Nos. 08-1553 & 08-1554

SEP 18 2009

In The Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,

Petitioners,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although both petitions obscure the questions they present, it appears from the petitions as a whole that they attempt to raise the following questions:

1. The "separate bill of lading" or *Altadis* question: Does the Carmack Amendment, 49 U.S.C. § 11706, apply to the domestic inland leg of a multimodal shipment when no separate bill of lading was issued for that inland leg?

2. The "import" question: Does the Carmack Amendment apply to the domestic inland leg of a multimodal shipment involving an import from a foreign country?

3. The "non-adjacent foreign country" question: Does the Carmack Amendment apply to the domestic inland leg of a multimodal shipment involving trade with a non-adjacent foreign country?

4. The "ocean carrier" question: Does the Carmack Amendment apply in an action against a bill of lading issuer for cargo damage during the domestic rail leg of a multimodal shipment when the issuer is an ocean carrier that also satisfies the statutory definition of a "rail carrier"?

5. The § 10709 "opt-out" question: May a rail carrier rely on 49 U.S.C. § 10709 to avoid the application of the Carmack Amendment to the domestic rail leg of an "exempt" multimodal shipment, and if so under what conditions?

6. The § 10502 "opt-out" question: Under 49 U.S.C. § 10502, may a rail carrier avoid the application of the Carmack Amendment to the domestic rail leg of an "exempt" multimodal shipment without offering the underlying shipper the "alternative terms" that the statute requires?

LIST OF PARTIES

Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc., petitioners in No. 08-1553, were defendants in the district court and appellees in the court of appeals.

Union Pacific Railroad Company, petitioner in No. 08-1554, was a defendant in the district court and an appellee in the court of appeals.

Respondents in each case are Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd., and Royal Sun Alliance Insurance Co. Ltd. They were all plaintiffs in the district court and appellants in the court of appeals.

RULE 29.6 STATEMENT

Respondent Regal-Beloit Corporation has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent Victory Fireworks, Inc. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

The People's Insurance Company (Group) of China and American International Group, Inc. each own more than 10% of the stock of respondent PICC Property & Casualty Co. Ltd.

RSA Insurance Group plc is the ultimate parent corporation of respondent Royal Sun Alliance Insurance Co. Ltd.

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RESPONDENTS' BRIEF IN OPPOSITION

The sum and substance of petitioners' argument is a simple syllogism: Their major premise is that in January 2007 this Court granted certiorari in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007).[1] Their minor premise is that one of the many issues in this case was raised in *Altadis*. They accordingly conclude that this Court should grant certiorari here.

Petitioners' reasoning is flawed. First, circumstances have changed significantly since January 2007. When certiorari was granted in *Altadis*, it appeared that an inter-circuit conflict was creating problems for industry that only this Court could resolve. It has since become clear that under contracts that petitioners themselves draft they have the power to correct any problem that they might perceive with the lower court's rejection of the questionable "separate bill of lading" doctrine. This is not merely a theoretical possibility. Published articles by experienced lawyers who regularly represent carriers in cargo damage litigation show that the contractual solution has already been implemented. Thus no long-term problem exists. At most, this Court

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[1] *Altadis* settled before briefing and oral argument. *See* 549 U.S. 1189 (2007) (dismissing certiorari under Rule 46.1). Since a maximum of $605,000 was in dispute there, the parties presumably decided to settle because too little was at stake to justify the substantial expenditures required to fully brief and argue a merits case in this Court.

might resolve some pending cases that arose under pre-2007 contracts (and prospectively protect carriers who are sloppy in their future contracting). What this Court was willing to undertake almost three years ago would now be an unnecessary use of the Court's judicial resources.

Moreover, the present case differs significantly from *Altadis*. In *Altadis*, this Court agreed to resolve a conflict on a narrow question that was cleanly presented. Petitioners here implicitly ask the Court to answer at least five additional questions – none of which even arguably involves a circuit conflict. Petitioners do not ask this Court to resolve an important question of federal law. The focus of their petitions is rather on the correction of what they characterize as errors. But the court below did not err.

If the "separate bill of lading" question presented in *Altadis* ultimately becomes important enough to require resolution, it will arise again in another case (such as *Altadis*) that presents the issue cleanly. This Court need not accept for review the poor vehicle petitioners offer here.

STATEMENT OF THE CASE

Respondent Regal-Beloit Corp., a Wisconsin manufacturer of electrical and mechanical motion control products, purchased a cargo of electric motors shipped from Shanghai, China, for delivery in

Indianapolis, Indiana. Petitioner Kawasaki Kisen Kaisha, Ltd. (referred to, with its U.S. subsidiary, petitioner K-Line America, Inc., as "K-Line") is a carrier that holds itself out as providing full "door-to-door" service from the point of origin to an ultimate inland destination. K-Line was therefore engaged for the entire multimodal shipment. K-Line issued a through bill of lading assuming responsibility for every aspect of the shipment, including not only the ocean voyage but also the inland rail journey. Rather than performing the inland rail leg itself, however, K-Line subcontracted with petitioner Union Pacific Railroad Co. ("UPRR") to fulfill its contractual undertaking to perform the final leg of the journey.

K-Line safely carried the cargo to the port of Long Beach, California, and delivered it to UPRR for rail carriage to Indianapolis. During that inland leg, however, UPRR's train derailed in Tyrone, Oklahoma, on April 21, 2005, damaging the cargo.[2] Regal-Beloit filed suit in Los Angeles Superior Court claiming $100,000 in compensation for its loss.

The remaining respondents suffered smaller losses under essentially the same circumstances. Respondent Victory suffered $40,893.70 in damages to its cargo bound for Minneapolis. Respondent PICC

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[2] Respondents have not yet had the opportunity to prove the derailment or their damages, but on petitioners' motions to dismiss, the facts alleged in respondents' complaints must be accepted as true.

is subrogated to the claim of an owner that suffered $12,524.07 in damages to a shipment *en route* to Milwaukee. And respondent Royal Sun is subrogated to a $3,012 claim on a shipment to Chicago. Each of these respondents also filed suit in Los Angeles Superior Court.

Petitioners removed all four cases to the district court, where they were consolidated into a single proceeding. After UPRR's motion to transfer the proceeding to New York was denied, petitioners moved to dismiss the action based on the Tokyo forum selection clauses in the K-Line bills of lading.[3]

The district court recognized that the Carmack Amendment, 49 U.S.C. § 11706, generally applies to the domestic rail leg of a multimodal shipment and that the forum selection clauses would be invalid under the Carmack Amendment's venue provisions. But it nevertheless granted petitioners' motions on the ground that they had successfully "opted out" of Carmack coverage under 49 U.S.C. § 10709.

The court of appeals reversed and remanded. It agreed that the Carmack Amendment applies to the

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[3] UPRR's contract with K-Line contained a very different forum selection clause requiring all cargo actions to be brought in Omaha, Nebraska. UPRR – although a U.S. railroad – nevertheless asserted (under a so-called "Himalaya" clause) the benefit of the forum selection clauses in the K-Line bills of lading. It thus argues that this dispute about a U.S. train derailment that occurred on a journey originating in greater Los Angeles should be resolved in Tokyo rather than Los Angeles.

domestic rail leg of a multimodal shipment and that the forum selection clauses would be invalid under the Carmack Amendment. But it concluded that petitioners could not "opt out" of Carmack coverage under 49 U.S.C. § 10709 because the relevant provision for this transaction would be 49 U.S.C. § 10502. The court of appeals remanded for the district court to determine whether petitioners had successfully opted out under § 10502. The remanded matter is still pending in the district court.

REASONS FOR DENYING THE PETITIONS

The court below carefully reviewed this complex case, meticulously analyzed an intricate statutory scheme (through frequent amendments and two recodifications), and correctly resolved each of the many issues before it. Indeed, the most recent scholarly writing on the subject – an authority even petitioners' amici cite, *see* Int'l Group Amicus Br. 15 n.12 – explains in detail why the central holdings in the decision below are correct. *See* Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1 (2009).[4]

[4] Professor Sturley's article was published almost simultaneously with the decision below, and thus does not directly discuss it. But the article analyzes the central issues in the case – including the only issue on which petitioners allege a circuit conflict – and fully supports the lower court's result and reasoning.

UPRR damaged respondents' cargo on April 21, 2005. Four and a half years later, petitioners are still fighting to deny respondents access to the Congressionally guaranteed forum in which they seek compensation for their losses. There is no need for this Court to further prolong the litigation.

I. Petitioners Present No Question Requiring This Court's Intervention.

It is somewhat difficult to identify the precise questions petitioners wish this Court to answer. UPRR (at i) asks "[w]hether the Ninth Circuit must be reversed" and suggests at least three potential errors (one of which raises multiple questions). K-Line (at i) purports to ask a single question but it raises at least three independent issues. And the argument sections of each petition raise additional issues that are not mentioned in either Question Presented. It appears that petitioners want this Court to attempt to micro-manage the lower courts' development of all of transport law.

To assist in the identification of the issues before the Court, this brief (at i) lists the six principal questions that it appears – from the petitions as a whole – that petitioners wish to raise. The "separate bill of lading" question was the issue before the Court

in *Altadis*. The five remaining questions are new to this case.[5] None of the six is currently cert-worthy.

This Court should intervene in a case only when necessary to advance an important public interest. No need exists for the Court's intervention here. Everything that petitioners seek could be achieved without this Court's assistance.

A. Petitioners do not even allege a conflict on most of the issues that they seem to raise.

Unlike *Altadis*, which cleanly presented only the "separate bill of lading" issue, the current case raises at least half a dozen independent issues. *See supra* at i. Petitioners do not even attempt to claim that any of the additional issues involves a circuit conflict. That is not an oversight; there are no such conflicts.

No court of appeals has ever accepted petitioners' "import" argument, *i.e.*, that the recodified Carmack Amendment does not apply to cases involving imports from a foreign country. *See* Sturley, *supra*, 40 J. MAR.

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[5] Because *Altadis* involved a shipment from a U.S. territory rather than a foreign country, it did not implicate the "import" or "non-adjacent foreign country" questions. In this Court the *Altadis* petitioner sought to apply the Carmack Amendment against only the inland carrier, so the "ocean carrier" question did not arise. Because *Altadis* involved motor carriage rather than rail carriage, 49 U.S.C. §§ 10502 & 10709 did not apply, and the comparable provisions for motor carriers were not relevant on the facts of the case.

L. & COM. at 32 & n.185. The cases instead support the decision below. Indeed *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986) – the principal case on which both petitioners rely so heavily – applied the post-recodification Carmack Amendment to the inland leg of an import shipment. Neither petition cites even a district court case to the contrary. *See* UPRR Pet. 21-22; K-Line Pet. 18-19. Nor does any amicus brief. *See* AAR Amicus Br. 6-9, 12; Int'l Group Amicus Br. 13-15; WSC Amicus Br. 4-7. Moreover, respondents are not aware of any state or federal case to the contrary.

Similarly, no court of appeals has ever accepted petitioners' "non-adjacent foreign country" argument, *i.e.*, that the recodified Carmack Amendment does not apply to cases involving trade with a non-adjacent foreign country. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 34 & nn.193-94. Once again, the cases support the decision below. Even petitioners' leading case applied the post-recodification Carmack Amendment to a shipment from non-adjacent Switzerland. *See Swift*, 799 F.2d at 698. Again, neither petition nor any amicus brief cites even a district court case to the contrary. *See* UPRR Pet. 22-23, 27; K-Line Pet. 19-22; AAR Amicus Br. 6-9; WSC Amicus Br. 5-7; *cf.* Int'l Group Amicus Br. 13 n.11 (listing "recent cases [that] have applied the Carmack Amendment to multimodal carriage from or to non-adjacent foreign countries"). Again, respondents are not aware of any state or federal case to the contrary.

Only K-Line makes the "ocean carrier" argument, contending that a company qualifying as an ocean carrier cannot also satisfy the Carmack "rail carrier" definition, and thus cannot be subject to the Carmack Amendment. Although K-Line (at 21) hints that the decision below may be in tension with *Rexroth Hydraudyne B.V. v. Ocean World Lines*, 547 F.3d 351 (2d Cir. 2008), on the "ocean carrier" question, there is (as K-Line implicitly concedes) no conflict. *Rexroth* involved no cargo damage during inland carriage that could implicate the Carmack Amendment.[6] The only other appellate decision to address the "ocean carrier" issue appears to be *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381, 391-94 (8th Cir. 1960), in which the Eighth Circuit (in an opinion by then-Judge Blackmun) reached the same conclusion as the court below.

Only UPRR (at 28-35) raises the "opt-out" questions. On the § 10709 opt-out question, it argues that it may rely on § 10709 in the circumstances of this case to avoid the statutory requirements of the Carmack Amendment despite the admitted application of § 10502, and despite the original shipper's failure to receive the "alternative terms" that the statute requires. On the § 10502 opt-out question, UPRR similarly argues that it may rely on § 10502 to avoid the Carmack Amendment. For each question,

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[6] *Rexroth* involved a misdelivery by the contracting carrier after the safe completion of the inland carriage. *See* 547 F.3d at 354.

UPRR simply argues that this Court should correct what it characterizes as an error below. It cites no other judicial decisions that have even addressed the "opt-out" questions, let alone resolved either of those questions in conflict with the decision below.

In the absence of any conflict on the five non-*Altadis* questions that petitioners raise, there is no need for this Court's intervention. Those issues should be allowed to percolate so that this Court can see whether a problem develops and (if a problem does develop) can have the benefit of the courts of appeals' analysis before tackling the subject. For the time being, at least, the matter can safely be left to the lower courts.

B. The one conflict that petitioners raise is not so entrenched as they claim.

Petitioners argue that this Court should hear all six of their issues based on a single conflict over the "separate bill of lading" question. But even that conflict is not so entrenched as petitioners assert. The entire line of cases supporting petitioners' argument is anchored on an isolated dictum in *Swift* that even petitioners recognize as being inconsistent with the holding. *See* UPRR Pet. 17.[7] The circuits on petitioners' side of the conflict generally followed that

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[7] Some courts have suggested that the entire "separate bill of lading" doctrine may be based on a typographical error. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 10 & n.51 (citing cases).

dictum blindly, with no analysis whatsoever. Most tellingly, none of the courts directly or indirectly adopting that dictum analyzed the governing statutory language.

The only courts of appeals that have carefully analyzed the issue and considered the statutory language – the court below and the Second Circuit in *Sompo Japan Insurance Co. v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006) – both rejected the "separate bill of lading" doctrine. Moreover, recent scholarship has explained in detail why there is no legitimate basis for the doctrine. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 8-26.

None of the courts adopting the questionable doctrine considered any of the arguments raised in *Sompo*, the decision below, or the recent scholarship. All but one of the cases supporting petitioners were decided before *Sompo*. And *Altadis* was decided so soon after *Sompo* that the Eleventh Circuit was unaware of it.[8] The conflict cannot be considered "entrenched" until the courts on each side have considered the opposing arguments and rejected them. At the very least, this Court should postpone further consideration of this issue and allow it to

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[8] The Eleventh Circuit's *Altadis* panel erroneously thought that the only authority contrary to its conclusion was the Ninth Circuit's earlier decision in *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000). *See Altadis*, 458 F.3d at 1292 n.9 (citing *Neptune* and characterizing "[t]he Ninth Circuit's holding and discussion" as "limited to a single sentence").

percolate until the courts following the *Swift* dictum have had an opportunity to reconsider their positions in light of the compelling arguments on the other side. If one of those courts adheres to its error, this Court could then review that decision.

C. Petitioners themselves have the contractual power to correct any perceived problem without any action by this Court.

Even if the court below had erred on any of the six questions that petitioners implicitly raise here, this Court would not need to address the issue. Petitioners already have the ability to avoid the impact of the decision below by contract. Indeed, the decision below provides a virtual roadmap for petitioners and other carriers in future cases. They need only offer the true shipper the option of Carmack terms (as Congress required).

For carriers that deal directly with the shipper (such as K-Line in this case), offering Carmack terms is simply a matter of ensuring that their boilerplate contracts (drafted by their lawyers) comply with the Congressional mandate. Contrary to amicus WSC's suggestion (at 9-10), the carrier need not know which inland carrier will ultimately handle the road or rail leg. For those shippers that elect Carmack terms, the carrier can simply purchase sufficient insurance to cover the potential cargo loss or damage claims at Carmack levels (and pass on any higher cost to the

shipper).[9] This would not create a practical problem for these carriers. On the contrary, their contracts with the inland carriers (which have been revised in the three years since *Sompo*) already require them to provide this option to the original shippers. *See infra* at 13-14.

UPRR (at 14, 33) complains that it would be "utterly impractical" for an inland carrier to "ensure[ ] that the overseas shipper – with whom [it] has no direct contact – is . . . offered contractual terms consistent with Carmack." That argument is disingenuous. Not only is it practical for inland carriers to protect themselves in this fashion, but after *Sompo* railroads began doing exactly that. They have already revised their standard contracts to require the original carriers (such as K-Line) to give the necessary choice to the original shippers. If an original carrier fails to give an original shipper that choice, then the original carrier must indemnify the railroad for any liability imposed on the railroad as a result. As one commentator explained:

> Under the revision [to the standard contract that governs the legal relationship between railroads and ocean carriers], the ocean carrier, as the railroad's ~~con~~tract shipper, is obligated to indemnify the railroad if the railroad loses its limitations of liability

[9] Such insurance would provide any necessary protection regardless of the choice of inland carrier or the form of sub-contract that the ocean carrier concluded with the inland carrier.

> because the ocean carrier did not put its own shipper on notice of the railroad's liability limitations and Carmack opt out provisions. In short, the railroads are throwing the obligation of Carmack notification onto the ocean carriers.

Paul Keane, *US Law – COGSA Limitations and Intermodal Transport*, 192 GARD NEWS 22, 24 (2008); *see also* Sturley, *supra*, 40 J. MAR. L. & COM. at 40 & n.228 (citing carriers' lawyers and others' explanations of actions that have been taken and that could be taken to further protect carriers).[10]

This Court need not protect petitioners from the consequences of their own actions. The decision below explains how Congress has already given them the tools to protect themselves by contract. More significantly, inland carriers are already using those tools. The only reason this case is here is that the governing contracts were concluded in 2005 – over a year before *Sompo* reminded inland carriers of the need to comply with the terms of the governing federal statute. There is no reason to believe that such cases will continue to arise now that revised contracts address the issue. If they do the Court could

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[10] Since all of the commentary discussing the contractual solutions was published after January 2007, those solutions would not have been well-established, let alone well-known, when certiorari was granted in *Altadis* (less than six months after *Sompo* was decided).

address the issue in a future case (assuming it were truly a problem warranting this Court's attention).

D. The Surface Transportation Board should address any problems with the application of the opt-out provisions.

As carriers' lawyers recognize, *see supra* at 13-14 & n.10, the statutory opt-out provisions, 49 U.S.C. §§ 10502 & 10709, already give petitioners all the protection they may need. The decision below does not alter that. If petitioners truly desire "guidance regarding how to read § 10502 and § 10709 in tandem," UPRR Pet. 12, they should seek relief in the first instance not from this Court but from the Surface Transportation Board (STB), which could initiate a rule-making proceeding to provide that guidance. This is not an abstract suggestion. The STB is currently addressing closely related issues and would thus be the logical entity initially to consider the two "opt-out" questions raised here.

The STB began addressing the scope of § 10709 more than two years ago. *See Interpretation of the Term "Contract" in 49 U.S.C. 10709*, 72 Fed. Reg. 16316 (2007) [STB Ex Parte No. 669]. Another STB proceeding on the parameters of § 10709 is now pending. *See Rail Transportation Contracts Under 49 U.S.C. 10709*, 74 Fed. Reg. 416 (2009) [STB Ex Parte No. 676]. Expanding that proceeding (or more likely instituting a new one) to address the relationship between § 10502 and § 10709 would be a logical

addition to the STB agenda, particularly since § 10502 is simply a grant of authority to the STB.[11]

II. Even If This Court Wished To Resolve The One Conflict That Petitioners Raise, This Case Would Be A Very Poor Vehicle.

Because events of the last two and a half years show that petitioners can fully protect their interests by contract, this Court's intervention is unnecessary. *See supra* part I. If the Court nevertheless wishes to resolve the one conflict on which petitioners build their argument, this would still be a very poor case in which to do so. The Court should instead wait for a suitable vehicle (such as *Altadis*). If the issue is really important enough to warrant this Court's attention, it will arise again in another case that presents the issue cleanly. The Court need not accept the poor vehicle that petitioners offer here.

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[11] In any event, it would be premature for this Court to address the two opt-out questions on an interlocutory basis. The district court should at least have the opportunity to decide on remand whether petitioners satisfied the statutory requirements to opt out of Carmack coverage under § 10502, as UPRR (at 32) claims. If the district court were to rule for petitioners in the already-pending remand action, it would moot their remaining arguments.

A. The other issues that petitioners raise are likely to interfere with this Court's ability to reach the "separate bill of lading" question.

If the Court wishes to resolve the "separate bill of lading" question (the only issue on which petitioners even claim a circuit conflict), a case such as *Altadis* that raises only that issue would provide a more suitable vehicle.

A suitable case could arise in any domestic trade,[12] including multimodal shipments to or from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, or any other overseas territory (*see, e.g.*, *Altadis*); multimodal shipments with a sea leg between coasts (*e.g.*, between California and New York); multimodal shipments with an intracoastal sea leg (*e.g.*, between Alaska and California or between New York and Florida); and interstate multimodal carriage that includes a river leg. Such commerce is already routine. It is likely to become even more common in light of current efforts to divert commercial traffic from overcrowded highways to coastal waterways. *See, e.g.*, Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 1121(a), 121 Stat. 1492, 1760-61 (2007) (codified at 46 U.S.C.

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[12] A suitable case could also arise in an export shipment to Canada or Mexico (such as a shipment from Honolulu to Vancouver), but such shipments are less common than the domestic examples discussed in the text.

§§ 55601-05) (establishing short sea transportation program).

If petitioners were correct about the importance of the issue and the need for this Court's intervention, cases raising the issue in a suitable context would occur with some frequency. If a good vehicle does not arise soon, it will presumably be because carriers have already addressed the issue by contract, *see supra* at 12-15, thus avoiding the need for judicial action. It would in any event prove that this Court's intervention was unnecessary.

If the Court instead hears a case such as this one, with so many other issues, there is a risk that it would never reach the "separate bill of lading" question. If this Court were to agree with petitioners on any of their alternative arguments, it would be unnecessary to reach the "separate bill of lading" question (and anything said about that issue could well be dictum). And if the Court agrees with respondents on the "separate bill of lading" question (as it should), it would still be required to wade through all of the other issues (on which there is no conflict) in order to decide the case. It makes no sense for this Court to attempt to micro-manage the lower courts' development of transport law simply to resolve a conflict that the parties themselves could have avoided – and indeed have subsequently avoided – by contract.

B. The underlying dispute in this case lies outside the scope of any policy guidance that *Kirby* might provide.

Both UPRR (at 27-28) and K-Line (at 20-21) contend that the decision below is inconsistent with *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004). That is simply wrong.[13] As the applicability of the Carmack Amendment was not before the *Kirby* Court (because the issue had not been preserved below), nothing in *Kirby* could be controlling. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 18-20.

Furthermore, maritime law's emphasis on uniformity does not support petitioners. Denying Carmack applicability to the inland leg of a multimodal shipment would not foster uniformity but "would instead frustrate an explicitly articulated federal policy of uniformity." *Id.* at 21. It would simply permit a carrier to benefit from whatever terms it included in its standard-form contract, however idiosyncratic they might be. In *Altadis*, for

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[13] Amicus International Group is also wrong to suggest (at 18-21) that the decision below is in tension with the U.S. position in negotiating the Rotterdam Rules. The U.S. delegation fully supported the railroad industry's insistence that it remain subject to the Carmack Amendment and that the uniform maritime regime not apply to it – the exact opposite of the position that UPRR takes before this Court. Professor Sturley, who was an active member of the U.S. delegation, addresses this subject in detail. *See* Sturley, *supra*, 40 J. MAR. L. & COM. at 37-39.

example, displacing the Carmack Amendment resulted in the application of a non-uniform variation of the time-for-suit provision in the Carriage of Goods by Sea Act (COGSA). *See id.* at 21-23. Similarly, in this case (in sharp contrast with *Kirby*) petitioners are not seeking to enforce a provision in COGSA because no COGSA provision is relevant.[14] They instead seek to enforce K-Line's boilerplate provision in an adhesion contract that seeks to undermine the uniform Carmack rule that Congress enacted.

In any event, the current case is outside the scope of *Kirby*, which was concerned only with providing guidance for "liability limitations for negligence resulting in damage." *Kirby*, 543 U.S. at 33. Thus when it considered a new agency principle in federal maritime law to address relations between shippers (such as respondents) and sub-contracting carriers (such as UPRR), *see id.* at 32-35, the Court focused on "a *single*, *limited* purpose," *id.* at 34 (emphasis in *Kirby*). That purpose was "limitation on liability" against the backdrop of state agency law. *Id.*

Forum selection clauses, the underlying issue here, are completely outside the *Kirby* scope. Even if that had not already been clear from *Kirby* itself, it

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[14] In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), this Court rejected the argument that COGSA § 3(8) addresses forum selection clauses – thus leaving their validity to be determined under the general principles of federal maritime law as formulated in non-COGSA cases. *See* 515 U.S. at 533-34.

became abundantly clear in a GVR six days later. This Court granted certiorari in a forum selection clause case that had been held for *Kirby*, vacated the decision below, and remanded the case "for further consideration in light of [*Kirby*]." *Green Fire & Marine Insurance Co., Ltd. v. M/V Hyundai Liberty*, 543 U.S. 985 (2004). The court below in *Green Fire* had applied an agency rule in the forum selection clause context that was consistent with the agency rule that *Kirby* applied in the limitation of liability context. The *Kirby* Court explicitly criticized that application, *see Kirby*, 543 U.S. at 33-34, thus emphasizing the narrow limitation on the scope of its decision. And the GVR reinforced that signal. If the Court had intended to apply *Kirby*'s principles in the forum selection clause context, it could simply have denied certiorari in *Green Fire*. But it instead vacated the decision and remanded the case.[15] Petitioners' effort to implicate *Kirby* is unavailing in view of the narrow holding of that decision, coupled with the Court's action in *Green Fire*.

[15] On remand, the court below did not adhere to its original approach but instead decided the case on other grounds. *See Kukje Hwajae Ins. Co. v. The M/V Hyundai Liberty*, 408 F.3d 1250 (9th Cir. 2005).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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