its error by employing a "stream of commerce" theory that focused on

the goods' broader interstate journey through the supply chain. See Pet. App. 7a. Again, that misdirected inquiry ignored the actual work performed by respondents and other members of the class.

For example, the court below discussed the fact that many of the goods "delivered *to* the Supply Center" originated out of state. Pet. App. 7a (emphasis added). But respondents and other drivers in the class of workers at issue in this case have no involvement whatever in that interstate journey or in the unloading of the goods from the carrier that made the interstate trip. Rather, they make their deliveries *from* the supply center to franchisees only after the goods arrive at the supply center, are transformed or packaged, and after a franchisee places an order. The Ninth Circuit's "error" in overlooking these critical characteristics of the actual work respondents perform resulted from its misplaced "focus[] on the movement of the goods and not the class of workers." *Hamrick*, 1 F.4th at 1351.

If the Ninth Circuit's test is whether the goods ever moved interstate, then the Section 1 exclusion would swallow an extremely large chunk of the FAA's rules protecting arbitration agreements. Most goods, or their components, cross state or national boundaries at some point given national, and often global, supply chains. This Court's Section 1 decisions preclude such an expansive reading of the provision.

Moreover, by sweeping in wholly intrastate activity into a single, nebulous stream of interstate commerce, the Ninth Circuit's approach harkens back to *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and the "far reaching" interpretations of Congress's commerce power that followed, *United States* v. *Lopez*, 514 U.S. 549, 560 (1995).

Some have criticized those decisions as a matter of constitutional interpretation. But whatever one might say about those *post*-1925 decisions, they are of no relevance in interpreting Section 1's residual clause—and the phrase "engaged in foreign or interstate commerce" in particular—according to its plain meaning at the time of the FAA's enactment in 1925.

Unlike Section 2, which reaches the full extent of "Congress' commerce power" and can therefore expand (or contract) the FAA's coverage over time to match this Court's understanding of the extent of that power, *Allied-Bruce*, 513 U.S. at 277, the meaning of the Section 1 exemption must be the same today as when "Congress enacted the [FAA] in 1925," *New Prime*, 139 S. Ct. at 543. See *Southwest Airlines*, 142 S. Ct. at 1788 (Section 1 must be given its "contemporary" meaning).

Indeed, the Court has already recognized that the term "engaged in" is far narrower than other terms relating to Congress's commerce power, such as "affecting" or "involving" commerce. *Circuit City*, 532 U.S. at 115, 118. The Court reaffirmed that conclusion in *Southwest Airlines*, stating that Congress' use of the "narrower phrase" "engaged in commerce" demonstrates that "it wanted to regulate short of th[e] limits" of its "authority under the Commerce Clause." 142 S. Ct. at 1789 (quotation marks omitted).

Thus, the exemption requires that workers actually—and "typically" engage in cross-border transportation. *Southwest Airlines*, 142 S. Ct. at 1788-89 (relying on contemporary dictionary definitions of "engaged" and "commerce"); *Hamrick*, 1 F.4th at 1350 (relying on contemporary definition of "interstate commerce" to conclude that the class of workers must "actually engage[]" in cross-border transportation);

see also, *e.g.*, Black's Law Dictionary 651 (2d ed. 1910) (defining "interstate commerce" as "commerce between two states," specifically—"traffic, intercourse, commercial trading, or [] transportation" "between or among the several states of the Union, or from or between points in one state and points in another state").

In sum, the class of workers in this case moves goods from one in-state location to another and is not involved in the goods' prior interstate movement. The class therefore is not "engaged in foreign or interstate commerce" because the workers are not "directly involved in transporting goods across state or international borders." *Southwest Airlines*, 142 S. Ct. at 1789.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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