No. 23-427

IN THE

Supreme Court of the United States

DOMINO'S PIZZA, LLC,

Petitioner,

v.

EDMOND CARMONA, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Arbitration Act's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, extends to a trucker who takes goods on the last leg of an interstate journey without himself crossing a state line.

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INTRODUCTION

The Federal Arbitration Act (FAA) requires courts to compel arbitration only of disputes subject to arbitration agreements within the scope of the Act. *See* 9 U.S.C. §§ 2, 4; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400–03 (1967). Section 1 of the FAA specifically excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the Act's scope. 9 U.S.C. § 1.

In this case, three truckers sued their employer Domino's Pizza, LLC (Domino's), alleging violations of state labor law. The district court found that the truckers, who transport pizza ingredients that originated out of state on their last leg of the journey to Domino's stores, are among a class of workers "engaged in foreign or interstate commerce" and, therefore, that the dispute falls within section 1's exclusion of transportation-worker employment agreements. The Ninth Circuit affirmed.

Notwithstanding Domino's insistence to the contrary, neither the court below, nor any other court of appeals, has extended section 1 to cover workers who deliver items from local stores and restaurants to local customers. Domino's suggestion that the decision in this case applies to local delivery people cannot be reconciled with the Ninth Circuit's case law, which—like the case law of other circuits—expressly distinguishes between workers engaged in last-mile interstate delivery and workers engaged in local delivery.

Nothing in the court of appeals' application of the FAA in this case conflicts with decisions of other circuits. While some cases find that section 1 exempts

particular workers and some cases find that section 1 does not exempt other workers, these outcomes do not reflect different views of the law. Rather, they reflect that whether workers are engaged in interstate commerce—whether they are part of the continuous movement of goods from one state to their intended destination in another state—depends on the facts. And applying that test, the courts have properly and consistently distinguished between last-leg delivery of goods from out of state, on the one hand, and local transportation, such as delivery of prepared meals or taxi-type services, on the other. Like Domino's, the Ninth Circuit agrees with the other courts of appeals that draw this distinction, as it has expressly noted in this and other recent opinions. Domino's disagrees with the Ninth Circuit only on the application of this principle to the particular facts here, not with the principle applied by the Ninth Circuit or any identifiable legal issue about how to apply it.

The consistent approach of the courts of appeals to these cases is also consistent with this Court's precedents. Again, Domino's argument to the contrary does not reflect disagreement on the law, but only over its application to the facts of this case.

This Court only recently decided a case concerning the scope of FAA section 1, and it will consider a second case this spring. In light of this Court's developing jurisprudence on section 1 and the consistency in the lower courts, the petition should be denied.

STATEMENT

Domino's provides goods to its stores using a nationwide network of sixteen supply chain centers. Pet. App. 20a. For southern California franchises, the goods—including goods from out of state—are first

delivered to Domino's Southern California Supply Chain Center, where the goods are stored and where some are reapportioned, weighed, and repackaged. Truckers employed by Domino's, referred to as D&S drivers, then deliver those goods to the franchisees, who order the goods either online or by calling the Supply Chain Center.

A. In June 2020, D&S drivers Edmond Carmona, Abraham Mendoza, and Roger Nogueira filed this case in California Superior Court. They alleged claims for violations of California law related to Domino's failure to reimburse all necessary work expenditures.

The employment agreements of the three drivers, respondents here, provided that "any claim, dispute, and/or controversy" between the parties would "be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act." Pet. App. 14a. After removing the case to federal court, and relying on that provision, Domino's moved to compel arbitration. Respondents opposed, and the district court denied the motion.

The focus of the district court briefing and the district court's decision was on the then-recent decision in *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021). In *Rittmann*, the court of appeals considered whether FAA section 1 encompassed individuals hired by Amazon to make "last mile" deliveries of products from Amazon warehouses to customers, occasionally across state lines but primarily in the same state. Applying this Court's precedent that exemptions to the FAA should be narrowly construed, *id.* at 909–11 (citing *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)), the court held that the entire journey

represented a continuous stream of commerce. *Id.* at 915–17. In so doing, *Rittmann* distinguished between last-mile drivers, who pick up goods delivered to a warehouse for delivery to their ultimate intended destination, and local delivery drivers, such as food delivery workers who bring prepared meals from local restaurants to customers. *Id.* at 916.

The district court found "significant similarities" between the truck drivers in this case and the last-mile drivers in *Rittman*. The court explained that the "nature of the business" for which the drivers perform the work is "to facilitate the movement of these products," many of which come from outside California, "to their final destination." Pet. App. 26a. Although some of the products are repackaged in state, the court found that the activity at the Supply Chain Center "can be viewed as merely an extension of the nature of the delivery" of the pizza ingredients from out of state to the franchisees. *Id.*

B. Domino's appealed, and the Ninth Circuit affirmed. To start, the court of appeals, citing decisions of this Court, explained that section 1's residual clause—"any other class of workers engaged in foreign or interstate commerce"—is given a narrow construction, and that the "burden is on the party opposing arbitration … to show that Congress intended to preclude a waiver of judicial remedies" for the rights at issue. *Id.* at 15a. The court then noted that the critical factor for determining whether section 1 applies is not the nature of the item transported or whether the plaintiffs themselves cross state lines. Rather, section 1 applies "if the class of workers is engaged in a 'single, unbroken stream of interstate commerce' that renders interstate commerce a 'central part' of their job description." *Id.*

at 16a (quoting *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 866 (9th Cir. 2021)).

Applying the law to the facts here, the court of appeals held that section 1 applies. Analogizing to its decision in *Rittman*, the court found that "Domino's is involved in the process from beginning to the ultimate delivery of the goods to their destinations and its 'business includes not just the selling of goods, but also the delivery of those goods'" to the franchisees. *Id.* at 17a. The court found Domino's argument that the outcome should be different than in *Rittmann* because some of the products were transformed into dough at the Supply Chain Center unpersuasive, given that other items, such as mushrooms from out of state, were not transformed, but only weighed, packaged, and stored until the D&S drivers delivered them. *Id.* at 17a–18a.

Domino's filed a petition for rehearing and rehearing en banc, which was denied with no judge requesting a vote. *See* Pet. App. 30a–31a.

C. Domino's filed a petition for certiorari. *See* U.S. No. 21-1572. This Court granted, vacated, and remanded for further consideration in light of *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), which held that workers who load and unload cargo from airplanes that travel in interstate commerce are a "class of workers" engaged in interstate commerce. *Saxon* noted that it was not addressing the issue addressed in *Rittmann*, concerning last-mile drivers, other than to observe that, under the facts of particular cases, "the answer will not always be so plain." *Id.* at 457 n.2.

On remand, the Ninth Circuit explained that its earlier decision in this case rested on *Rittman*, which

Saxon had expressly not addressed. Accordingly, unless *Rittmann* was "clearly irreconcilable" with *Saxon*, circuit law required that the court of appeals, at the panel stage, continue to follow it. Pet. App. 6a–7a. Concluding that "*Saxon* is not inconsistent, let alone 'clearly irreconcilable,'" with its earlier decision, the court again affirmed the district court. *Id.* at 9a.

REASONS FOR DENYING THE WRIT

I. The decision does not conflict with decisions of other courts of appeals.

The courts of appeals are in agreement on the test for determining whether delivery drivers in a particular case are a "class of workers engaged in foreign or interstate commerce." Relying on the ordinary meaning of the phrase "engaged in commerce," courts that have been presented with the issue agree that last-mile drivers fall under section 1, while local food delivery workers do not. *Compare Rittmann*, 971 F.3d at 915–19 (last-mile drivers exempt from the FAA), *and Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 17–26 (1st Cir. 2020) (same), *cert. denied*, 141 S. Ct. 2794 (2021), *with Immediato v. Postmates, Inc.*, 54 F.4th 67, 74–80 (1st Cir. 2022) (local food delivery workers non-exempt), *and Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801–03 (7th Cir. 2020) (Barrett, J.) (same). These outcomes do not reflect disagreements on the law, but the ordinary result of applying the law to different sets of facts.

Domino's assertion of a conflict begins with the First Circuit's decision in *Immediato*. The defendant there, Postmates, operates a mobile platform on which retail customers can order take-out meals from local restaurants and items from local grocery stores. The plaintiffs were couriers who made the deliveries to the

retail customers. The court explained that the term "engaged in foreign or interstate commerce" in section 1 "can apply to workers who are engaged in the interstate movement of goods, even if they are responsible for only an intrastate leg of that movement." 54 F.4th at 77. "Their work, though," the court continued, "must be a constituent part of that movement, as opposed to a part of an independent and contingent intrastate transaction." *Id*. And the court noted that interstate movement "terminates when [the] goods arrive at the local manufacturer or retailer." *Id*. As to the goods delivered by Postmates couriers, however, "[t]he interstate journey terminates when the goods arrive at the local restaurants and retailers to which they are shipped." *Id*. at 78. The court explained: "[W]hen the couriers set out to deliver customer orders, they do so as part of entirely new and separate transactions. And the record is luminously clear that those new and separate transactions are intrastate in nature as almost all deliveries made by the couriers as a class are completed within the state in which the order is placed." *Id*.

The First Circuit's approach and conclusion are wholly consistent with Ninth Circuit case law. Indeed, Domino's earlier petition to this Court on this same issue in this same case acknowledged that the First and Ninth Circuits are in agreement. *See* Petition for Cert. 7, *Domino's* (No. 21-1572). Domino's was correct the first time: The decisions of the two Circuits do not conflict. Indeed, the Ninth Circuit has expressly stated its agreement with "cases involving food delivery services like Postmates or Doordash" that "recognize that local food delivery drivers are not 'engaged in the interstate transport of goods' because the prepared meals from local restaurants are not a

type of good that are 'indisputably part of the stream of commerce.'" *Rittmann*, 971 F.3d at 916. And the First Circuit has held, twice, that it agrees with the Ninth Circuit that workers who complete the continuous movement of goods by carrying out the last leg of interstate delivery are within the ambit of section 1. *See Fraga v. Premium Retail Servs.*, 61 F.4th 228, 241 (1st Cir. 2023) ("Premium's use of its own employees to carry the materials for the last part of each interstate journey does not turn the journey into two unconnected trips."), *cited in* Pet. 12 n.2; *Waithaka*, 966 F.3d at 26. Thus, as the Ninth Circuit has noted, its decision in *Rittmann* "joined the First Circuit" and "articulated the [same] approach" to the issue. *Capriole*, 7 F.4th at 866.

For the same reason, Domino's errs in arguing that the Ninth Circuit and the Seventh Circuit are in conflict. Domino's points to the Seventh Circuit decision in *Wallace v. Grubhub*, 970 F.3d 798. Like *Immediato*, that case concerned workers who deliver to customers food ordered from local restaurants through the Grubhub online platform. In an opinion by then-Judge Barrett, the court held that the workers were not engaged in interstate commerce. Again, the Ninth Circuit has expressly noted its agreement with *Wallace*'s holding that workers who deliver meals to retail customers from local stores and restaurants are not engaged in interstate commerce. *Rittmann*, 971 F.3d at 916 (discussing cases, including *Wallace*, that "recognize that local food delivery drivers are not 'engaged in the interstate transport of goods' because the prepared meals from local restaurants are not a type of good that are 'indisputably part of the stream of commerce'"). For its part, the Seventh Circuit in *Wallace* cited the First Circuit's *Waithaka*'s holding

twice, without disapproval, in support of its point that the courts of appeals approach the question in the same way and to illustrate the point that determining the bounds of the section 1 exclusion is more difficult in some cases than others. *See* 970 F.3d at 801 n.2, 802; *see also Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 501 (7th Cir. 2021) (citing *Rittmann*'s and *Waithaka*'s holdings regarding last-mile workers without expressing disagreement), *aff'd*, 596 U.S. 450 (2022).

As for the Third Circuit, Domino's concession that the "Third Circuit has taken the same approach as the First," Pet. 12, belies its claim of a conflict, in light of the agreement of the First and Ninth Circuits. Domino's looks for support in *Singh v. Uber Techs., Inc.*, 67 F.4th 550 (3d Cir. 2023), pet. pending, No. 23-479 (filed Nov. 3, 2023), which held that Uber drivers are not a class of workers engaged in interstate commerce. The Ninth Circuit, however, has held exactly the same thing. *See Capriole*, 7 F.4th at 865.

Finally, Domino's cites *Lopez v. Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022). In that case, the plaintiff was a "Route Service Sales Representative" who "did not predominantly drive a truck to deliver items." *Id.* at 431; *Lopez v. Cintas Corp.*, 2021 WL 230335, at *1 (S.D. Tex. Jan. 21, 2021). The sales representatives "belong[ed] to a 'class of workers' that pick[ed] up items from a local warehouse and deliver[ed] those items to local customers," although the "emphasis" of the job was "on sales and customer service." *Lopez,* 47 F.4th at 432. As the defendant in that case recognized, the conclusion that these workers fell outside the ambit of section 1 does not conflict with the decisions of the Ninth and First Circuits. *See* Br. for Cintas at *17, *Lopez v. Cintas* (No. 21-20089), 2021 WL 3164017 (July 23, 2021) (explaining that the class of workers at

issue "is easily distinguishable from … the package delivery drivers in *Waithaka* and *Rittman[n]*"). In fact, a California federal court reached the same conclusion as the Fifth Circuit about Cintas workers. *See Veliz v. Cintas Corp.*, 2004 WL 2452851, at *10 (N.D. Cal. Apr. 5, 2004) (holding that Cintas sales representatives fall outside section 1).

Moreover, although the Fifth Circuit panel that decided *Lopez* mistakenly read the Seventh Circuit's opinion in *Wallace* to state that last-mile drivers do *not* fall within the exception, *see Lopez*, 47 F.4th at 432; *but see Wallace*, 970 F.3d at 802, *Lopez* itself did not concern that issue. Rather, to the extent that the class of workers in *Lopez* comprised transportation workers at all, the Fifth Circuit described them as carrying out only local deliveries from a local warehouse to local customers, *see* 47 F.4th at 432, not as completing a continuous interstate transportation process. *Lopez*'s holding does not imply that the same result would hold on the different facts of this case. Indeed, a Fifth Circuit decision in a related context recognized that when, as in this case, "the halt in goods is simply a convenient intermediate step in the process of delivering them to their final destination, they remain interstate commerce." *Siller v. L&F Distribs., Ltd.*, 1997 WL 114907, *2 (5th Cir. 1997) (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943)).

Thus, what Domino's seeks to portray as a conflict in fact reflects a consistent mode of analysis and agreement as to outcome. In short, no disagreement exists among the courts of appeals as to the question presented.

II. The decision below correctly applies this Court's precedents.

The consistent decisions of the courts of appeals properly apply this Court's precedents. As the Court instructed recently in *Saxon*, the cases start by defining the "class of workers" at issue and then consider whether that class of workers is "engaged in foreign or interstate commerce." *See Saxon*, 596 U.S. at 455–56. To answer the first question, the courts consider "what [the plaintiff] does" in her job, "not what [the employer] does generally." *Id*. at 456. To answer the second question, the courts consider whether the worker is involved in the transportation of goods across state or international borders. *Id*. at 457. To be involved in the transportation of goods across state lines, the worker does not have to be the one to travel across state lines, but the work must be "so closely related to interstate transportation as to be practically a part of it." *Id*. For example, workers who load and unload airplane cargo, although they do not themselves travel, are engaged in interstate commerce. *Id*.

Domino's faults the decision below for finding that respondents—truckers employed by Domino's to deliver to franchisees pizza ingredients shipped from out of state to the Domino's warehouse for the purpose of delivery to franchisees—are engaged in interstate commerce. But nothing in *Saxon*'s reasoning suggests that last-mile workers are outside the section 1 exclusion, and *Saxon* explicitly disclaimed any holding on the issue. *Id*. at 457 n.2. And for its part, the decision below *does* expressly address *Saxon* and concludes that its decision is consistent with *Saxon*. Domino's suggestion otherwise is a disagreement about the application of the law to the facts of this

case, not a disagreement about a legal principle warranting review. *See* Sup. Ct. R. 10.

Similarly, Domino's errs in contending that the decision below is inconsistent with cases involving the Fair Labor Standards Act, which exempts from its minimum wage and overtime requirements workers subject to the Department of Transportation's hours of service rules for transportation workers in interstate or foreign commerce. *See* 29 U.S.C. § 213(b)(1); 49 U.S.C. § 31502. Again, Domino's contention depends on its disagreement with the factual findings in this case. Citing *Walling*, 317 U.S. at 569, and *McLeod v. Threlkeld*, 319 U.S. 491, 494 (1943), Domino's asserts that the decision in this case blurs the line between goods moved from out of state to a warehouse and then to customers whose prior orders or contracts are being filled, on the one hand, and goods acquired by a merchant for general local disposition, on the other. This case is true to that line: The goods arrive in Domino's warehouse for the specific purpose of being transported to the franchisees, pursuant to their contracts. Moreover, as *Walling* noted, that decision should *not* be read "to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement in 'commerce.'" *Walling*, 317 U.S. at 570; *accord McLeod*, 319 U.S. at 494 (stating that "handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce"). In contrast, and consistent with those cases, when a Grubhub or Postmates driver picks up items at a grocery store or restaurant for delivery to local

customers, the Ninth Circuit and other courts of appeals to have addressed the issue agree that the class of workers is not engaged in interstate commerce. *See supra* pp. 7–9.

The decision below—like the consistent decisions of the other courts of appeals—is likewise consistent with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). According to Domino's, this Court's statement in that case that the "interstate transactions in relation to th[e] poultry … ended" when the poultry was "trucked to their slaughterhouses … for local disposition," *id.* at 543, supports its argument here. But Domino's omits all context for the language it quotes. The defendants in *Schechter Poultry* operated slaughterhouses in New York City. They "ordinarily purchase[d]" live poultry in New York, although sometimes in New Jersey or Philadelphia. *Id.* at 520. "After the poultry [was] trucked to their slaughterhouse markets in Brooklyn," they slaughtered and sold it "to retail poultry dealers and butchers who [sold] directly to consumers." *Id.* at 521. In short, after buying a product, the defendants took it to their place of business in New York, transformed it in New York, and then—in separate transactions that were wholly in-state—sold it to their customers in New York.

Domino's truckers are not comparable to the operators of the slaughterhouses in *Schechter Poultry*. Unlike in *Schechter Poultry*, the out-of-state goods' stop at the Domino's warehouse is a way station to the provision of the goods to Domino's own franchisees. The "essential character" of this journey is to "supply the demand" of the franchisees, *Tex. & New Orleans R.R. Co. v. Sabine Tram Co.*, 227 U.S. 111, 114 (1913),

not to bring goods into a state for "local disposition" to customers, *Schechter Poultry*, 295 U.S. at 543.

More generally, Domino's discussion of the Court's case law further reflects its disagreement about the outcome on the evidence before the lower courts in this case, and its failure to appreciate the distinction between last-mile drivers completing the continuous movement of goods from out of state and local delivery workers bringing prepared meals and items from restaurants and retail stores to their in-state customers. Because that distinction is well supported by this Court's cases, and agreed upon by the courts of appeals, review in his case is unwarranted.

III. The Court's consideration of the question presented is not warranted at this time.

Twice in two years, this Court has granted certiorari to consider the scope of the residual clause of FAA section 1. The Court decided *Saxon*, 596 U.S. 450, in 2022. The second of the two cases is pending and will be argued early next year. *See Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (granted Sept. 29, 2023). Already *Saxon* has informed the lower courts' consideration of the scope of section 1, as reflected in many of the cases cited in the petition and in this opposition. And the Court's decision in *Bissonnette*, while it will not address the question presented here, may have relevance to how the courts apply section 1 in future cases. The Court should not reach out now to consider yet another section 1 question, especially when the courts of appeals are in such considerable agreement.

As illustrated by *Saxon* and *Bissonnette*, in light of the increasing use by employers of mandatory pre-dispute arbitration provisions, variations of the

question presented have reached the courts of appeals in several cases over the past few years. As to the question presented in this case, however, there has been notable consistency in the courts' approach. Indeed, although Domino's disagrees with the outcome of the decision in this case, it seems to agree with the outcomes in the cases decided by the other courts of appeals—and the Ninth Circuit agrees with them as well. *See supra* pp. 7–8.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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