No. 08-1554

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents concede that there is an acknowledged and deep circuit split concerning whether the Carmack Amendment applies to the inland leg of a multimodal shipment under a through bill of lading. This Court granted certiorari to resolve that split two years ago, but review was frustrated by the parties' settlement. *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1189 (2007). And although Respondents argue that this Court's decision in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), is not "controlling" (Opp.19), they do not deny that the Ninth Circuit's interpretation of 49 U.S.C. §§10502(e) and 10709 is inconsistent with the interpretation advanced by the United States at the certiorari stage in *Kirby*. The Ninth Circuit's reasoning also is irreconcilable with this Court's square holding in *Kirby* that shipping intermediaries can bind their customers to terms for downstream shipping, even if that original shipper lacked any notice of those terms *and even if (unlike here) the intermediary lacked explicit authorization to do so*. Again, Respondents have no answer at all.

Respondents instead assert that the split this Court sought to resolve in *Altadis* is "not so entrenched" (Opp.10); that the issue is no longer exceptionally important (Opp.12-14); and that this case is a "poor vehicle" for resolving it (Opp.16-21). None of Respondents' arguments is persuasive.

Nothing has changed, from either a jurisprudential or a practical standpoint, since this Court granted certiorari in *Altadis*. The circuits are hopelessly divided on a question of enormous importance to commercial trade. There is no reason to believe that

the four circuits on the other side of the split will abandon their positions, settled for many years, because of the Second Circuit's reasoning in *Sompo Japan Insurance Co. v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006). *Sompo* is unpersuasive in several important respects, and rests on prior circuit precedent that even the *Sompo* panel itself obviously believed to be incorrect. This Court also was well aware of *Sompo* when it granted certiorari in *Altadis*.

This case is an excellent vehicle. There are no preliminary or threshold issues, the essential facts are undisputed, and the forum selection clause at issue is unenforceable if Carmack applies and is enforceable if it does not. The parties here vigorously litigated, and the Ninth Circuit resolved, *both* the scope of Carmack and the operation of its contractual opt-out mechanism. That makes this case a *better* vehicle than *Altadis* would have been, because this Court can resolve these related and recurring questions in one case, rather than in piecemeal fashion. Contrary to Respondents' suggestion, there is no danger that this Court would be prevented from reaching the merits of the "separate bill of lading" issue. Whether Carmack applies at all to the inland leg of international through shipments is a *threshold* question.

Respondents' suggestion that rail carriers might be able to resolve this problem with contractual protections or indemnities is unworkable. This Court recognized in *Kirby* that the investigation necessary to ensure that shipping intermediaries live up to such promises would be impractical and excessively burdensome. And Respondents' invocation of the STB's potential regulatory authority is just speculation. Even if the STB has the power to resolve

the statutory questions presented here, it has shown absolutely no inclination to exercise that authority.

As *amici* explain, this case presents questions of exceptional importance that affect a very large segment of the United States economy. This Court and industry commentators have recognized the increasingly important role of through bills of lading in international multimodal shipments. *E.g.*, *Kirby*, 543 U.S. at 25-26. This case implicates the same need for certainty and uniformity recognized in *Kirby*. Cargo interests and carriers alike must be able to assess and insure against the risks to which they are exposed. That is impossible given the current state of the law.

The petitions for certiorari should be granted.

ARGUMENT

1. Nothing has happened to unripen the conflict that this Court deemed ripe for consideration two years ago. Without actually engaging the merits, Respondents assert that *Sompo* contains more analysis than previous circuit decisions with contrary holdings, and that the 4th, 6th, 7th, and 11th circuits will naturally fall in line behind it. *Sompo* was decided nearly contemporaneously with *Altadis*, and discussed at length in the *Altadis* Petition. *See* Petition for Writ of Certiorari at 2, 10, 13-15, *Altadis*, No. 06-606, 2006 WL 3101141 (Nov. 1, 2006). This Court obviously was not persuaded that the Second Circuit's reasoning in *Sompo* would resolve this conflict without this Court's intervention.

It is exceedingly unlikely that the four circuits that have held that Carmack does not apply to the inland leg of a through shipment will revisit and abandon that longstanding position in light of *Sompo*. For the

reasons explained in the Petitions, the Second Circuit's decision in *Sompo* is deeply flawed. It misunderstands the timing and significance of Congress's amendment to the ICA while the *Woodbury* case was pending. *See* Pet. 21-23, 27; *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 254 U.S. 357 (1920). It also places far too little weight on the long-settled interpretation of Carmack prior to Congress's non-substantive recodifications of the ICA, and far too much on *Woodbury*'s counter-textual interpretation of a *different* provision. *Id.*

Perhaps most important, *Sompo* explicitly rests in part upon a prior Second Circuit precedent about which the *Sompo* panel was openly skeptical, but to which it felt bound. The *Sompo* panel acknowledged a "fair[] ... objection" that the precodification version of Carmack was limited to shipments involving *adjacent* foreign countries—and "the codification bill's omission of the word 'adjacent' should not be interpreted as a change in the law." 456 F.3d at 68 n.13. The *Sompo* court seemed to find that point persuasive, but concluded it was bound by a prior Second Circuit panel that had "[f]ocus[ed] solely on the post-codification language" and applied Carmack to a shipment involving a non-adjacent country. *Id.* (citing *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 75 (2d Cir. 2001)). Other circuits are not likely to follow *Sompo* into a holding that even the *Sompo* panel believed was error.[1]

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[1] Respondents wrongly suggest (Opp.8) that Petitioners' argument is inconsistent with *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986). The whole point of the *Swift* line of cases is that the domestic leg of an import transaction is outside Carmack's reach *unless* a separate bill of lading is issued for the domestic leg (as in *Swift*)—which

Respondents do not engage with Petitioners' criticisms of the decision below or of *Sompo*. Instead, Respondents rely on a single law review article, Michael Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J.Mar.L. & Com. 1 (2009), which they characterize as the "most recent scholarly writing on the subject," Opp.5. Professor Sturley is far from a disinterested academic. He represented the shippers in both *Altadis* and *Kirby*, and his article unsurprisingly is in accord with his litigation position in those cases. *See generally Altadis* Petition; Brief for Respondent, *Kirby*, 543 U.S. 14 (2004). (Professor Sturley argued vigorously in *Altadis* that the division in the circuits was firmly entrenched and ripe for this Court's review. *See Altadis* Petition 9-18.)

The article is also unpersuasive. Sturley argues that the pre-codification text of Carmack should be ignored, 40 J.Mar.L. & Com. at 34, notwithstanding Congress's express admonition that the 1978 codification of Carmack "may not be construed as making a substantive change," 92 Stat. 1337, 1466. Even the *Sompo* panel understood that the pre-codification language must control. 456 F.3d at 67-68; Pet.21. Sturley fails entirely to account for the 1920 amendment to the Interstate Commerce Act. Pet.22. He also ignores the force of Congress's reenactment of Carmack in 1995, without substantive change, against the backdrop of decades of federal appellate decisions holding that Carmack does not apply to the domestic inland leg of transportation that originates in a non-adjacent country, unless a separate bill of lading is

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effectively severs it from the prior international movement, per *Reider v. Thompson*, 339 U.S. 113, 117 (1950).

issued. Pet.26. Finally, the article offers nothing in support of the Ninth Circuit's interpretation of the ICA's opt-out mechanism. Pet.28-35.

2. Respondents assert that the petitions for certiorari actually raise six "questions," only one of which implicates a circuit conflict. Opp.6-10.

Petitioners' questions embrace several different but closely related statutory errors embedded in the Ninth Circuit's holding that Carmack applies to these shipments. The cargo here moved under contractual arrangements that are very typical for international shipping. Petitioners advance several alternative *reasons* why Carmack could not apply to intermodal shipments moving under these standard contractual arrangements—all of which are intertwined with the question on which the circuits are divided—and the law governing intermodal shipments cannot be stabilized and made uniform, as a practical matter, until they all are resolved. The issues were briefed and decided below, and this Court routinely decides related issues in tandem when necessary to provide certainty on a question of national importance or to resolve fully the questions properly before it. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009) (two related questions concerning CERCLA liability); *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 549 U.S. 1105 (2007) (1st Amendment issue that divided the circuits as well as a related due process issue). Respondents essentially mistake alternative *arguments* for separate questions presented. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 380-81 (1995).

Second, it is neither surprising nor significant that the explicit circuit conflict embraces the threshold

question of whether Carmack applies at all, but not the related questions about how Carmack's opt-out provisions should work *if Carmack applies*. In the four circuits that have held that Carmack does not apply to intermodal shipments under a through bill of lading, the operation of the opt-out provisions for such shipments is irrelevant. Those issues matter only in the Second and Ninth Circuits, which have now weighed in on them. And because the six circuits that have addressed the applicability of Carmack to through shipments encompass the six largest ports in the country (accounting for more than 90% of container imports),[2] there is no reason to believe that the remaining circuits will have occasion to address *any* of these issues. Respondents' implication that these issues will benefit from further percolation in the lower courts is, therefore, entirely misplaced.

These related issues are also highly important in their own right. The Second and Ninth Circuits' interpretations of §10502(e) have upended settled expectations in the transportation industry in conflict with a central premise on which *Kirby* was based. The United States represented to this Court in *Kirby* that the exempt intermodal transportation at issue there was not subject to Carmack because it was moving under a §10709 contract. *Kirby* Invitation Br. 12. That representation was crucial to this Court's grant of certiorari in *Kirby*, because if Carmack had applied this Court could not have reached the issue it granted certiorari to resolve. And the Ninth Circuit's holding that §10502(e) requires the railroad to extend a

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[2] *See* Martitime Administration, http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited Sept. 28, 2009).

Carmack-compliant alternative offer *to the original shipper*, rather than to an intermediary, is plainly inconsistent with this Court's holding that intermediaries can always bind their customers to shipping terms.

3. This case is an excellent vehicle. If this Court grants certiorari, the circuit conflict will be squarely presented. There are no threshold issues or disputed facts. If this Court were to hold that Carmack does not apply, it would not need to address the other related issues decided by the Ninth Circuit. But if this Court were to decide that Carmack applies, it would then have an opportunity to clarify the relationship between §§10709 and 10502(e), and whether (and to whom) an alternative offer of Carmack-compliant terms must be made. Respondents' suggestion that those secondary issues might prevent this Court from resolving the threshold issue makes no sense. Of course this Court could *choose* to skip over the threshold question and hold that these parties validly contracted out of Carmack, assuming Carmack applies at all. But nothing would force this Court to approach the issues in such an awkward and elliptical way.

That this case presents the full range of interrelated statutory questions is a virtue, not a vehicle problem. If Carmack applies to intermodal shipments from non-adjacent countries under a through bill of lading, then the requirements for contracting out of Carmack become crucially important. This Court granted certiorari in *Altadis* and *Kirby* because it recognized the importance to international trade of clear, sensible rules governing intermodal shipments. This case presents the Court with an opportunity to bring genuine clarity and

stability to the law, and to correct aspects of the Ninth Circuit's analysis that are plainly inconsistent with the policies articulated in *Kirby*.

The second alleged "vehicle problem" Respondents identify (Opp.19-21) has nothing to do with whether this case is suitable for review; rather, it is an unpersuasive attempt to limit *Kirby* to its facts by suggesting that its holding does not apply to forum selection clauses. Nothing in this Court's decision indicates a desire to limit *Kirby*'s core holding: that downstream rail and motor carriers are entitled to rely upon and enforce the terms of a through bill of lading to which the shipper has agreed. 543 U.S. at 31-32.

Respondents contend that their narrow view of *Kirby* is confirmed by the fact that this Court granted, vacated, and remanded a Ninth Circuit decision involving a forum selection clause for further consideration in light of *Kirby*. *Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*, 543 U.S. 985 (2004). This Court's GVR in *Green Fire* cannot bear the weight Respondents place upon it. Respondents assert that the Ninth Circuit in *Green Fire* "had applied an agency rule in the forum selection context that was consistent with the agency rule that *Kirby* applied in the limitations of liability context." Opp.21. That is only half correct. *Green Fire* did rely on traditional agency principles in holding that the downstream carrier could enforce a forum selection clause (and a liability limitation) in a bill of lading. The shipper respondents in *Kirby* had urged this Court to follow suit, apply traditional principles of agency law, and find that Norfolk Southern could *not* enforce the terms of the bill of lading because it was not the shipper's "agent." This Court rejected that argument, holding

that "reliance on agency law is misplaced here," 543 U.S. at 34, and that shippers are bound to agreements between intermediaries and downstream carriers without regard to "traditional agency principles," *id.* This Court GVR'd *Green Fire* because *Kirby* had discredited *Green Fire*'s reasoning; it in no way "signals" that *Kirby*'s holding is limited to one particular type of contract term.

4. Finally, Respondents suggest that the international shipping community might be able to resolve these problems without this Court's intervention, either through improved contractual terms or rulemaking by the STB. Neither argument is persuasive.

First, Respondents propose (Opp.13) that UP should "solve" the problems created by the Ninth Circuit's decision by contractually requiring intermediaries to offer Carmack terms to the original overseas shipper, or by negotiating an indemnity from the intermediary. There are serious practical obstacles to obtaining or enforcing such agreements. *See* "K"-Line Reply 2-4. "In intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner," and a rule requiring carriers to "seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection," would be wholly unworkable. *Kirby*, 543 U.S. at 34-35. The necessary "information gathering might be very costly or even impossible," and carriers would want to charge shipping intermediaries higher rates, "interfer[ing] with statutory and decisional law promoting nondiscrimination in common carriage." *Id.* at 35.

A carrier also could not have confidence that Carmack would not apply to a shipment unless it independently verified that the offer was made. Nor is an expensive and uncertain after-the-fact cause of action an acceptable substitute for the carrier's right to know *in advance* which liability regime will govern (particularly where the intermediary may be insolvent or not subject to suit in the United States). This Court thought the carrier's need for certainty on that issue was so important in *Kirby* that it held that shipping intermediaries can bind their customers to the downstream carrier's terms *even without express authorization to do so.*

Second, Respondents suggest (Opp.15) that Petitioners should "seek relief" from the STB. That suggestion rests on a string of wholly unsupported conjectures—including that the STB is interested in attempting a resolution of these issues, and that it has the political will and legal authority to impose a solution. This Court does not refrain from resolving square circuit splits concerning the interpretation of federal statutes based solely on the theoretical possibility that an agency might have authority to issue a regulation addressing the subject. The STB is not a party to this case. It has not even proposed rulemaking on any of these issues. As Respondents acknowledge, none of the STB proceedings concerning §10709 addresses the question whether §10502(e) places any limits on the ability of exempt carriers to contract out of Carmack; and the only agency pronouncements on point confirm Petitioners' reading of §10502(e). *See* Pet.30-31.

In any event, the STB has already expressed its views to this Court. The agency was the Solicitor

General's client, and appeared on the briefs, in *Kirby*. The STB understood that the multimodal shipments in *Kirby* were moving under §10709 contracts, even though they were exempt. *Kirby* Invitation Br. 12 ("[T]he rail transport in this case was provided as contract carriage under [§]10709"); *id.* at 11 n.4 (noting that the transportation is exempt).

CONCLUSION

The petitions for certiorari (Nos. 08-1553, 08-1554) should be granted.

Respectfully submitted,

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