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

SUPPLEMENTAL BRIEF FOR PETITIONER

NORMAN M. LEON
DLA PIPER LLP (US)
444 West Lake Street,
Suite 900
Chicago, IL 60606
(313) 368-4000
norman.leon@
us.dlapiper.com

COURTNEY G. SALESKI
Counsel of Record
DLA PIPER LLP (US)
One Liberty Place
1650 Market Street,
Suite 5000
Philadelphia, PA 19103
(215) 656-2431
courtney.saleski@
us.dlapiper.com

Counsel for Petitioner

October 13, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

SUPPLEMENTAL BRIEF FOR PETITIONER

In accordance with Rule 15.8, Petitioner Domino's Pizza, LLC respectfully submits this supplemental brief to apprise the Court of *Bissonnette v. LePage Bakeries Park St., LLC*, --- F.4th ---, 2022 WL 4457998 (2d Cir. Sept. 26, 2022), in which a panel of the Second Circuit reconsidered its earlier opinion in light of *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), but came to the same conclusion, with Judge Pooler again dissenting.

The relevant facts of *Bissonnette* are similar to those presented in this case. There, as here, the relevant class of workers comprised truck drivers who transported food products from in-state warehouses to in-state destinations. *Bissonnette*, 2022 WL 4457998, at *5; *cf.* App. at 10a. And there, as here, while some of the food products originated out-of-state, the workers' routes never crossed state lines. *Bissonnette*, 2022 WL 4457998, at *5 n.5; *cf.* App. at 6a. In a pre-*Saxon* decision, the Second Circuit held that these workers were "not 'transportation workers'" and thus not covered by the residual clause of the Federal Arbitration Act "because they are in the *bakery* industry, not a transportation industry." *Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 652 (2d Cir. 2022) (emphasis added) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001)).

The *Bissonnette* panel agreed to rehear the case in light of *Saxon*. The holding—and reasoning—of its superseding opinion, however, remained the same. *Bissonnette*, 2022 WL 4457998, at *1. In this new opinion, the majority again recognized that the relevant workers "spen[t] appreciable parts of their working days moving goods from place to place by truck," but reiterated its belief that the customers

were paying "for the baked goods themselves[,]" not "the movement of [those] goods, so long as they arrive." *Id.* at *5; *see id.* ("The commerce is in breads, buns, rolls, and snack cakes—not transportation services."). Consequently, the majority once again resolved the case on bakery-industry-not-transportation-industry grounds. *Id.* at *1.

The majority candidly recognized that *Saxon* did not reference a "transportation industry" requirement, but believed that this was because the "point needed no elaboration" in *Saxon* as the "plaintiff [there] worked for an airline" and was thus indisputably "in the business of moving people and freight[.]" *Id.* at *5. So, while the majority recognized the split of authority regarding the application of the residual clause to last-mile delivery drivers, *id.* at *5 n.5 ("The issue may not be simple."), its "transportation industry" requirement allowed it to refuse to wade into that debate, *id.* ("[W]e do not consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied.").

Judge Pooler in dissent took direct aim at this "transportation industry" requirement, calling it "textually baseless and inconsistent with decisions of courts nationwide." *Id.* at *11. Noting that this Court deliberately "rejected [an] industrywide approach" when applying the residual clause in *Saxon*, *id.* (quoting *Saxon*, 142 S. Ct. at 1788), she criticized the majority for unapologetically "focusing on the nature of the defendants' business, and not on the nature of the plaintiffs' work," which she believed allowed the majority to "sidestep *Saxon*." *Id.* at **11, 13.

Casting the "transportation industry" requirement aside, Judge Pooler believed that, under a proper application of *Saxon*, the *Bissonnette* "plaintiffs

plainly belong to a class of workers engaged in interstate commerce" for purposes of the residual clause, since the plaintiffs were "commercial truck drivers" who "carry . . . goods for a portion of a single interstate journey and are indispensable parts of an interstate distribution system." *Id.* at **11–12 (quotation marks, alterations, and citation omitted). In doing so, she cited authority from the First and Ninth Circuits, which courts expressly focus on the movement of the *goods* at issue. *Id.*; *see* Petition at 7–9.

The only other post-*Saxon* Circuit Court decision evaluating whether to apply the residual clause to last-mile delivery drivers is *Lopez v. Cintas Corporation*, 47 F.4th 428 (5th Cir. 2022), in which the Fifth Circuit joined the Seventh and Eleventh Circuits in expressly focusing on the activities of the *workers* at issue. As discussed in the Reply Brief, doing so caused the Fifth Circuit to hold that last-mile drivers "do not have . . . a 'direct and necessary role' in the transportation of goods across borders"—i.e., they do *not* satisfy the test laid out in *Saxon*—since those drivers "enter the scene after the goods have already been delivered across state lines." *Id.* at 432–33 (quoting *Saxon*, 142 S. Ct. at 1790); Reply Brief at 2–3. The disparate and distinct reasoning between *Bissonnette* and *Lopez*—and amongst the panel in *Bissonnette*—shows that *Saxon* has not dispelled the confusion surrounding this issue.

CONCLUSION

The multi-dimensional split remains post-*Saxon* and will likely continue to widen and fracture as more lower courts attempt to apply the residual clause in the face of increasingly irreconcilable case law. The facts of this case squarely, clearly, and concisely tee up the relevant question for immediate review.

This Court, therefore, should grant Domino's Petition and conclusively resolve this matter before further confusion ensues.

Respectfully submitted,

NORMAN M. LEON
DLA PIPER LLP (US)
444 West Lake Street,
Suite 900
Chicago, IL 60606
(313) 368-4000
norman.leon@
us.dlapiper.com

COURTNEY G. SALESKI
Counsel of Record
DLA PIPER LLP (US)
One Liberty Place
1650 Market Street,
Suite 5000
Philadelphia, PA 19103
(215) 656-2431
courtney.saleski@
us.dlapiper.com

Counsel for Petitioner

October 13, 2022