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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Section 1 of the Federal Arbitration Act ("FAA") exempts "workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In *Southwest Airlines Co. v. Saxon*, this Court explicitly recognized a split amongst the Courts of Appeals regarding the application of this "residual clause" to local delivery drivers who, like Respondents, *never cross state lines*.[1] 142 S. Ct. 1783, 1789 n.2 (2022). In its Petition for a Writ of Certiorari ("Petition"), Domino's identified at least *three dimensions* to this split.

Respondents' Brief in Opposition ("Opposition") makes no attempt to harmonize the split and instead simply denies its existence. *See* Opposition at 2 ("There is no Circuit Split[.]"). The lower courts' continued confusion and disagreement, however, speaks for itself. And that disagreement has in fact *grown* since Domino's filed its Petition. Less than one month ago, the Fifth Circuit concluded that local delivery drivers are *not* covered by the residual clause.

The Seventh and Eleventh Circuits, which focus on the activities of the workers, would likely have reached the same conclusion as the Fifth Circuit. The First and Ninth Circuits, which focus more on the overall journey of the goods, would likely have reached the opposite conclusion. The facts of this case—

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[1] In their Opposition, Respondents seem to imply that they transported goods across state lines. *See, e.g.*, Opposition at 3 ("[Respondents] transported over 200 different products from Domino's supply chain centers ***outside of California*** to their individual franchise stores ***in California***[.]" (emphasis in original)). That is incorrect. It is undisputed on this record that Respondents never crossed state lines. *See* App. at 10a ("At no point did [Respondents] deliver or transport goods outside of California.").

involving delivery drivers *making entirely intrastate deliveries*—present the perfect vehicle to provide clarity and predictability to the lower courts. This Court, therefore, should grant Domino's Petition.

I. Since the Filing of the Petition, the Circuit Courts Are Even More Divided Regarding the Application of the Residual Clause to Workers Involved Solely in Intrastate Transportation.

In *Saxon*, this Court explicitly left open a disagreement percolating in the Courts of Appeals regarding the treatment of local delivery drivers under the residual clause. *See Saxon*, 142 S. Ct. at 1789, n.2. Domino's Petition identified three dimensions to this split, noting that some courts applying the residual clause to these workers focus on the drivers' *duties*, other on the drivers' *freight*, and still others on the drivers' *industry*. *See* Petition at 7–12. Respondents largely ignore the split, failing to acknowledge the question left open in *Saxon* and failing to even cite to the most recent addition to this split: the Fifth Circuit's decision in *Lopez v. Cintas Corporation*, 47 F.4th ---, 2022 WL 3753256 (5th Cir. Aug. 30, 2022).

After *Lopez*, the deepening split's primary dimension runs between the First and Ninth Circuits, on one hand, and the Fifth, Seventh, and Eleventh Circuits, on the other. In *Lopez*, "items arrived at [a] warehouse from out of state[,]" and plaintiff "deliver[ed] them to local clients." *Id.* at *1. A dispute arose between plaintiff and his employer, and plaintiff sued. *Id.* The employer moved to arbitrate the claims, but plaintiff resisted, seeking shelter under the residual clause. *Id.* The district court rejected application of the clause, and the Fifth Circuit affirmed.

Relying on *Saxon*, the Fifth Circuit first noted that plaintiff "belongs to a 'class of workers' that picks up items from a local warehouse and delivers those items to local customers[.]" *Id.* at *2 (citing *Saxon*, 142 S. Ct. at 1788–89). It then noted that such workers were not "directly involved in transporting goods across state or international borders," *id.* at *3 (quoting *Saxon*, 142 S. Ct. at 1789), since they "enter the scene *after* the goods have already been delivered across state lines," *id.* (emphasis added); *see also id.* (local delivery drivers "do not have . . . a 'direct and necessary role' in the transportation of goods across borders" because they are not "actively engaged in the transportation of those goods across borders" (quoting *Saxon*, 142 S. Ct. at 1790)). In fact, the Fifth Circuit determined that "[o]nce the goods arrived at the [local] warehouse and were unloaded, *anyone* interacting with those goods was no longer engaged in interstate commerce." *Id.* at *4 (emphasis added).

Those are precisely the facts of this case. The goods that Respondents delivered to franchised stores in California came to rest at a California Supply Center, where they were "reapportion[ed], weigh[ed], package[d, and] store[d]" unless and until they were ordered by independent franchisees. App. at 10a. Yet the Ninth Circuit, focusing on the journey of the goods instead of the duties of the workers, concluded that the exemption applied.

The Eleventh Circuit, like the Fifth Circuit, would have concluded otherwise. Respondents note that the Eleventh Circuit asks whether workers "in the main . . . actually engage in the transportation of goods in interstate commerce," and claim that the First and Ninth Circuits "employ[] the same analysis." Opposition at 5. But when confronted with facts nearly

identical to those here—i.e., "final-mile delivery drivers . . . who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse"—the Eleventh Circuit specifically *rejected* the Ninth Circuit's goods-focused approach. *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1340, 1350 (11th Cir. 2021) ("[The residual clause] is directed at what the class of workers is engaged in, and not what it is carrying." (citing, *inter alia*, the *dissenting opinion* from the Ninth's Circuit's decision in *Rittmann v. Amazon, Inc.*, 971 F.3d 904 (9th Cir. 2020))).

Respondents' assertion that the Seventh Circuit would have ruled as the Ninth Circuit did below is also incorrect. Seeking to distinguish themselves from the delivery drivers at issue in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020), Respondents claim that "the role of the Grubhub drivers" considered by the Seventh Circuit in that case "[wa]s *extremely attenuated*" because those drivers were "deliver[ing] items that were ***converted*** from food products into meals[.]" Opposition at 4 (emphasis in original). But Respondents, too, were "delivering items that were converted" when they were carrying pizza dough. *See* Dkt. No. 14–5 (Declaration of Travis Wright) ¶ 4 ("Domino's pizza dough is made from scratch at the Supply Center . . . out of ingredients (flour, salt, etc.) that are delivered to the Supply Center."). And in any event, the Seventh Circuit, like the Eleventh Circuit, requires workers seeking coverage under the residual clause to be "connected . . . *to the act of moving . . . goods across state or national borders*." *Wallace*, 970 F.3d at 802 (emphasis added). Respondents do not—and cannot—explain how their duties fall within this test.

Respondents also refuse to recognize—and thus make no attempt to deal with—the remaining two dimensions to the split. They ignore the First and Ninth Circuit's abandonment of the stream-of-commerce approach when the transported items are *people* instead of *goods*. *See Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 867 (9th Cir. 2021) (residual clause inapplicable to workers "transporting passengers to and from transportation hubs as part of a larger foreign or interstate trip"); *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 251 (1st Cir. 2021) ("[W]e do not think that plaintiffs are engaged in interstate travel merely because they bring passengers to and from an airport."). And they likewise ignore the Second Circuit's decision to focus dispositively on the *industry* in which the workers are employed. *See Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 656–57 (2d Cir. 2022) (residual clause inapplicable to workers who "spen[t] appreciable parts of their working days moving goods from place to place by truck" because those workers were employed "in the bakery industry," not the "transportation industry").

In sum, whether the residual clause exception will be applied to a local delivery driver could turn on the driver's *duties*, *freight*, or *industry* depending on the Circuit in which the court sits. This uncertainty was recognized in *Saxon* and will continue unabated unless and until this Court intervenes and provides the needed clarity.

II. The Decision Below is Incorrect.

As discussed in the Petition, this Court should also grant certiorari because the Ninth Circuit's analysis was wrong, in conflict with the FAA's text, and in tension with *Saxon* and *A.L.A. Schechter Poultry*.

First, the Ninth Circuit applied the incorrect test under Section 1. The Ninth Circuit believed that the "'*critical factor*' in determining whether the residual clause exemption applies is . . . the nature of the *business* for which [the] class of workers perform[s its] activities." App. at 6a (citation omitted) (emphasis added). So the Ninth Circuit focused on *Domino's*—not *Respondents'*—engagement in interstate commerce generally. *See, e.g.*, App. at 7a ("*Domino's* is directly involved in the procurement and delivery of interstate goods[.]" (emphasis added)). But *Saxon* instructs that such an "industrywide approach" is improper, and that a court should instead "direct [its] attention to . . . the actual work that the members of the class, as a whole, typically carry out." *Saxon*, 142 S. Ct. at 1788 (internal quotation marks and citations omitted). *Saxon* could not have been clearer on this point: "Saxon is . . . a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally." *Id.*

The local delivery drivers here do not have the requisite "direct and necessary role" in the transportation of goods across borders. *Id.* at 1790 (quotation marks omitted). And these local delivery drivers are simply not "actively engaged in transportation of . . . goods across borders." *Id.* (quotation marks omitted). In fact, the *very first* Court of Appeals to apply *Saxon* in a similar local-delivery-driver context easily concluded, in contrast to the Ninth Circuit below, that the residual clause *does not* cover local delivery drivers. *See Lopez*, 2022 WL 3753256, at *4 (local delivery drivers are not "actively engaged in transportation of . . . goods across borders"; "[o]nce the goods arrived at the [in-state] warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce").

Second, the Ninth Circuit incorrectly applied this Court's stream-of-commerce precedents. Respondents repeatedly stress that some of the goods they transported originated outside California. Although Respondents' characterization of the origins of what they transported strays greatly from the record,[2] there has never been a dispute that one of the products that was delivered to the Supply Center—mushrooms—came from out of state.

This fact, in any event, does not change the application of the residual clause under *Saxon*. *Cf. Lopez*, 2022 WL 3753256, at *1 ("Th[e] items arrived at the warehouse from out of state."). Under this Court's precedents, workers moving goods locally *may* be "employed" in interstate commerce if such movement is but a "step in the transportation of the [goods] to real and ultimate destinations in another state." *Philadelphia & R. R. Co v. Hancock*, 253 U.S. 284, 285–86 (1920); *see Saxon*, 142 S. Ct. at 1789 ("[T]he 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." (quoting *Baltimore & O. S. W. R. Co. v. Burtch*, 263 U.S. 540, 544 (1924))). Here, however, the crucial and distinguishing fact (largely ignored by Respondents) is that, after being purchased by Domino's, *all* of the

[2] Throughout their Opposition, Respondents suggest that they were tasked with delivering "vegetables" and "cheese" that originated from outside of California, including from "Illinois" and "Colorado." Opposition 1, 2, 3, 5. The record supports neither claim. The putative support for Respondents' proposition, a few pages of a deposition transcript, actually states (1) that the Supply Center received its cheese from Modesto, California, Dkt. No. 15–3 (Deposition of Jose Villalobos) at 26; and (2) that while there may be a "vegetable" plant in Illinois, that plant "distributes to [Domino's] facilities . . . in the East," *id.* at 27.

goods came to rest at the Supply Center, where they were "reapportion[ed], weigh[ed], package[d and] store[d]" *unless and until* ordered by independent franchisees. *See* App. at 10a ("At the[] Supply Chain Center[], employees . . . use these ingredients *to create the Products* that [Respondents] deliver[.]" (emphasis added)); App. at 4a ("[F]ranchisees . . . order the goods either online or by calling the Supply Center[.]"); *cf. Lopez*, 2022 LW 3753256, at *4 ("Once the goods arrived at the [in-state] warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce.").

The Ninth Circuit, without analysis, said that the goods were insufficiently "transformed" at the Supply Center. App. at 8a. But that ignores the fact that the goods Respondents delivered were ordered by in-state franchisees from an in-state Supply Center *after* those goods had reached that Supply Center. It also ignores the fact that Supply Center employees "reapportion, weigh, package, and otherwise prepare" *all* the goods that arrive there. App. at 4a. And while Respondents simply assert, without explanation, that "one cannot 'reapportion' mushrooms," Opposition at 3, the undisputed record states otherwise, *see* Wright Decl. ¶ 4 (all "raw ingredients" coming to the Supply Center are "reapportion[ed], weigh[ed], package[d], [and] store[d]" until they are "use[d] . . . to create the products that [Respondents] deliver to the individual corporate and franchise locations"). Under these particular circumstances, "[o]nce the goods arrived at the [Supply Center] and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce." *Lopez*, 2022 WL 3753256, at *4. *Compare A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935) (poultry "c[a]me to rest" at slaughterhouse where it was "held for slaughter and

local sale to retail dealers and butchers[,] who in turn sold directly to consumers") *with Hancock*, 253 U.S. at 286 ("There was *no interruption* of the movement[of the coal when it stopped briefly after being mined from the earth]; it *always continued* towards points as originally intended." (emphasis added)).

III. Resolution of this Question Now Will Eliminate Ongoing Uncertainty, Delay, and Cost, and Will Permit Efficient Resolution of Labor Disputes.

Domino's Petition is supported by a well-reasoned and comprehensive *amicus* brief by the Chamber of Commerce of the United States of America, which recognizes the same confusion among the lower courts as does the Petition. Also like the Petition, the Chamber of Commerce recognizes that this confusion has led to, and will continue to lead to, increased costs, in terms of both time and monetary expenditures. These costs, furthermore, are borne by both the business and labor communities alike, since neither can appropriately prepare for, or respond to, disputes whose resolution turns on the jurisdiction in which they occur.

CONCLUSION

The Ninth Circuit's decision below exacerbated a three-dimensional split among the Courts of Appeals, which has deepened since the filing of the original Petition and under which outcomes in similar cases can turn—depending on the geographical location of the courthouse—on local delivery drivers' *duties*, their *freight*, or their *industry*. And although this Court recently identified this precise split, Respondents fail to even *recognize* it. Instead, Respondents attempt to salvage the Ninth Circuit's decision by ignoring its key

errors, including—most egregiously—its improper focus on the origin of the *goods* instead of the activities of the *workers*.

This case presents what has become a classic (and sure to be recurring) problem: how the FAA's residual clause applies to local delivery drivers. The facts here—involving workers who *never cross state lines*—are clean, simple, and undisputed, and thus ideal for resolving this stubborn and mushrooming split among the Courts of Appeals. This Court, therefore, should grant Domino's Petition.

Respectfully submitted,

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