No. 23-427

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

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 19103-7300
(215) 656-2431
Courtney.Saleski@us.dlapiper.com

Counsel for Petitioner

January 3, 2024

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Respondents' attempt to pass this case off as an application of the same old test to the same old facts is wrong. Although the Ninth Circuit professed that its ruling was based on existing precedent, the court actually created a new test—one in which the residual-clause exemption hinges on whether goods transported intrastate are "inevitably destined" for a sufficiently definite set of consumers. This test not only conflicts with this Court's precedent and the approach taken by other Circuits, but creates uncertainty regarding the enforceability of arbitration agreements entered into by local delivery drivers. In the Ninth Circuit, those individuals may now be deemed engaged in interstate commerce even if, as here, their deliveries are purely intrastate and made in response to purely intrastate orders.

Although Respondents attempt to portray this as a one-off, it is anything but that. When a consumer base is practically captive—because of geography, economic limitations, consumer preferences, etc.—local deliveries made to those consumers may be treated as part of interstate commerce, rendering the people who make those deliveries exempt from the FAA, if even one component of the goods delivered (through no effort of the delivery person) crossed a state line. That result is inconsistent with *Saxon*, which made clear that "transportation workers must be actively 'engaged in transportation' of . . . goods across borders" to fall within Section 1's exemption. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457–58 (2022); *see also Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943) (goods exited the stream of commerce when they arrived at the warehouse, even if "the customers form a fairly stable group").

Respondents obfuscate these conflicts by terming themselves "last-leg" drivers, but that terminology proves too much. Respondents deliver goods from a California warehouse (the Supply Center) to California customers (independent Domino's franchisees). Some of the goods originally come from out of state, but they all rest at the Supply Center unless and until an independent franchisee in California decides to order them.

These facts, which are undisputed, would have required Respondents to arbitrate their disputes if this case had been brought in Texas instead of California. *See Lopez v. Cintas Corp.*, 47 F.4th 428, 433 (5th Cir. 2022) ("Once the goods arrived at the Houston warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce."). Arbitration would also have been required if the case had been brought in Massachusetts, New Jersey, or Illinois—or any other state in the First, Third, Fifth, or Seventh Circuits. *See Immediato v. Postmates, Inc.*, 54 F.4th 67 (1st Cir. 2022); *Singh v. Uber Techs., Inc.*, 67 F.4th 550 (3d Cir. 2023); *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020). It was not required here because the Ninth Circuit created a new test which turns not on a worker's role in moving goods across borders, but on the relative certainty of the customer base to whom purely local deliveries are made.

Respondents distract from this Circuit split by noting that a previous Ninth Circuit decision ***suggested***—but did not hold—that the residual-clause exemption would not encompass workers like them, who deliver goods that are "held at warehouses for later sales to local retailers." *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916 (9th Cir. 2020). But the Ninth Circuit rejected this dictum when ***actually*** confronted with those

workers. *See, e.g.*, App. at 8a (recognizing that "Domino's franchisees do not order the goods until after they arrive at the warehouse"). Respondents also misunderstand the undisputed record. To be clear, there is absolutely no evidence that third-party franchisees are purchasing goods from the Supply Center "pursuant to their contracts." Opp'n at 12.

Because the Ninth Circuit's decision conflicts with this Court's precedent and creates uncertainty as to the applicability of the Section 1 exemption, this Court should grant Domino's Petition and bring clarity to this important area of federal law.

I. Whether the Residual-Clause Exemption Applies to Local Delivery Drivers Delivering In-State Orders to In-State Customers is an Important Question of Federal Law that this Court Should Settle.

Respondents cannot deny that the actual question presented by this Petition is an important question of federal law. That is because the Ninth Circuit concluded that individuals who (i) made intrastate deliveries (ii) of goods taken out of general inventory at a California warehouse (iii) to fill orders placed by California franchisees were nonetheless engaged in interstate commerce simply because the goods were "inevitably destined" for Domino's franchisees as a group. App. at 9a. This approach risks transforming local delivery people into transportation workers engaged in interstate commerce any time, for whatever reason, a retailer is the only source for certain goods. Such an approach would render unenforceable all the arbitration agreements those delivery people entered into, a result irreconcilable with this Court's directive to apply the residual clause narrowly and the federal policy favoring arbitration.

Rather than engage with the question presented, Respondents obfuscate the issue by characterizing themselves as "last-leg drivers." But as Abraham Lincoln recognized, calling a dog's tail a leg doesn't make it a leg.

The facts of this case are simple and undisputed. Domino's has third-party franchisees in California. App. at 4a. Domino's also has a Supply Center in California. *Id.* Domino's stocks the Supply Center with various goods (some from out-of-state) in anticipation of future orders. *Id.* The third-party franchisees then have the option—but not the obligation—to order these goods if and when needed. *Id.* Respondents then deliver the goods from the Supply Center to the franchisees who ordered them. *Id.*

Even if "last-leg" delivery drivers are encompassed by Section 1's exemption—a question expressly left open in *Saxon*, 596 U.S. at 457 n.2—Respondents do not fall within the scope of that asserted exemption. Unlike "last-leg" cases, Domino's does not stock the Supply Center with specific franchisees in mind; the franchisees' orders are placed only after the goods arrive at the warehouse; and the goods used to fill those orders are taken from general inventory.

If this was enough to eviscerate arbitration agreements, no delivery driver could ever enter into a valid arbitration agreement because nearly all goods contain something from out of state. This Court should therefore grant certiorari to resolve this important federal question that remains unresolved after *Saxon*.

II. The Ninth Circuit's Decision Conflicts with the Decisions of the First, Third, Fifth, and Seventh Circuits.

On the undisputed facts, Respondents operate as "local delivery" drivers, functionally identical to those "who deliver items from local stores and restaurants to local customers." Opp'n at 1. Yet the Ninth Circuit held that Respondents were encompassed by the residual-clause exemption because the goods as a whole are "inevitably destined" for the third-party franchisees as a whole. App. at 9a. In doing so, the Ninth Circuit split with the First, Third, Fifth, and Seventh Circuits, which have all held that local delivery drivers are ***not*** encompassed by the residual-clause exemption.

Respondents deny this split not by pointing to the decision below, but instead to dicta from a ***different*** Ninth Circuit decision, *Rittmann*. The *Rittmann* plaintiffs delivered specific packages from warehouses to Amazon customers. 971 F.3d at 916. The sole function of the warehouse stop was so that Amazon could "transfer [the packages] to a different vehicle for the last mile of the [their] interstate journeys." *Id.* Therefore, "[t]he interstate transactions between Amazon and customer d[id] not conclude until the packages reach[ed] their intended destinations"—*i.e.*, the specific customers who ordered those specific goods. *Id.* Because those plaintiffs delivered goods that were traveling pursuant to a single, interstate order, *Rittmann* concluded the goods remained in the stream of commerce until they reached their final destinations, and the individuals who delivered the goods were therefore encompassed by the residual-clause exemption. *Id.* at 916, 919.

Rittmann suggested that a different result would obtain if the workers were "local delivery drivers, such as food delivery workers who bring prepared meals

from local restaurants to customers." *Rittmann*, 971 F.3d at 916.[1] Respondents rely on this dictum to argue that "[t]he courts of appeals are in agreement on the test for determining whether delivery drivers in a particular case" are encompassed by the residual-clause exemption. *Id.* at 6. But it does not matter how the Ninth Circuit ***suggested in dictum*** it would handle local delivery drivers like Respondents. Here, the crucial fact is how the Ninth Circuit ***actually*** handled such workers when confronted with them.

As noted above, Respondents fill orders placed by in-state, third-party franchisees. Despite Respondents' suggestion, there is ***no*** evidence that franchisees are contractually obligated to purchase any goods from the Supply Center, *cf.* Opp'n at 12, and it is undisputed that any goods ordered in-state had already become part of the Supply Center's general inventory. Under *Rittmann*, then, the franchisees' "new or subsequent transactions, all of which took place within the state of the [Supply Center]" ***should have*** "marked the dividing line between interstate and intrastate commerce," and thus between the application, or not, of the residual-clause exemption. *Rittmann*, 971 F.3d at 916 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–43 (1935)).

However, the decision below (while purportedly relying on *Rittmann*, *see* App. at 9a) ignored *Rittmann*'s distinction between last-leg and local-delivery drivers,

---

[1] Respondents suggest that Domino's previous certiorari petition conceded that there is no Circuit split. *See* Opp'n at 7. That petition, however, simply noted that *Rittmann*'s handling of ***last-leg*** drivers was consistent with other Circuits' handling of such drivers.

and instead held that drivers are encompassed by the residual-clause exemption if they are carrying goods that are "inevitably destined from the outset of the[ir] interstate journey" for a local customer, no matter "how the purchasing order is placed." App. at 8a–9a. This holding violated this Court's instruction that the residual-clause exemption should "be afforded a narrow construction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). It also created a split between the Ninth Circuit, on the one hand, and the First, Third, Fifth, and Seventh Circuits, on the other, which have held that local-delivery drivers responding to in-state orders from in-state customers are ***not*** encompassed by the exemption.

Respondents distract from the issue at hand by noting that the Ninth Circuit has not "extended [the residual-clause exemption] to cover workers who deliver items from local stores and restaurants to local customers." Opp'n at 1. But the Ninth Circuit has created a split that involves ***something other*** than just "food delivery services." *See Lopez v. Cintas Corp.*, 47 F.4th 428, 430 (5th Cir. 2022) (plaintiffs "deliver[ed] work uniforms and other facility-services products"). If anything, future Ninth Circuit decisions involving food-delivery services will aggravate the existing inconsistency, because the applicability of the residual clause does not turn on the type of good carried, but instead "on what [the workers] do at [their job]." *Saxon*, 596 U.S. at 456.

The Fifth Circuit's decision in *Lopez* epitomizes the split. Like this case, *Lopez* involved plaintiffs who "pick[ed] up items from a [local] warehouse and deliver[ed] them to local clients." 47 F.4th at 430. In contrast to the decision below, *Lopez* held that "[o]nce the goods arrived at the [local] warehouse and were

unloaded, ***anyone*** interacting with [them] was" not encompassed by the residual-clause exemption. *Id.* at 433. Respondents ignore this holding, noting that *Lopez* may be reconcilable with the holding in *Rittmann*. Yet that fails to deal with the actual issue presented here. Opp'n at 9–10. *Lopez* and the Ninth Circuit's decision ***in this case*** cannot be reconciled.

Lopez is hardly an outlier. Like the Fifth Circuit in *Lopez*, the First, Third, and Seventh Circuits have all concluded that local delivery drivers are not encompassed by the residual-clause exemption. *See* Petition at 10–14. The Ninth Circuit should have done the same below. Like the plaintiffs in *Immediato*, *Singh*, *Lopez*, and *Wallace*, Respondents made in-state deliveries to in-state customers to fulfill in-state orders. Some of the goods they delivered may have come from out of state before coming to rest at the warehouse, but there is no evidence that any of these goods were originally ordered by Domino's to fill any particular order or for any particular customer. There is therefore no evidence that Respondents even work ***in*** the stream of interstate commerce, let alone that they are "directly involved" or "actively engaged" in that stream. *Saxon*, 596 U.S. at 457–58. Nevertheless, because they happen to work in the Ninth Circuit, Respondents are permitted to disregard their obligation to arbitrate.

This Court should therefore grant certiorari to resolve the Circuit split on this important question of federal law.

III. The Decision Below Conflicts with This Court's Precedent.

The Ninth Circuit's decision conflicts with both *Saxon* and this Court's stream-of-commerce precedent. In *Saxon*, this Court noted that the dispositive question

when determining the scope of the residual-clause exemption is whether the class of workers at issue is "directly involved" or "actively engaged" in interstate commerce. 596 U.S. at 457–58. And this Court has (at least for purposes of the FLSA) repeatedly drawn a clear line between goods moved from "manufacturers or suppliers without the state, through [a] warehouse and on to customers whose ***prior orders or contracts*** are being filled," *Walling*, 317 U.S. at 569 (emphasis added), and goods "acqui[red] by a merchant for ***general local disposition***," *McLeod v. Threlkeld*, 319 U.S. 491, 494 (1943) (emphasis added). Under these cases, workers handling the former goods are "engaged in" interstate commerce, while workers handling the latter—absent unique and specifically identified circumstances—are not. *See Walling*, 317 U.S. at 566; *McLeod*, 319 U.S. at 492.

It is undisputed that Respondents are not filling any "prior orders or contracts" by the franchisees, but instead are delivering goods that have already been acquired by Domino's for "general local disposition" to those franchisees. Petition at 16. Respondents therefore operate ***outside*** the stream of commerce and therefore can hardly be described as "directly involved" or "actively engaged" in it.

Respondents attempt to disguise these undisputed facts two ways. First, Respondents misunderstand them, stating that franchisees place their orders "pursuant to their contracts." Opp'n at 12. But there is simply no evidence—in the record ***or*** outside it—that franchisees are under any such obligation.[2]

[2] To be clear, the Ninth Circuit did not make this error, nor rely on it in its holding.

Second, Respondents note that *Walling* suggested that otherwise-intrastate orders ***might*** become interstate orders if "a wholesaler's course of business [is] based on the anticipation of needs of specific customers," since that ***might*** "at times be sufficient to establish that practical continuity in transit necessary to keep a movement in 'commerce.'" Opp'n at 12 (quoting *Walling*, 317 U.S. at 570). But *Walling* held (in a case involving the FLSA, not the narrowly construed Section 1 exemption) that orders are intrastate even if a wholesaler "has a fair idea of when and to whom the merchandise will be sold" "before placing his orders"; is "able to estimate with considerable precision the immediate needs of his customers even where they do not have contracts calling for future deliveries"; "most of the customers form a fairly stable group"; and the "orders are recurrent as to the kind and amount of merchandise." *Walling*, 317 U.S. at 569. In any event, Respondents have adduced no evidence showing that Domino's orders the Supply Center goods in "anticipation of [the] needs of [any] ***specific***" franchisees"—or even that Domino's has ***any*** "idea of when and to whom the merchandise will be sold"; can estimate with ***any*** "precision the immediate needs of" its franchisees; or that ***any*** franchisee "orders are recurrent as to the kind and amount." *Id.* at 569–70.

IV. This Case Is an Appropriate Vehicle to Resolve this Important Federal Question.

As demonstrated above (and in Domino's Petition), the Circuits are split on the application of the residual-clause exemption to local-delivery drivers—*i.e.*, workers, like Respondents here, who make in-state deliveries to fill in-state orders. Respondents seem to agree that this federal question is an important one, as there has

been an "increasing use by employers of mandatory pre-dispute arbitration provisions," and "variations of [this] question . . . have reached the courts of appeals in several cases over the past few years." Opp'n at 14–15.

Indeed, this Court has already recognized the importance of this question, by deciding *Saxon* and then by granting the certiorari petition in *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (docketed July 20, 2023). Respondents attempt to use those cases to argue that granting certiorari in this case is improper. *See* Opp'n at 14. But *Saxon* did not decide the question presented here, and Respondents admit that *Bissonnette* will not, either.[3] *See* Opp'n at 14.

That question yearns for an answer from this Court. This case has simple, undisputed facts, and thus presents the perfect opportunity for this Court to guide the lower courts regarding the proper application of ***both*** its stream-of-commerce precedents ***and*** the residual-clause exemption.

---

[3] While *Bissonnette* will not resolve the precise question presented by Domino's Petition, the Court's ruling in *Bissonnette* may affect the application of the residual-clause exemption in this case. *Compare* Petition for a Writ of Certiorari at i, *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (U.S. July 17, 2023) ("To be exempt from the [FAA], must a class of workers . . . be employed by a company in the transportation industry?") *with* App. at 27a ("[C]learly, neither party can dispute that Domino's is a pizza company and not a transportation or delivery company."). So if the Court is not inclined to resolve the question presented by Domino's Petition at this time, Domino's respectfully requests that the Court hold that Petition until the resolution of *Bissonnette*, and then determine whether this case should be remanded to the Ninth Circuit for reconsideration in light of *Bissonnette*'s holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

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 19103-7300
(215) 656-2431
Courtney.Saleski@
us.dlapiper.com

Counsel for Petitioner

January 3, 2024