

No. __-____

IN THE
Supreme Court of the United States

ALTADIS USA, INC.,
Petitioner,
v.

SEA STAR LINE, LLC AND
AMERICAN TRANS-FREIGHT (ATF), INC.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Carmack Amendment, 49 U.S.C. § 14706, apply to the inland leg of a multimodal shipment to a place in the United States from a place in a territory of the United States, as provided in 49 U.S.C. § 13501(1)(C), even if the inland carrier does not issue a separate bill of lading for the inland leg?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Altadis USA, Inc. was the plaintiff/cross-defendant in the district court and the appellant in the court of appeals.

Respondent Sea Star Line, LLC was a defendant/cross-defendant/cross-claimant in the district court and an appellee/cross-appellant in the court of appeals.

Respondent American Trans-Freight (ATF), Inc. was a defendant/cross-claimant/cross-defendant in the district court and an appellee/cross-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Altadis USA, Inc. states the following:

Altadis USA, Inc. is a wholly owned subsidiary of Altadis, S.A. (Spain), which has no parent company, and no publicly held company owns 10% or more of its stock.

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Altadis USA, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

This case involves an issue of surpassing significance in the transportation of goods using different modes of transport, which encompasses more than \$1 trillion each year in U.S. trade. Since the beginning of the “container revolution” 50 years ago, the volume of containerized shipments, and thus of multimodal shipments, has mushroomed. With the exception of “bulk” cargo (such as oil carried in tankers), most imports to or exports from the United States are transported in containers that are carried both by sea on ships and by land on trains or trucks. That development has generated innumerable court decisions seeking to clarify which liability rules apply to the distinctive legs of a multimodal shipment.

The Carmack Amendment, now codified at 49 U.S.C. § 11706 (for rail carriers) and 49 U.S.C. § 14706 (for motor carriers), enacted the liability regime for rail and motor carrier transportation. In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), this Court addressed whether an ocean bill of lading could, in the face of possibly inconsistent state law, contractually extend an ocean carrier’s limitation of liability to a railroad whose train had derailed while carrying cargo from an ocean port to its final inland destination. In holding such a contractual extension permissible, the *Kirby* Court left open the question presented in this case: whether the Carmack Amendment applies of its own force to provide liability rules for an inland carrier that transports goods under a “through” bill of lading without issuing a separate bill of lading for the inland leg.

The decision below solidifies a 4 to 2 circuit conflict on whether the issuance of a separate inland bill of lading is a precondition to the application of the Carmack Amendment’s statutory rules in the event of loss of or damage to cargo during an inland rail or motor leg. Almost contem-

poraneous with the Eleventh Circuit’s affirmative answer to that question in the case below, the Second Circuit issued a comprehensive and correctly reasoned decision holding to the contrary – that the Carmack Amendment *does* apply to the inland leg of a multimodal shipment even when a separate bill of lading has not been issued for that leg. *Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir. 2006). Resolving that well-acknowledged conflict is critical in light of the key differences between the liability regimes for ocean and inland carriage, the huge volume of trade that depends on certainty in applying those rules, and the opportunity for forum-shopping available to plaintiffs in picking the circuit with the most favorable law.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 458 F.3d 1288. The relevant orders of the district court (Pet. App. 13a-23a) are not reported.

JURISDICTION

The court of appeals entered its judgment on August 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Carmack Amendment, 49 U.S.C. § 11706 (for rail carriers) and 49 U.S.C. § 14706 (for motor carriers), and other relevant provisions of Title 49, including earlier iterations of the United States Code, are set forth at Pet. App. 24a-44a.

STATEMENT

A. Factual Context

In March 2003, petitioner Altadis USA, Inc. (“Altadis”) contracted with respondent Sea Star Line, LLC (“Sea Star”) for the carriage of a sealed container of cigars and cigar bands from San Juan, Puerto Rico, to Tampa, Florida. *See* Pet. App. 2a. Sea Star issued its multimodal “through” bill of lading to cover both the ocean voyage from San Juan to the port of Jacksonville, Florida, and

the inland transportation from Jacksonville to Tampa. *See id.*

Standard-form clauses in that bill of lading provided that (1) any suit against Sea Star must be brought within one year after delivery of the goods or the date the goods should have been delivered,¹ (2) suit would not be deemed to have been brought against Sea Star until jurisdiction has been obtained and service of process effected,² and (3) the benefit of Sea Star's defenses extended to inland carriers and other parties performing services on its behalf. *See id.* at 16a-17a.

Sea Star carried the container without incident from San Juan to Jacksonville. *See id.* at 2a-3a. On March 17, 2003, Sea Star delivered the container to respondent American Trans-Freight, Inc. ("ATF"), a trucking company, for continuing carriage to Tampa. *See id.* ATF did not issue a separate bill of lading for the inland portion of the journey but began performance under the original multimodal bill of lading. *See id.* at 3a.

Rather than securing the container in a safe place during a break in the journey, the ATF driver responsible for the cargo instead parked his truck overnight in a gas station driveway. *See id.* When he returned the next morning, it was gone. The empty container was discovered in South Dade County, Florida, on March 25, 2006. The contents were never recovered. *See id.*

B. Statutory Context

Under federal law, the Carmack Amendment provides the liability rules governing inland carriers. Of particular

¹ One-year time-for-suit clauses are permitted in ocean transport under section 3(6) of the Carriage of Goods by Sea Act ("COGSA") (previously codified at 46 U.S.C. app. § 1303(6)).

² Clauses that redefine when a suit is deemed to have been brought are prohibited in ocean transport under COGSA § 3(8) (previously codified at 46 U.S.C. app. § 1303(8)), but lower courts have upheld them in situations when COGSA does not apply with the force of law. *See, e.g., Ralston Purina Co. v. Barge Juneau*, 619 F.2d 374, 376 (5th Cir. 1980) (per curiam).

relevance here, time-for-suit provisions of less than two years are prohibited:

A carrier may not provide by rule, contract, or otherwise . . . a period of less than 2 years for bringing a civil action against it under this section.

49 U.S.C. § 14706(e)(1) (Pet. App. 33a).³

By its express terms, the Carmack Amendment applies to any motor or rail carrier subject to the jurisdiction of the Surface Transportation Board,⁴ which is defined in separate scope-of-application provisions based on the mode of shipment. The motor carrier scope provision includes transportation

between a place in . . . (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States.

Id. § 13501(1) (Pet. App. 29a).⁵ Under the relevant definitions, *see id.* § 13102, Tampa is “a place in . . . the United

³ Section 14706(e)(1) applies to trucking companies such as ATF (“motor carriers” under the statute). Rail carriers are subject to an identical rule. *See* 49 U.S.C. § 11706(e) (“A rail carrier may not provide by rule, contract, or otherwise . . . a period of less than 2 years for bringing a civil action against it under this section.”) (Pet. App. 28a).

⁴ Under 49 U.S.C. § 14706(a)(1), a civil action may be brought against any carrier “subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105.” Pet. App. 30a. Carriers “subject to jurisdiction under subchapter I of chapter 135” include those referenced in 49 U.S.C. § 13501 (motor carriers) (Pet. App. 29a). Under 49 U.S.C. § 11706(a), the Carmack Amendment applies to “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part.” Pet. App. 26a. Rail carriers “subject to the jurisdiction of the Board under this part” include those referenced in 49 U.S.C. § 10501 (Pet. App. 24a). Older versions of the Carmack Amendment contained the same scope-of-application language, except insofar as they referred to the Interstate Commerce Commission – the precursor to the Surface Transportation Board. *See, e.g.*, 49 U.S.C. § 11707(a)(1) (Supp. II 1978) (Pet. App. 37a); *see also infra* note 9.

⁵ The scope of application for rail carriers is substantially identical in all relevant aspects. *See* 49 U.S.C. § 10501(a)(2) (covering “transportation in the United States between a place in . . . (B) a State and a place in a territory or possession of the United States”) (Pet. App. 24a).

States,” San Juan is “a place in a territory or possession of the United States,” and the inland journey from Jacksonville to Tampa is “transportation . . . in the United States.”

Although the Carmack Amendment’s liability rules and scope provisions are located in different sections of Title 49 based on the mode of shipment, those provisions are substantially identical in all relevant aspects. The historical evolution of the Carmack Amendment demonstrates that Congress intended for the same liability rules to apply to both rail and motor carriers for the type of transportation that occurred in this case.

Congress passed the Interstate Commerce Act in 1887 to provide uniform national law governing the interstate transportation of goods. *See* Act to Regulate Commerce, Feb. 4, 1887, ch. 104, 24 Stat. 379 (“1887 Act”) (subsequently codified as amended at 49 U.S.C. §§ 1 *et seq.* (1926) (recodified in 1978)). Although the 1887 Act provided for the regulation of carriage rates, state law continued to govern carrier liability. *See Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 491 (1903). In 1906, Congress passed the Carmack Amendment⁶ to provide uniform national liability rules, thus displacing state law. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06 (1913).

The original version of the Carmack Amendment applied only to rail carriers. *See* 49 U.S.C. § 1 (1926).⁷ In 1935, however, Congress extended the liability rules to motor carriers through a separate scope provision. *See*

⁶ The Carmack Amendment was in section 7 of the Hepburn Act, ch. 3591, 34 Stat. 593, 595 (1906) (“Hepburn Act”) (subsequently codified at 49 U.S.C. § 20(11) (1926) (recodified in 1978)).

⁷ The original version of the Carmack Amendment also applied only to domestic interstate carriage and did not include a minimum time-for-suit provision. *See* Hepburn Act § 7, 34 Stat. 595. In the First Cummins Amendment of 1915, however, Congress amended the statute to include shipments to territories and foreign countries and to prohibit time-for-suit provisions of less than two years. *See* Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1196, 1197.

Motor Carrier Act, 1935, ch. 498, 49 Stat. 543.⁸ Thus the Carmack Amendment liability rules were centralized for motor and rail carriers in 49 U.S.C. § 20(11) (1940), but the scope provisions for the two types of carriers were in separate parts of the Code.

When the Carmack Amendment was first recodified in 1978, its liability rules remained centralized in 49 U.S.C. § 11707 (Supp. II 1978) (Pet. App. 37a), and the provisions specifying to which modes of transportation those liability rules applied continued to be placed in different sections depending on the mode of transportation.⁹ The 1978 recodification retained the minimum two-year time-for-suit rule¹⁰ and continued to apply between states and territories.¹¹

In 1995, a further recodification produced the current version of the Carmack Amendment. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. This

⁸ The Motor Carrier Act extended 49 U.S.C. § 20(11) (the Carmack Amendment’s liability rules) to motor carriers through 49 U.S.C. § 319 (Supp. I 1935). The scope provision for motor carriers was codified at 49 U.S.C. § 302(b) (Supp. I 1935) (recodified at 49 U.S.C. § 302(a) (1940) by Act of Sept. 18, 1940, ch. 722, 54 Stat. 920).

⁹ After the 1978 recodification, the Carmack Amendment applied to “[a] common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title.” 49 U.S.C. § 11707 (Supp. II 1978) (Pet. App. 37a). Subchapter I included rail carrier transportation. *See id.* § 10501 (Supp. II 1978) (Pet. App. 35a). Subchapter II included motor carrier transportation. *See id.* § 10521 (Supp. II 1978) (Pet. App. 36a).

¹⁰ *See* 49 U.S.C. § 11707(e) (Supp. II 1978) (“A carrier may not provide by rule, contract, or otherwise . . . a period of less than 2 years for bringing a civil action against it under this section.”) (Pet. App. 39a).

¹¹ *See* 49 U.S.C. § 10501(a)(2) (Supp. II 1978) (applying the Carmack Amendment to rail carriers “to the extent the transportation is in the United States and is between a place in . . . (C) a State and a place in a territory or possession of the United States”) (Pet. App. 35a); *id.* § 10521(a)(1) (Supp. II 1978) (applying the Carmack Amendment to motor carrier transportation “between a place in . . . (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States”) (Pet. App. 36a).

time, however, both the substantive liability rules¹² and the provisions specifying to which modes of transportation those liability rules applied¹³ were placed in different parts of Title 49 based on the mode of carriage. As noted above, in both the rail and motor carrier provisions, the current version retains the minimum two-year time-for-suit rule and covers transportation between states and territories. *See supra* notes 3 & 5, and accompanying text.

C. Proceedings Below

On March 4, 2004, less than a year after the cargo should have been delivered,¹⁴ petitioner filed the present action in state court to recover its damages for respondents' failure to deliver the cargo. Process was not served, however, until April 13, 2004, more than one year after the cargo should have been delivered. Sea Star removed the action to federal district court based on federal question jurisdiction.

The district court granted respondents' motions for summary judgment based on petitioner's failure to file suit and serve process within one year after the cargo should have been delivered, as stated in the bill of lading. *See supra* p.3 & notes 1-2. The court rejected petitioner's argument that the one-year time-for-suit clause was invalid under the Carmack Amendment, which prohibits time-for-suit provisions shorter than two years. *See* 49 U.S.C. § 14706(e)(1) (Pet. App. 33a). The court concluded

¹² The liability rules started in 49 U.S.C. § 20(11) (1926), moved to 49 U.S.C. § 11707 (Supp. II 1978) (Pet. App. 37a), and are now codified for rail carriers at 49 U.S.C. § 11706 (Pet. App. 26a) and for motor carriers at 49 U.S.C. § 14706 (Pet. App. 30a).

¹³ The scope provisions started in 49 U.S.C. § 1 (1926) (for rail carriers) and 49 U.S.C. § 302(b) (Supp. I 1935) (for motor carriers), moved to 49 U.S.C. § 10501 (Supp. II 1978) (for rail carriers) (Pet. App. 35a) and 49 U.S.C. § 10521 (Supp. II 1978) (for motor carriers) (Pet. App. 36a), and are now codified at 49 U.S.C. § 10501 (for rail carriers) (Pet. App. 24a) and 49 U.S.C. § 13501 (for motor carriers) (Pet. App. 29a).

¹⁴ At the earliest, the cargo could have been delivered on March 18, 2003.

that COGSA governed the action instead of the Carmack Amendment because the bill of lading had incorporated COGSA by contractual agreement. *See* Pet. App. 19a, 22a.¹⁵

Petitioner argued on appeal that a contractual agreement could not displace a governing federal statute such as the Carmack Amendment (which contains express language prohibiting any contractual agreement altering the statutory time-for-suit provision) and that the one-year time-for-suit clause therefore was invalid. The Eleventh Circuit rejected that argument, reasoning that the Carmack Amendment did not apply on these facts because ATF had not issued a separate bill of lading. *See* Pet. App. 9a. The court followed directly on-point decisions from the Fourth, Sixth, and Seventh Circuits holding that the Carmack Amendment is inapplicable to the inland leg of a multimodal shipment absent a separate bill of lading for that leg. *See id.* Acknowledging that the Ninth Circuit had held to the contrary, the Eleventh Circuit expressly rejected the Ninth Circuit’s holding in *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000). *See* Pet. App. 7a n.9. The court below did not mention *Sompo Japan Insurance Co. of America v. Union Pacific Railroad*

¹⁵ The district court apparently sought to rely on COGSA § 13 (previously codified at 46 U.S.C. app. § 1312), which permits the parties to apply COGSA *with the force of law* to domestic sea carriage. *See* Pet. App. 19a n.5. The court did not cite COGSA § 12 (previously codified at 46 U.S.C. app. § 1311), which provides that “[n]othing in this Act shall be construed as superseding any part of the [Harter Act], or of *any other law* which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship” (emphasis added).

If COGSA had applied to this case with the force of law, however, petitioner’s suit would unquestionably have been timely. Suit was *filed* within one year of the scheduled delivery, which is all that COGSA § 3(6) requires. *See supra* note 1. The carrier’s attempt to require *service of process* within one year would have been invalid if COGSA had applied with the force of law. *See supra* note 2.

Co., 456 F.3d 54 (2d Cir. 2006), a contrary decision of the Second Circuit that had been announced less than a month before.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DEEPENS A WELL-ESTABLISHED 4-2 CONFLICT AMONG THE COURTS OF APPEALS ON A FUNDAMENTAL QUESTION OF FEDERAL TRANSPORTATION LAW

All of the major port circuits (except the Fifth Circuit) that routinely handle multimodal transportation cases have now weighed in on the question presented, and the result is a deep and acknowledged conflict among six courts of appeals. This conflict has been the product of much percolation over the past two decades. The timing of the decision below and a directly conflicting decision from the Second Circuit one month before underscores that the time is ripe for this Court to resolve the conflict and to bring much needed clarity to this critical issue of transportation law.

The origins of the circuit conflict begin with dicta in *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), which declared that the Carmack Amendment does not apply to the inland leg of a multimodal shipment conducted under a single, through bill of lading unless the inland leg is also covered by a separate bill of lading.¹⁶ The Fourth, Sixth, and Seventh Circuits have all followed *Swift*, and, in the case below, the

¹⁶ The *Swift* opinion suggested that this proposition was the holding. See *Swift*, 799 F.2d at 701 (“We therefore *hold* that when a shipment of foreign goods . . .”) (emphasis added). In its decision below, however, the Eleventh Circuit acknowledged that the articulated “holding” was actually dicta. Pet. App. 7a (“Dicta in our own circuit is consistent with the Fourth, Sixth and Seventh Circuits.”). The Second Circuit also recognized the problems with *Swift*’s supposed holding: “[T]he [*Swift*] court muddled the waters when it articulated its holding . . .” *Sompo*, 456 F.3d at 62.

Eleventh Circuit elevated the dicta in *Swift* to a holding, establishing a firm four-circuit rule.

By contrast, the Second and Ninth Circuits have rejected *Swift* and its progeny, holding instead that the Carmack Amendment applies of its own force to the inland segment of an overseas shipment notwithstanding the absence of a separate bill of lading issued by the inland carrier. District court decisions addressing this issue in both the Fifth and Eighth Circuits have similarly reached opposite conclusions, further demonstrating the state of confusion that persists in the lower courts. Indeed, in the recently decided *Sompo* case, the Second Circuit explicitly acknowledged “a difference of opinion in the courts regarding Carmack’s applicability to a through bill of lading covering a shipment of goods originating in a foreign country.” 456 F.3d at 61.¹⁷

**A. The Court Below Joined The Fourth, Sixth,
And Seventh Circuits In Holding That The
Carmack Amendment Is Inapplicable To The
Inland Leg Of A Multimodal Shipment Absent
A Separate Bill Of Lading**

Dicta in the Eleventh Circuit’s *Swift* decision have spawned four circuit decisions, each holding that the Carmack Amendment does not apply to the inland portion of a multimodal shipment if the inland carrier (motor or rail¹⁸) has not issued a separate bill of lading for that

¹⁷ It makes no fundamental difference whether a case involves a shipment between a U.S. territory and the United States (as here) or a shipment between a foreign country and the United States (as in other cases discussed here). As the court below acknowledged, the language that “supports the applicability of the Carmack Amendment to shipments to the United States from United States possessions . . . is identical to the language relating to shipments from foreign countries to the United States.” Pet. App. 9a-10a n.12. Compare 49 U.S.C. § 13501(1)(C) with *id.* § 13501(1)(E) (motor carriage) (Pet. App. 29a); compare 49 U.S.C. § 10501(a)(2)(B) with *id.* § 10501(a)(2)(F) (rail carriage) (Pet. App. 35a).

¹⁸ For purposes of resolving the conflict, it does not matter whether a case involves a motor shipment (as here) or a rail shipment (as in some of the other cases discussed here). Although the substantive provisions

portion of the carriage. As a result, the liability regime enacted by Congress for inland transportation does not apply in these four circuits in the typical circumstances of a multimodal shipment.

1. Seventh Circuit. The first court of appeals to address and issue a clear holding on the question presented here was the Seventh Circuit in *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992). That case involved a shipment bound from Genoa, Italy, to Chicago, Illinois, that arrived in Norfolk, Virginia, but was never delivered to Chicago. *Id.* at 393. Relying solely on *Swift*, the Seventh Circuit held without further explanation that the Carmack Amendment “does not extend to shipments by water, rail or motor carriers from a foreign country to the United States, unless a domestic segment of the shipment is covered by a separate domestic bill of lading.” *Id.* at 394 (internal citations omitted). Because the through bill of lading governing the shipment from Genoa to Chicago was not accompanied by a separate domestic bill of lading, the Seventh Circuit held that the Carmack Amendment was inapplicable. *Id.* at 394-95.

of the Carmack Amendment are now codified in two different sections of Title 49, this is nothing more than an accident of recodification. As explained in section B of the Statement, *see supra* pp. 3-7, until 1978 the Carmack Amendment was a single provision codified at 49 U.S.C. § 20(11) (1976) (Pet. App. 41a-43a). From 1978 to 1995, it was a single provision codified at 49 U.S.C. § 11707 (Supp. II 1978) (Pet. App. 37a-39a). It has only been since 1995 that the motor and rail aspects of the Carmack Amendment have been codified in two different sections, but these provisions are substantially identical.

Courts of appeals on both sides of the conflict have properly recognized that the motor and rail cases are indistinguishable in this regard. Thus the court below indiscriminately cited motor and rail cases to support its holding, *see* Pet. App. 6a-7a, and recognized that its decision conflicted with a Ninth Circuit rail decision, *see id.* at 7a n.9. Similarly, the Second Circuit’s careful review of the conflicting authorities in *Sompo* properly discusses motor and rail cases without distinguishing between them. *See* 456 F.3d at 61.

2. Fourth Circuit. The Fourth Circuit sided with the Seventh and Eleventh Circuit views in *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993), which involved a multimodal shipment of goods from Taiwan to Baltimore, Maryland, via Long Beach, California. *Id.* at 701. The goods were mistakenly routed from Long Beach to a warehouse in Miami, Florida, where they were ultimately destroyed in a fire. Addressing the preliminary question whether the Carmack Amendment governed the dispute, the Fourth Circuit followed the *Swift* dicta and the *Capitol Converting* holding to conclude that the Carmack Amendment “does not extend . . . to shipments from a foreign country to the United States unless a domestic segment of the shipment is covered by a separate domestic bill of lading.” *Id.* at 703. The court of appeals remanded the case to the district court to determine “whether any domestic bill of lading was issued to cover the domestic segment of the shipment.” *Id.* at 703-04.

3. Sixth Circuit. Similarly, in *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003), the Sixth Circuit refused to apply the Carmack Amendment to a shipment from Germany to Detroit, Michigan, when the goods were destroyed between the port in Newark, New Jersey, and Detroit. *Id.* at 566-67. Citing *Swift*, *Capitol Converting*, and *Shao*, the Sixth Circuit, without further discussion, held that the Carmack Amendment “does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading.” *Id.* at 568. According to the *American Road Service* court, “[t]o support a claim under the Carmack Amendment, [the plaintiff] must present some proof that a domestic bill of lading was issued.” *Id.* at 569. Finding no such evidence, the Sixth Circuit held that the Carmack Amendment was inapplicable to the shipment. *Id.*

4. Eleventh Circuit. The decision below is in full accord with well-established precedent in the Fourth, Sixth, and Seventh Circuits. Relying on *American Road Service*, *Shao*, *Capitol Converting*, and its own dicta in

Swift, the Eleventh Circuit determined “that the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and overland leg to the final destination in the United States) *unless the domestic, overland leg is covered by a separate bill of lading*.” Pet. App. 6a (emphasis added). With the confirmation of that rule in the Eleventh Circuit, a solid, four-circuit line of cases holds that the Carmack Amendment is inapplicable to the inland segment of a multimodal shipment absent a separate bill of lading covering that segment.

B. The Decision Below Squarely Conflicts With Decisions Of The Second And Ninth Circuits

In contrast to the well-settled precedent in the Fourth, Sixth, Seventh, and Eleventh Circuits, the Second and Ninth Circuits have held in recent cases that the Carmack Amendment *does* apply to the inland portion of a multimodal shipment, even in the absence of a separate bill of lading. A recent Second Circuit opinion acknowledges that its minority rule conflicts with the decisions discussed above.

1. Ninth Circuit. In *Neptune Orient Lines*, the Ninth Circuit held that the Carmack Amendment “encompasses the inland leg of an overseas shipment conducted under a single ‘through’ bill of lading . . . to the extent that the shipment runs beyond the dominion of the Carriage of Goods by Sea Act.” 213 F.3d at 1119. The *Neptune* court thus applied the Carmack Amendment to the inland rail leg of a shipment from Jakarta, Indonesia, to Memphis, Tennessee, even though a separate bill of lading had not been issued for that leg. *Id.*

2. Second Circuit. In a comprehensive decision issued shortly before the decision below, the Second Circuit adopted the Ninth Circuit’s *Neptune* position. *See Sompo*, 456 F.3d at 57 (“Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country”). In a well-reasoned opinion that canvassed every precedent in this area, the *Sompo* court

examined the Carmack Amendment’s applicability and the evolution of conflicting decisions in other circuits. Rejecting the *Swift* line of cases, the Second Circuit held that the Carmack Amendment applies to the inland segment of an overseas shipment, even in the absence of a separate bill of lading.

Sompo involved a shipment from Tokyo, Japan, to Swannee, Georgia, via Los Angeles, California. The shipment was made under an “intermodal”¹⁹ through bill of lading that covered ocean and rail carriage. *Id.* at 56. The *Sompo* court analyzed prior decisions in other circuits, most of which relied on the Eleventh Circuit’s “fatally flawed” dicta in *Swift*. *Id.* at 61. *Sompo* noted that, under *Swift*’s essential reasoning, the Carmack Amendment applies to a shipment that represents a “continuation of foreign commerce.” *Id.* at 62 (quoting *Swift*, 799 F.2d at 699). But the *Swift* court “muddied the waters when it articulated its holding” and stated that the Carmack Amendment applies “as long as the domestic leg is covered by separate bill or bills of lading.” *Id.* (quoting *Swift*, 799 F.2d at 701) (emphasis omitted). Indeed, the *Sompo* court found *Swift*’s statement to be “perplexing to say the least” because the *Swift* carrier actually argued that the Carmack Amendment did *not* apply because of the separate bill of lading. *Id.*

Refusing to apply *Swift*’s dicta, the *Sompo* court performed its own analysis of the plain language of the statute and concluded that the inland portion of a multimodal shipment is covered by the Carmack Amendment, even though a separate bill of lading covering that portion was not issued. *Id.* at 57. The court opined that its “interpretation of Carmack – that it applies to the domestic inland portion of a foreign shipment regardless of the shipment’s point of origin – also comports with Congress’s view of the law when Congress codified the [Interstate Commerce Act] in 1978.” *Id.* at 68. In the Second Circuit’s view, the

¹⁹ “Intermodal” and “multimodal” are synonymous in this context.

more recent iterations of the Carmack Amendment “reflect[] Congress’s understanding that the boundaries of Carmack’s applicability have always been co-extensive with those of the ICC’s jurisdiction.” *Id.* And, as to that jurisdiction, the Second Circuit had no doubt that the Carmack Amendment applied to the inland leg of a multimodal shipment. *Id.* at 69.

* * *

In sum, by holding that the Carmack Amendment is applicable to the inland segment of a multimodal shipment even in the absence of a separate bill of lading, the Second and Ninth Circuits have settled precedent that is diametrically opposite to that of the Fourth, Sixth, Seventh, and Eleventh Circuits, each of which categorically requires a separate bill of lading to trigger the Carmack Amendment’s applicability in the multimodal context.

C. Opposing District Court Decisions In The Fifth And Eighth Circuits Further Demonstrate The Confusion In The Lower Courts

Even in circuits in which courts of appeals have not yet addressed the issue, district courts have similarly split on whether a separate bill of lading must cover the inland portion of a multimodal shipment for the Carmack Amendment to apply.

A district court in the Eighth Circuit, for instance, followed *Swift* to hold that the Carmack Amendment did not apply during a multimodal shipment from Italy to Omaha, Nebraska, because there was no separate bill of lading for the inland portion of the shipment. See *Nebraska Wine & Spirits, Inc. v. Burlington Northern R.R. Co.*, No. 91-0103-CV-W-2, 1992 WL 328938, at *6 (W.D. Mo. Sept. 29, 1992).

By contrast, in a detailed and well-reasoned opinion, the Northern District of Texas held that the Carmack Amendment *did* apply to a shipment of goods from Mexico to Plano, Texas, “regardless whether a domestic bill of lading ever issued.” *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 826 (N.D. Tex. 2003). Examining

decisions from other circuits, the district court determined that, while “[t]he [s]tatute is [c]lear” that a separate bill of lading is not necessary for the Carmack Amendment to apply, “[t]he [c]ase [l]aw is [n]ot.” *Id.* at 827-28. The court traced the line of cases requiring a separate bill of lading to *Swift*, but pointed out in a detailed analysis that *Swift*’s “‘holding’ . . . creates an internal inconsistency in the Eleventh Circuit’s opinion.” *Id.* at 828. As a result, the court found “unpersuasive those cases which rely on the ‘holding’ of *Swift*” because they “are based on uncertain precedent and run counter to the plain text of the statute.” *Id.* at 830. The court held that the Carmack Amendment applied despite the absence of a separate bill of lading. *Id.*

D. Lower Courts, The Solicitor General, And Scholars Have Recognized The Inter-Circuit Conflict

Lower courts that have engaged in reasoned and thoughtful analysis of the Carmack Amendment have recognized the conflict over the Amendment’s applicability and have identified *Swift* as the source of confusion. The *Berlanga* court, for example, noted that case law on the Carmack Amendment is unclear and can be traced back to the “inconsistent” holding in *Swift*. *Berlanga*, 269 F. Supp. 2d at 829. Similarly, the *Sompo* court acknowledged the flawed reasoning behind the *Swift* decision and lamented that, “[r]egrettably, it has proven to be influential.” *Sompo*, 456 F.3d at 63 n.11. Recognizing that “[t]he disconnect between *Swift*’s reasoning and the articulation of its holding has not gone unnoticed,” the Second Circuit was “reluctant to rely on any line of precedent derived from *Swift*’s articulated holding.” *Id.* at 62-63. And, although it gave no awareness of the recently issued *Sompo* decision, even the court below acknowledged that the Ninth Circuit’s decision in *Neptune* “ha[d] reached a different result” from the majority rule. Pet. App. 7a n.9.

In its invitation brief at the certiorari stage in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543

U.S. 14 (2004), the United States addressed whether the train derailment in that case might have been covered by the Carmack Amendment. The Solicitor General there noted that “[i]t is unsettled whether the Carmack Amendment applies to land transport under international, multimodal through bills of lading.” Brief for the United States as Amicus Curiae at 11, *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, No. 02-1028 (U.S. filed Nov. 14, 2003) (comparing *Neptune* and *Berlanga* with *Capitol Converting* and *Swift*). In *Kirby*, the Solicitor General recognized that the Carmack Amendment might have dictated the liability rules for the train’s derailment in that case, because “[t]he record facts do not preclude the possibility that [the railroad’s] liability could have been determined under statutory rules governing railroad transport.” *Id.* The government nonetheless advised this Court that the issue was not presented in *Kirby* because the “Carmack Amendment issue was not raised in the lower courts or in respondent’s brief in opposition” and therefore was “waived.” *Id.* at 12.²⁰

Likewise, scholars in the field have acknowledged the conflict over the Carmack Amendment’s applicability. Professor Schoenbaum, for example, has noted that the “applicability of the Carmack Amendment to the inland leg of multimodal transport is in dispute.” 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2004). A recent *Tulane Law Review* article also found that “it is not clear whether the Carmack Amendment applies to inland portions of multimodal shipments in the United States” and explained that, while some courts have “generally followed the rule established by the Eleventh Circuit in *Swift*,” other courts “have relied on the plain language of the statute and applied the Carmack Amendment to inland portions of foreign shipments.” Michael E. Crowley, *The Limited Scope of the*

²⁰ The Solicitor General also suggested that the Carmack Amendment might not apply on the facts of *Kirby* because the particular transport at issue was exempt under 49 U.S.C. § 10709.

Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem, 79 TUL. L. REV. 1461, 1485-86 (2005).

II. THE COURT BELOW ERRONEOUSLY CONSTRUED THE CARMACK AMENDMENT

A. The Plain Language Of The Statute Requires Application Of The Carmack Amendment

The statutory text plainly provides that the Carmack Amendment applies to motor carrier transportation “between a place in . . . the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States.” 49 U.S.C. § 13501(1)(C) (Pet. App. 29a). Specifically, the current version of the Carmack Amendment relevant to motor carriers applies to common carriers “providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135.” *Id.* § 14706(a)(1) (Pet. App. 30a). Subchapter I defines the general jurisdiction of the Secretary of Transportation and the Surface Transportation Board over motor carrier transportation. *See id.* § 13501 (Pet. App. 29a). Jurisdiction attaches so long as the shipment at issue is “between” a point in the United States and “a place in a territory or possession of the United States”²¹ or “a place in a foreign country.”²² Coverage runs to motor carriers “to the extent the transportation is in the United States.” *Id.* § 13501(1)(C), (E) (Pet. App. 29a). Although the statute mandates that a carrier providing service subject to the Surface Transportation Board’s jurisdiction “shall issue a receipt or bill of lading,” *id.* § 14706(a)(1) (Pet. App. 30a), it also clarifies that “[f]ailure to issue a receipt or bill of lading does not affect the liability of a carrier,” *id.*

²¹ 49 U.S.C. § 13501(1)(C) (Pet. App. 29a); *see also id.* § 10501(a)(2)(B) (corresponding provision for rail carriers) (Pet. App. 24a).

²² 49 U.S.C. § 13501(1)(E) (Pet. App. 29a); *see also id.* § 10501(a)(2)(F) (corresponding provision for rail carriers) (Pet. App. 24a).

In *Sompo*, the Second Circuit correctly interpreted those provisions to mean that the Carmack Amendment covers the domestic leg of a shipment between a place in the United States and a place outside the United States regardless of the point of origin and regardless of whether the inland carrier issued its own bill of lading for the domestic portion of the carriage. *See* 456 F.3d at 63. Thus, although by its plain terms the Carmack Amendment does not extend to the international or marine leg of such a shipment because the Surface Transportation Board's jurisdiction does not reach transportation that takes place outside of the United States, the Carmack Amendment's rules do apply to that portion of a multimodal shipment that occurs by rail or motor carrier within the United States. *See* 1 SCHOENBAUM § 10-4, at 598 (“the correct rule . . . is that the Carmack Amendment applies to the inland leg of an overseas shipment conducted under a single bill of lading to the extent that the shipment runs beyond the dominion of COGSA and the Harter Act.”).

B. This Court's Decision In *Reider* Does Not Support The Decision Below

The court below read *Reider v. Thompson*, 339 U.S. 113 (1950), as support for a requirement that a domestic carrier must issue a bill of lading for the Carmack Amendment to apply to the domestic leg of an international multimodal shipment. *See* Pet. App. 8a (“[S]ubsequent cases, citing *Reider*, have held that a separate bill of lading for the domestic leg of an international shipment *must* be issued in order for the Carmack Amendment to apply.”) (emphasis added).

This Court in *Reider* did not so hold. That case involved damage to cargo during a shipment from New Orleans to Boston. As the Court made clear, “[i]t is not disputed that if these were all the facts in the case the courts below were in error,” 339 U.S. at 115, and the Carmack Amendment would apply. The Court noted that the cargo had originated in Buenos Aires, Argentina, under a bill of lading that required notice to be given to a party in

Boston, Massachusetts, when the cargo arrived in New Orleans. *Id.* at 115-16. In New Orleans, a separate bill of lading was issued for the carriage to Boston. *Id.* at 116. The Court held that it was of no moment “that the shipment in this case originated in a foreign country, since the foreign portion of the journey terminated at the border of the United States.” *Id.* at 117. The obligation created by the contract of carriage from New Orleans to Boston “was squarely within the provisions of the statute.” *Id.*

The Court explained that holding the carrier liable for the loss of the cargo advanced the “purpose of the Carmack Amendment,” which “was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.” *Id.* at 119. The Court emphasized that “[t]o hold otherwise than we do would immunize from the beneficial provisions of the Amendment all shipments originating in a foreign country when re-shipped via the very transportation chain with which the Amendment was most concerned.” *Id.* Nowhere in *Reider* did the Court hold that a prerequisite to the application of the Carmack Amendment was the issuance by the domestic carrier of a separate bill of lading. Nor would such a reading be plausible in light of the statute’s provision that “[f]ailure to issue a receipt or bill of lading does not affect the liability of a carrier.” 49 U.S.C. § 14706(a)(1) (Pet. App. 30a).

C. The Eleventh Circuit Erroneously Relied On The Dicta In *Swift*

Instead of applying the plain language of the Carmack Amendment, the court below relied on dicta in *Swift* that “the domestic leg of [an international multimodal shipment] will be subject to the Carmack Amendment as long as the domestic leg is covered by a separate bill or bills of lading.” Pet. App. 7a (quoting *Swift*, 799 F.2d at 701). That reliance was misplaced because the *Swift* dicta were entirely gratuitous: the trucker in *Swift* actually had issued a separate bill of lading for the inland carriage so

Swift did not turn on the existence (or absence) of such a bill, and in any event nothing in the Carmack Amendment compels issuance of a separate bill of lading for the statute to apply.

Swift involved a shipment of textile spinning machinery under a through bill of lading from Switzerland to La Grange, Georgia, via Savannah, Georgia. 799 F.2d at 698. The shipment was damaged during the intrastate domestic leg of the trip. *Id.* The motor carrier contended that a separate domestic bill of lading covered the inland carriage from Savannah to LaGrange and was evidence of two separate, distinct shipments. *Id.* at 699; *see also Sompo*, 456 F.3d at 62 (noting that “it was the separate domestic bill of lading (covering a purely intrastate journey) in *Swift* that the motor carrier employed, unsuccessfully, to argue that Carmack *did not* apply”). The court of appeals, however, applied an “intent” test to determine whether the domestic, intrastate leg of the shipment was separate or just a temporary stop in the overall chain of foreign commerce. According to the *Swift* court:

The nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by “the essential character of commerce,” *United States v. Erie R.R. Co.*, 280 U.S. 98, 102 (1929), reflected by the “intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement,” *Great N. Ry. Co. v. Thompson*, 222 F. Supp. 573, 582 (D.N.D. 1963) (three-judge district court).

799 F.2d at 699 (parallel citations omitted).

Once the court had determined that the parties intended a continuous shipment from the foreign place of origin to the final, inland destination, it deemed the separate domestic bill of lading to be irrelevant. If there had been two separate shipments, the Carmack Amendment would not have applied to the inland portion of the trip because the inland portion was purely intrastate, and the

Carmack Amendment does not apply to purely intrastate shipments. The *Swift* court found that the shipment was intended to start in Switzerland and end in LaGrange, so the intrastate portion was a continuation of foreign commerce under 49 U.S.C. § 10521(a)(1)(E) (Supp. II 1978) (Pet. App. 36a-37a) (superseded in 1995 by 49 U.S.C. § 13501(1)(E) (Pet. App. 29a)), and the Carmack Amendment applied. See 799 F.2d at 700-01.

Thus, even though the *holding* of *Swift* was that the Carmack Amendment applied to determine the liability rules for the inland carriage, the Eleventh Circuit's *articulation* of the holding created confusion for future courts seeking to apply its reasoning:

[W]hen a shipment of foreign goods is sent to the United States with the intention that it come to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment *as long as the domestic leg is covered by separate bill or bills of lading*.

Id. at 701 (emphasis added); see also *Sompo*, 456 F.3d at 62 (finding that, “[d]espite the clarity of *Swift*’s analysis, the court muddled the waters when it articulated its holding”). By inserting language requiring issuance of a separate bill of lading for the Carmack Amendment to apply to cover the inland carriage of an international shipment, the *Swift* court imposed a requirement not found in the text of the Carmack Amendment (in a case where, ironically, such a bill of lading was in fact issued).

D. The Eleventh Circuit’s Reliance On *Kirby* Is Misplaced

The court below cited as support for its holding this Court’s decision in *Kirby*, but that case did not address the issue presented here, and its reasoning does not support the decision below. The *Kirby* Court held that the contractual extension of COGSA in a multimodal bill of lading preempts competing state law because to do other-

wise would “undermine the uniformity of general maritime law.” 543 U.S. at 28-29. The applicability of other federal law, as opposed to state law, however, was not raised before the Court. The United States recognized as much in its *amicus* brief filed at this Court’s invitation at the certiorari stage. *See supra* pp. 16-17 & note 20.

Kirby resolved the issue whether state or federal law applies in a case involving cargo damage in the domestic leg of an international multimodal shipment. That question is not presented here. Instead, this case asks whether a private contract can be enforced under the general maritime law to displace an otherwise applicable federal statute. Unlike *Kirby*, which addressed the potential applicability of the tort laws of 50 different states, this case invites the Court to give full effect to Congress’s intent to enact uniform liability rules under a federal statute.

III. WHETHER THE CARMACK AMENDMENT APPLIES TO INLAND SEGMENTS OF MULTIMODAL SHIPMENTS IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

A. Multimodal Transportation Represents A Significant Portion Of All Commercial Activity

The issue presented in this case affects a very large portion of the United States economy. The latest data from the Bureau of Transportation Statistics show that multimodal transportation was valued at \$1.1 trillion in 2002.²³ Multimodal shipments have a higher dollar value than shipments by rail, water, and air.²⁴ The federal government has recognized this trend and noted the important role of through bills of lading in international multimodal shipments: “International shipments are increasingly

²³ *See* BUREAU OF TRANSPORTATION STATISTICS, U.S. DEPARTMENT OF TRANSPORTATION, FREIGHT SHIPMENTS IN AMERICA: PRELIMINARY HIGHLIGHTS FROM THE 2002 COMMODITY FLOW SURVEY 7 (2004), *available at* http://www.bts.gov/publications/freight_shipments_in_america/pdf/entire.pdf.

²⁴ *See id.*

made on a through bill of lading under a multimodal contract. The multimodal transit operator (frequently one of the transporters) takes charge of and responsibility for the entire movement from factory to final destination.”²⁵

Secondary commentators have also noted the nation’s increasing reliance on multimodal shipments in overseas trade. See, e.g., 1 SCHOENBAUM § 10-4, at 589 (“The freight transportation industry clearly has moved into a new era – the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.”); Crowley, 79 TUL. L. REV. at 1462 (“increasing volumes of cargo are moving under multimodal ‘through’ bills of lading issued by ocean carriers and intermediaries, such as freight forwarders and nonvessel owning common carriers (NVOCCs), providing the shippers an efficient, stream-lined method of moving goods from ‘door to door’”).

B. This Court Has Recognized The Importance Of Uniformity In The Multimodal Context

In *NLRB v. International Longshoremen’s Association*, 447 U.S. 490, 494 (1980), this Court noted the “container revolution” that had increased the ease of moving cargo by means of water, rail, and road without its having to be repackaged. More recently, in *Kirby*, this Court stressed the need for uniform rules in the interpretation of maritime multimodal through bills of lading (much like the one in this case): “our touchstone is a concern for the uniform meaning of maritime contracts.” 543 U.S. at 28. Although the circuit conflict over the applicability of the Carmack Amendment to the domestic leg of a multimodal shipment was not before the *Kirby* Court, that issue is squarely presented in this case, in a decision that recognizes (at least partially) the deep conflict on this issue. Nonetheless, the same need for uniformity that this Court recognized in *Kirby* also exists on this question, so that

²⁵ U.S. Department of Commerce, *Handling*, http://www.export.gov/logistics/exp_handling.asp (last visited Oct. 29, 2006).

cargo interests and carriers alike can properly know, and insure against, the risks to which they are exposed under the liability rules that Congress intended.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE WELL-DEVELOPED CONFLICT AMONG THE LOWER COURTS

This Court will not benefit from further percolation in the lower courts. The issue has now been discussed in the courts of appeals for two decades. Four circuits have fully considered the issue and have concluded that the Carmack Amendment is inapplicable to the inland segment of a multimodal shipment absent a separate bill of lading covering that segment. Two circuits have held precisely the opposite. Indeed, both the court below, *see* Pet. App. 7a & n.9, and the Second Circuit, *see Sampo*, 456 F.3d at 61, have acknowledged the conflict, as has the Solicitor General, the *Berlanga* district court, and a host of commentators. The conflict is thus fully developed without any realistic prospect of being resolved in the lower courts. It is ripe for adjudication by this Court. Further percolation is therefore unnecessary.

Moreover, this case presents the issue of Carmack Amendment applicability in a pure form, unclouded by extraneous matters. There are no preliminary or threshold issues, and the essential facts are undisputed. It is beyond question that the present suit was timely if the Carmack Amendment applies, and petitioner did not challenge the district court's finding that it was untimely if the Carmack Amendment does not apply. The only question to be decided, therefore, is whether as a matter of law the Carmack Amendment applies to the inland portion of a multimodal shipment when no separate bill of lading has been issued.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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