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No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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. Such "intermodal" or "multimodal" transportation of goods now accounts for more than $1 trillion each year in U.S. trade. The Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes) ("COGSA"), governs the rights and liabilities of parties to an international maritime bill of lading. COGSA allows parties to such maritime contracts to extend COGSA liability terms by contract for the entire carriage—including any inland leg of the journey. 46 U.S.C. §30701 (Notes Secs. 7, 13). The Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. §11706 (rail carriers) and 49 U.S.C. §14706 (motor carriers), supplies the default liability regime for rail and motor carrier transportation within the United States. Other provisions of the ICA authorize carriers to contract out of Carmack's default rules. *See* 49 U.S.C. §10709. The question presented is:

Whether the Ninth Circuit must be reversed because it erroneously held, in conflict with four other circuits, that the Carmack Amendment applies to the inland leg of an international, multimodal shipment under a "through" bill of lading, and also erred by holding that carriers providing exempt transportation cannot contract out of Carmack under 49 U.S.C. §10709 or by offering Carmack-compliant terms to the rail carrier's own direct customer?

LIST OF PARTIES

1. Petitioner Union Pacific Railroad Company was a defendant in the district court and an appellee in the court of appeals.

2. Petitioners Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc. were defendants in the district court and appellees in the court of appeals.

3. Respondents Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. Ltd. (Shanghai Branch), and Royal Sun Alliance Insurance Co. Ltd. were plaintiffs in the district court and appellants in the court of appeals.

RULE 29.6 STATEMENT

Union Pacific Railroad Company was formerly known as the Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6 percent of Union Pacific Railroad Company's stock and also wholly owns the Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and Union Pacific Railroad Company has issued publicly traded debt securities.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App.1a-35a) is reported at 557 F.3d 985. The opinion of the District Court (Pet.App.36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on February 4, 2009, and no party sought rehearing. On April 20, Justice Kennedy extended the time for filing any petition to and including June 18, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the Carmack Amendment, 49 U.S.C. §§11706 and 14706, other relevant provisions of the Interstate Commerce Act (codified at Title 49), and the Carriage of Goods by Sea Act, 46 U.S.C. §30701 (Notes), are reproduced at Pet.App.48a-115a.

STATEMENT OF THE CASE

Most foreign trade is transported in freight containers that are carried both by sea on ships and by land on trains or trucks. Such "multimodal" or "intermodal" shipments now account for more than $1 trillion each year in U.S. trade. The modern industry practice is for shippers to arrange on a "through" contract basis for "'door-to-door transport'" across oceans and to inland destinations making "'efficient use of all available modes of transportation by air, water, and land.'" *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25 (2004) (quoting 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 589 (4th ed. 2004) ("Schoenbaum")).

This case involves contracts for the continuous carriage of goods from China to various destinations in

the United States. The issues presented arise from the confluence of two statutory schemes. The Carmack Amendment to the Interstate Commerce Act ("ICA"), now codified at 49 U.S.C. §11706 (rail carriers) and 49 U.S.C. §14706 (motor carriers), supplies the default liability regime for rail and motor common carrier transportation within the United States and strictly limits the venue in which any suit for cargo damage may be brought. 49 U.S.C. §11706(d)(2). Parties may, however, opt out of the ICA, including the Carmack Amendment, by entering into a contract for service on specified terms. *See* 49 U.S.C. §10709; *cf. id.* §§10502(e), 11706(c).

The Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936) (46 U.S.C. §30701 (Notes)), governs the rights and liabilities of parties to an international maritime bill of lading. COGSA allows parties to agree to COGSA liability terms for the entire carriage—including any inland leg of the journey. (Notes Secs. 7, 13).

The issue here is whether the carriers may enforce the forum selection clause in the maritime contracts to which the shippers agreed. If, as the Ninth Circuit below held, the Carmack Amendment applies to the inland rail portion of this contract carriage, then the forum selection clause is unenforceable. If the parties' contracts govern, as four other circuits have held, the forum selection clause is enforceable. The resolution of that issue will also determine the fundamental liability rules governing the suit.

Statutory Background

1. a. In 1887, Congress enacted the ICA and created the Interstate Commerce Commission ("ICC") to regulate railroad transportation. Act of Feb. 4, 1887,

ch. 104, 24 Stat. 379. In 1906 Congress added the Carmack Amendment. Act of June 29, 1906, ch. 3591, §7, 34 Stat. 584, 595. Under Carmack, a shipper may recover actual damages sustained as a result of loss or damage to its cargo, from either the delivering carrier or the carrier that issued the bill of lading. 49 U.S.C. §11706(a)(1)-(3).[1] Courts have characterized Carmack as imposing on carriers "'something close to strict liability.'" *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 59 (2d Cir. 2006) (citation omitted). Carmack also expressly limits the venues in which a claim may be brought. *See* 49 U.S.C. §11706(d)(2). Forum selection clauses in a bill of lading subject to Carmack are therefore generally unenforceable.

Carmack has always applied to domestic interstate transportation. But from 1915 until 1978, its application to *foreign* trade was expressly limited to transportation "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. §20(11) (1976). For decades courts held that Carmack applied to the inland leg of a multimodal ocean shipment *only* if a separate bill of lading was issued for the inland leg, rendering it a separate domestic shipment within Carmack's terms. *Infra*, at 22.

Congress enacted the ICA into positive law in 1978, "without substantive changes." Pub. L. No. 95-473, §3, 92 Stat. 1337, 1466 (1978); *see also* H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009,

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[1] In certain circumstances a rail carrier may limit its liability "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." 49 U.S.C. §11706(c)(3)(A); *see also id.* §14706(c)(1)(A) (motor carriers).

3018 (Congress intended to "make[] no substantive change in the law"). The codified version of Carmack refers, however, to "transportation or service subject to the jurisdiction of" the ICC. 92 Stat. at 1453. Carmack was again reenacted in 1995, without any change to the relevant language, except that it now refers to the jurisdiction of "the Board," rather than the ICC. Interstate Commerce Commission Termination Act of 1985 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. §11706).

The Board's jurisdiction includes transportation within the United States that is "between a place in ... the United States and a place in a foreign country." 49 U.S.C. §10501(a).

b. From 1976 to 1980 Congress undertook an expansive deregulation of the rail industry. The Railroad Revitalization and Regulatory Reform Act of 1976 created a mechanism through which the STB may "exempt" a carrier, class of carriers, or a particular service from some or all of the ICA's regulatory requirements. Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended at 49 U.S.C. §10502(a)).

Four years later, Congress passed the Staggers Rail Act. Pub. L. No. 96-448, 94 Stat. 1895, 1896-97 (1980) ("Staggers") (finding that "regulations affecting railroads have become unnecessary and inefficient" and "greater reliance on the marketplace is essential"). Among other things, Congress added to the exemption provision a subsection explicitly authorizing the Board "to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." Staggers, §213, 94 Stat. at 1913 (codified at 49 U.S.C. §10502(f)). The Board has exercised that authority. *See* 49 C.F.R. §§1090.1(4), 1090.2. The

Board "may specify the period of time during which an exemption granted under this section is effective," 49 U.S.C. §10502(c), and retains the power to "revoke an exemption," *id.* §10502(d). Such "exempt" carriage thus remains subject to the Board's jurisdiction. *See* Improvement of TOFC/COFC Regulation, 46 Fed. Reg. 14,348, 14,351 (Feb. 27, 1981) ("Nothing in this exemption shall be construed to affect our jurisdiction ....").

Staggers also made clear that carriers may contract out of the ICA, including Carmack's default liability and venue rules. It added 49 U.S.C. §10502(e), which clarifies that an exemption from regulation pursuant to §10502(a) does not itself "relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [the Carmack Amendment]," but also provides that "[n]othing in this subsection or [Carmack] shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of [Carmack]." Staggers, §213(e), 94 Stat. at 1913.

Staggers also added §10713 (now codified as amended at 49 U.S.C. §10709), which applies to *all* carriage "subject to the jurisdiction of the Board" and states:

> (a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

> (b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.
>
> (c) ....
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, *unless the parties otherwise agree.*

(emphasis added). The service provided under such contracts is therefore "exempt ... from all regulation and all of the requirements of the Interstate Commerce Act," H.R. Rep. No. 96-1035, at 100 (1980), 1980 U.S.C.C.A.N. 3978, 4132, including Carmack's venue rules.

Congress amended and recodified §10709 in 1995 as part of the ICCTA, which abolished the ICC, created the STB, and revamped Title 49 "to minimize the need for Federal regulatory control over the rail transportation system" in order "to ensure the development and continuation of ... effective competition among rail carriers." 49 U.S.C. §10101(2), (4).

2. a. COGSA "is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (citation omitted).

A bill of lading is a contract recording that a carrier has received certain goods from a shipper and

establishing other conditions that "govern[] the relationship of the parties before delivery of the goods." 1 Schoenbaum, *supra*, at 621. Historically, ocean bills of lading were not uniformly enforceable in all nations. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-43 (2d ed. 1975). That "distressing lack of uniformity in shipping practice and law" prompted efforts to establish "uniform international regulation of the rights and duties of carriers of ocean cargo." 1 Schoenbaum, *supra*, at 636.

The Hague Rules of 1921 established uniform international law governing the carriage of goods by sea. In 1936, Congress implemented those rules (as amended by international convention in 1924) by enacting COGSA. *Sky Reefer*, 515 U.S. at 536-37.

b. COGSA governs "[e]very bill of lading ... for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. §30701 (Notes). It guarantees shippers' rights against carriers and establishes the carriers' minimum liability to shippers for cargo damage or loss. (Notes Secs. 2-4).

By its terms, COGSA applies to "the period from the time when the goods are loaded on to the time when they are discharged from the ship," the so-called "tackle-to-tackle" period. (Notes Sec. 1(e)). But the statute also permits the carrier and shipper to agree to COGSA terms for "the entire period in which the [cargo] would be under [the shipper's] responsibility, including the period of the inland transport." *Kirby*, 543 U.S. at 29 (citing (Notes Sec. 7)). "[C]ontractual extension of COGSA is now routine in the shipping industry." *Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007). A so-called "clause paramount" in a bill of lading extends COGSA's liability rules beyond the

tackle-to-tackle period to the cargo's final destination. A "Himalaya clause" extends the terms of the bill of lading, including the contractual extension of COGSA, to parties with whom the ocean carrier has subcontracted for inland transportation.

c. Under COGSA, the parties may agree to a liability limitation. The default (and minimum) liability cap is $500 per package. 46 U.S.C. §30701 (Notes Sec. 4(5)). Shippers and carriers typically opt to retain COGSA's liability limitation. Shippers pay a reduced transport rate that reflects the carriers' reduced risk, and (like the shippers in this case) obtain private insurance for the excess value of their goods. *Kirby*, 543 U.S. at 19-21 (citation omitted). COGSA also permits the parties to choose the forum in which any disputes concerning the carriage will be litigated. *Sky Reefer*, 515 U.S. at 535-37.

Factual Context

1. During March and April 2005, Defendant Kawasaki Kisen Kaisha, Ltd. ("K"-Line) accepted cargo shipments to be carried from Shanghai, China to various delivery points within the United States via the Port of Long Beach, California. Pet.App.2a. These shipments for "through" (door-to-door) transportation of cargo were undertaken pursuant to through bills of lading between "K"-Line and the shipper Plaintiffs.[2]

The intermodal through bills of lading that govern the shipments in this case—like the vast majority of

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[2] Plaintiffs are Regal-Beloit Corporation, Victory Fireworks, Inc. (both Wisconsin corporations), and two foreign insurers—PICC Property and Casualty Company, Ltd. (based in Shanghai, China) and Royal Sun Alliance Insurance Co., Ltd. (based in the United Kingdom). Each filed separately, but the cases were consolidated.

such contracts—contain both a Himalaya clause (extending the contract to any subcontractors) and a clause paramount (extending COGSA to the inland leg). Pet.App.6a & nn.4, 5. The through bills authorize "K"-Line "'to sub-contract *on any terms whatsoever* Carriage ... by any of the following: (I) any Connecting Carrier ... (III) sub-contractors, ... agents and independent contractors ....'" Pet.App.38a (quoting bills of lading) (emphasis added). The bills of lading also include a forum selection clause providing that "'any action [under the bill of lading] or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction [the shippers] irrevocably consent.'" *Id.*

2. Through its American agent, K-Line America, Inc. ("KAM"), "K"-Line contracted with Union Pacific ("UP") to provide the inland rail transportation contemplated by the through bills of lading. *Id.* at 6a.

The "Exempt Rail Transportation Agreement" to which "K"-Line and UP agreed incorporated liability terms from UP's "Master Intermodal Transportation Agreement" ("MITA"). Pet.App.6a-7a. The MITA explicitly invokes §10709 (the ICA opt-out provision) and offered "K"-Line the option of electing Carmack-compliant terms for inland domestic carriage, provided the nature of the goods is declared to UP. Pet.App.117a. (Without such disclosure, UP would have no way to price the insurance implicit in Carmack's expansive and essentially strict liability regime.) Consistent with its right under the ocean bill of lading to subcontract "on any terms whatsoever," "K"-Line instead elected a cheaper non-Carmack shipping option.

3. The cargo was loaded on vessels in Shanghai and Hong Kong, carried across the Pacific Ocean to Long Beach, and then delivered to UP to be carried by rail to its final destination. Pet.App.39a. The cargo was allegedly damaged when the train carrying it derailed in Oklahoma. Pet.App.3a.

Proceedings Below

1. a. Plaintiffs sued "K"-Line, KAM, and UP in Los Angeles Superior Court. UP removed the actions to the United States District Court for the Central District of California. Pet.App.7a. Thereafter, UP and the ocean carrier defendants moved to dismiss based on the Tokyo forum selection clause in the bills of lading. *Id.* Plaintiffs argued that the action was wholly governed by the Carmack Amendment, which would render the Tokyo forum selection clause unenforceable.

b. Relying on *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, 213 F.3d 1118 (9th Cir. 2000), the district court first held that the Carmack Amendment applies to "'the *inland leg* of an overseas shipment conducted under a single "through" bill of lading,' such as the one in this case." Pet.App.44a (citation omitted).

The district court further held the parties had contracted out of Carmack under 49 U.S.C. §10709. Pet.App.45a. Because §10709 "specifically contemplates that the parties to a rail service contract may contractually agree to litigate in a forum other than that provided by the Carmack Amendment," Pet.App.46a, the district court concluded, Plaintiffs' actions must be brought in Tokyo.

2. The United States Court of Appeals for the Ninth Circuit reversed.

a. The Court of Appeals recognized that in four other circuits Carmack does *not* apply to the inland leg of a continuous intermodal shipment from a foreign country under a through ocean bill of lading. Pet.App.17a. "Despite this weight of authority," the court held, "our own precedent expressly forecloses" that interpretation. *Id.* (citing *Neptune*, 213 F.3d at 1119).

b. The Court next considered whether the "the parties' explicit contractual extension of COGSA inland should take precedence" over Carmack. Pet.App.19a.

The Ninth Circuit first acknowledged that "[t]he unanimous [Supreme] Court in *Kirby* ... observed that an inability to extend COGSA's default rules to inland transport, so that entire shipments could be governed by the same liability regime, would defeat 'the apparent purpose of COGSA[] to facilitate efficient contracting ... for carriage by sea.'" Pet.App.24a (fourth alteration in original). The Court of Appeals further observed that "[i]gnoring a contractual provision incorporating COGSA seems particularly inappropriate where, as here, 'the parties to the bill of lading were sophisticated business entities that should rarely be released from contractual obligations.'" *Id.* (citation omitted). It recognized that the "policies recently endorsed by the Supreme Court [in *Kirby*]—such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers—recommend applying COGSA here." Pet.App.11a. The Ninth Circuit nevertheless concluded that "*Kirby* does not control." Pet.App.25a.

The Ninth Circuit further held that contractual extensions of COGSA lack statutory force and must

give way to "conflicting law." Pet.App.22a (citing 46 U.S.C. §30701 (Notes secs. 7, 12, 13)).

c. The Court of Appeals next considered whether the parties "complied with the applicable requirements for opting out of Carmack." Pet.App.26a. The court noted that "the Board has exempted the transportation at issue here" and observed that an exemption does not relieve a carrier of its obligations under Carmack. Pet.App.27a-28a (citing 49 U.S.C. §10502(e)).

Lamenting the lack of "guidance regarding how to read §10502 and §10709 in tandem," Pet.App.30a, the Ninth Circuit concluded that exempt carriers may not contract out of Carmack through §10709. It reasoned that exempt services are not "'*subject to the jurisdiction of the Board*'" for purposes of §10709, Pet.App.28a-29a (quoting 49 U.S.C. §10709(a) (emphasis added by court of appeals)), even though it had concluded that such transportation *is* subject to the jurisdiction of the Board for purposes of applying Carmack in the first instance. Pet.App.18a ("Carmack's reach is coextensive with the Board's jurisdiction."). Neither the Ninth Circuit nor Plaintiffs contend that the MITA contract was deficient in any other respect under §10709.

Adopting the Second Circuit's holding in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006), the Ninth Circuit held that §10502(e) provides a separate mechanism through which exempt transportation may avoid Carmack's default liability regime. In the Second and Ninth Circuits' view, however, §10502(e) "requires carriers providing *exempt* transportation to offer Carmack protections before they can successfully contract for alternative terms." Pet.App.29a. The

Ninth Circuit acknowledged that UP's MITA agreement offered "*K*"*-Line* the option to "'select the liability provisions set forth in [Carmack]'" for domestic transportation. Pet.App.33a (quoting MITA). The Court of Appeals held, however, that "K-line needed to offer Carmack's protections when contracting with *Plaintiffs*." *Id.* (emphasis added). The court remanded for a determination of whether "K"-Line offered Carmack-compliant terms to the shippers in China. *Id.* at 35a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a widely acknowledged, firmly entrenched circuit conflict on a question of enormous significance to international trade. The shipment in this case is representative of great numbers of international multimodal transactions, for which uniform rules of law are essential.

The Ninth Circuit's decision solidifies a 2-to-4 circuit split as to whether the Carmack Amendment applies to the inland leg of a multimodal shipment, irrespective of the terms of the maritime contract that the parties agreed would govern the entire carriage at sea and on land. This question has been percolating in the lower courts for years and is ripe for this Court's review. This Court granted review to resolve this conflict two years ago, *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), but the parties settled before that case could be heard on the merits, 549 U.S. 1189 (2007). Since then, the conflict has become only more entrenched.

Four of the first five courts of appeals that addressed this question—the Fourth, Fifth, Seventh, and Eleventh Circuits—concluded that the Carmack

Amendment does not apply to the inland leg of a multimodal shipment under a single through bill of lading. That conclusion is consistent with Congress's intent to limit Carmack's applicability, in the context of international "through" shipments, to transportation from the United States to an adjacent foreign country. In accord with this Court's decision in *Kirby*, the four-circuit majority enforces the terms of through maritime bills of lading, including the parties' contractual extension of COGSA to the inland leg of a multimodal shipment. Since this Court's decision in *Kirby*, the Eleventh Circuit has reaffirmed this rule. *See Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288, 1291-94 (11th Cir. 2006).

By contrast, the Second and Ninth Circuits have held that the Carmack Amendment applies to the inland leg of a continuous multimodal shipment. The Ninth Circuit further held that a carrier providing such service may not opt out of Carmack unless it somehow ensures that the overseas shipper—with whom the carrier has no direct contact—is first offered contractual terms consistent with Carmack. The resulting uncertainty in the law of multimodal transportation threatens a huge segment of U.S.-foreign trade.

Like this case, *Kirby* involved a one-stop-shopping arrangement. Kirby had hired an Australian freight forwarding company to arrange through transportation from Australia to Huntsville, Alabama, via the port of Savannah, Georgia. 543 U.S. at 18-19. The shipment was covered by a through bill of lading that contained a liability limitation under COGSA and a Himalaya clause extending its benefits to inland carriers. *Id.* at 19-20. The train carrying Kirby's cargo from Savannah

to Huntsville derailed, allegedly causing damage. *Id.* at 21.

This Court held that the multimodal through bill of lading was a maritime contract governed by federal law, *id.* at 23-24, and that downstream rail and motor carriers were entitled to rely upon and enforce its terms, *id.* at 31-32. In so holding, this Court was not ignorant of the potential applicability of the Carmack Amendment to the inland portion of the journey; rather, the United States and the parties in *Kirby* took the position (rejected by the Ninth Circuit below) that the inland transportation was provided under a contract for specified services under §10709, and was therefore not subject to Carmack. *See, e.g.*, Brief for United States as Amicus Curiae at 12, *Kirby*, 543 U.S. 14 (2004) (No. 02-1028) ("U.S. *Kirby* Invitation Brief"). The United States articulated that position in *Kirby*, and this Court accepted it, even though all multimodal carriage was then (and still is) exempt pursuant to §10502.[3] The Ninth Circuit's decision thus conflicts with a central premise upon which this Court's decision in *Kirby* was based.

The Second and Ninth Circuit's decisions have upended the settled expectations of innumerable multimodal carriers, which have understandably relied upon this Court's holding that downstream carriers are entitled to enforce the terms of a through bill of lading under a Himalaya clause. The United States represented to this Court in its Invitation Brief in *Kirby* (at 12) that as of 2003 well over half of all

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[3] *See* U.S. *Kirby* Invitation Brief at 11 n.4 (noting that "[t]he particular shipments at issue here are exempt," and that "such exempt freight is generally subject to the liability rules of [Carmack]" (citing 49 C.F.R. §1090.2, 49 U.S.C. §10502(e)).

containerized rail freight was transported under "contract-carriage arrangements, to which the Carmack Amendment's liability regime does not apply." The Ninth Circuit's holding that Carmack *does* apply notwithstanding the parties' contract-carriage arrangement thus has far-reaching consequences.

In light of the key differences between the liability regimes of COGSA and Carmack, the huge volume of trade that depends on certainty in applying those rules, and the opportunity for forum-shopping presented by the current state of the law, this Court should grant and consolidate the petitions for certiorari filed by UP and the ocean carrier defendants.

I. THE NINTH CIRCUIT'S DECISION PERPETUATES A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT.

All but one of the major port circuits (the exception being the Fifth Circuit) have now weighed in on the question presented, and the result is a deep and acknowledged conflict.

A. Four Circuits Have Squarely Held That Carmack Does Not Apply To The Inland Leg Of A Multimodal Shipment Covered By A Single Maritime Through Bill Of Lading

The Fourth, Sixth, Seventh, and Eleventh Circuits have all held that the Carmack Amendment does not apply to the inland leg of a multimodal shipment under a through a bill of lading. This well-established four-circuit rule is consistent with this Court's decision in *Kirby* and was recently reaffirmed by the Eleventh Circuit in *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006). Had this suit been brought

in any one of these circuits, the Tokyo forum selection clause would have been enforced.

Eleventh Circuit. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987), involved a shipment of machinery by rail from Switzerland to Germany, then by water to Charleston, South Carolina, and finally by truck to Savannah and then LaGrange, Georgia. A separate bill of lading covered the domestic inland leg from Savannah to LaGrange. *Id.* at 698.

Without examining the statutory history, the *Swift* court cursorily concluded that the scope of Carmack was coextensive with the ICC's jurisdiction and hence reached the domestic portion of all foreign trade. The court held that the separate domestic bill of lading did not transform the international shipment into a domestic intrastate movement (which, at the time, Carmack did not reach). When stating its holding, however, the *Swift* court wrote that

> when 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 ... 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).

The *Swift* court's articulation of the test for Carmack's applicability is in some tension with other aspects of its reasoning, but that test correctly implements the statutory language of Carmack prior to the 1978 codification—which extended to interstate domestic shipments and shipments "from any point in

the United States to a point in an adjacent foreign country" (*i.e.*, exports over land) but *not* to multimodal shipments from outside the United States to a point inside the United States. 49 U.S.C. §20(11) (1976). The *Swift* formulation proved to be highly influential.

Twenty years later, and two years after this Court's decision in *Kirby*, the Eleventh Circuit reaffirmed the rule as stated in *Swift*. *Altadis USA, Inc. v. Sea Star Line, LLC* involved a shipment from Puerto Rico to Tampa, Florida. A single through bill of lading designated COGSA as the governing law for the entire carriage. 458 F.3d at 1289-90 & n.1. The cargo was apparently stolen while in the inland motor carrier's possession. *Id.* at 1289-90.

The Eleventh Circuit held that the Carmack Amendment did not apply. The court first noted the weight of authority that "the Carmack Amendment does not apply to a shipment from a foreign country to the United States ... unless the domestic, overland leg is covered by a separate bill of lading." *Id.* at 1291. It then explained that a contrary interpretation would be inconsistent with this Court's decision in *Kirby*:

> The [*Kirby*] Court emphasized the importance of the uniformity of the general maritime law, ... the need to reinforce the liability regime Congress established in COGSA, and the apparent purpose of COGSA to facilitate efficient contracting in contracts for carriage by sea. The Court also noted that a "single Himalaya Clause can cover both sea and land carriers downstream." Finally, the Court pointed out that COGSA explicitly authorizes such clauses. Thus, the Court

> held that ... the rail carrier ... was entitled to the protection of the liability limitations in the through bill of lading.

Id. at 1294 (citations omitted). The Eleventh Circuit concluded that applying Carmack in the face of a through bill of lading "would introduce uncertainty and lack of uniformity into the process of contracting for carriage by sea, upsetting contractual expectations expressed in through bills of lading." *Id.*

Seventh Circuit. In *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992), the Seventh Circuit likewise held that Carmack "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 bill of lading." *Id.* at 394 (citations omitted). The shipper hired the defendant to transport machinery from Italy to Chicago under a through bill of lading. *Id.* at 392-94. The cargo was lost in transit, and the shipper sued invoking Carmack. *Id.* Citing the Eleventh Circuit's decision in *Swift* and this Court's decision in *Reider v. Thompson*, 339 U.S. 113 (1950), the court explained that "[b]ecause such a 'through' bill of lading includes no separate domestic segment ... the Carmack Amendment is inapplicable." 965 F.2d at 394-95.

Reider involved a shipment of goods sent from Buenos Aires under an ocean bill of lading to New Orleans, and then under a separate bill of lading from New Orleans to Boston. In holding that the Carmack Amendment applied, this Court emphasized that "[t]here was *no through bill of lading* from Buenos Aires to Boston." 339 U.S. at 117 (emphasis added).

Fourth Circuit. In *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993), a shipper contracted to have personal belongings shipped from Taiwan to Baltimore, Maryland. The goods were shipped first to California and then inadvertently forwarded to Miami, where they were destroyed by fire. *Id.* at 701. Two defendants argued that Carmack did not apply to the inland journey "because the shipment originated outside of the United States." *Id.* at 703. Citing *Reider*, *Swift*, and *Capitol Converting Equipment*, the court agreed and held that Carmack does not apply "unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.*

Sixth Circuit. In *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003), the Sixth Circuit joined the Eleventh, Seventh, and Fourth Circuits in holding that Carmack applies to the inland portion of an international multimodal shipment only where a separate bill of lading is issued for the inland journey. That case involved a containerized shipment sent from Germany to Detroit via Newark, New Jersey, pursuant to a single through bill of lading. *Id.* at 566-67. The cargo was destroyed by fire while in the rail carrier's possession. *Id.* at 567. Finding no evidence "that a domestic bill of lading was issued," the court held that Carmack did not apply. *Id.* at 569.

B. Two Circuits Have Squarely Held That Carmack Applies To The Inland Leg Of A Multimodal Shipment Covered By A Single Maritime Through Bill of Lading

By contrast, the Second and Ninth Circuits have held that the Carmack Amendment *does* apply to the

inland portion of a multimodal shipment, even where there is a through bill of lading.

Second Circuit. *Sompo Japan Insurance v. Union Pacific Railroad* involved a shipment of tractors from Japan to Georgia that was allegedly damaged by a derailment in Texas. 456 F.3d at 55. As in *Kirby*, the bills of lading contained both a clause paramount (identifying COGSA as the law governing the entire shipment) and a Himalaya clause (extending the contractual provisions of the bills of lading to downstream carriers). *Id.* at 56-57.

Agreeing with the Eleventh Circuit's "mode of analysis" in *Swift* but dismissing its holding as "fatally flawed," *id.* at 61, the Second Circuit held that the presence of a through bill of lading is irrelevant to whether Carmack applies, *id.* at 63. The Second Circuit acknowledged that the pre-1978 Carmack language is controlling, because "courts should not 'infer[] that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed,'" and "Congress made clear that the bill was intended to leave the law substantively unchanged." *Id.* at 64 (citation omitted). But the Second Circuit noted that this Court's decision in *Galveston, Harrisburg & San Antonio Railway Co. v. Woodbury*, 254 U.S. 357, 359-60 (1920), had interpreted the phrase "*from* any place in the United States *to* an adjacent foreign country" in a pre-1920 version of the ICC jurisdictional provision to cover *imports* as well as exports. *Id.* at 65. The Second Circuit concluded that Congress would have

understood the parallel language in Carmack to have the same (atextual) meaning.[4] *Id.* at 65-66.

The Second Circuit acknowledged (at 66) that the courts generally "resisted that inclination" after *Woodbury* and continued to give a plain language interpretation to Carmack, following the "influential" decision in *Alwine v. Pennsylvania Railroad Co.*, 15 A.2d 507 (Pa. Super. Ct. 1940).[5] *Alwine* declined to extend the *Woodbury* interpretation to Carmack in part because Congress *amended* the ICC jurisdictional provision shortly before *Woodbury* was decided, to conform the actual text to the result this Court ultimately reached. *See* Act of February 28, 1920, ch. 91, 41 Stat. 456, 474 (replacing "from ... to" with "from or to ... to or from"). Although Congress made minor changes to Carmack at the same time, it *did not* change the language limiting Carmack's application to foreign trade to exports to adjacent countries. *Id.* at 494-95.

The Second Circuit acknowledged a "fair[] ... objection" that, even if "from ... to" can mean "to ... from," the precodification version of Carmack was also 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. Even if this Court's

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[4] Commentators recognized that *Woodbury*'s interpretation of the ICC jurisdictional provision was a "prodigious feat of interpretation." Note, *Foreign Commerce and the Interstate Commerce Act*, 40 Harv. L. Rev. 1130, 1134 (1927).

[5] *See also Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachman v. Palmer*, 177 F.2d 427, 429 (1st Cir. 1949); *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 463-64 (E.D. Pa. 1979); *Condakes v. Smith*, 218 F. Supp. 1014, 1015 (D. Mass. 1968).

decision in *Woodbury* applies, the word "adjacent" excludes from Carmack the great majority of intermodal international shipping under a through bill of lading. 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.*

After deciding that the actual pre-1978 language of Carmack should be disregarded in favor of this Court's atextual interpretation of a different provision, the Second Circuit held that the parties' extension of COGSA to the inland rail journey lacked "the force of statute with the capability to supersede" the Carmack Amendment. *Id.* at 70-71. Attempting to distinguish this Court's decision in *Kirby*, the Second Circuit offered that "[i]n *Kirby*, the Court was primarily concerned with the lack of uniformity and consistency that would result if *state* law were applied to contracts extending COGSA's terms inland." *Id.* at 74.

Finally, the Second Circuit held—without any analysis or explanation—that §10502(e) requires an exempt carrier to "provide the shipper an opportunity ... to receive full Carmack liability coverage" before it may contract out of Carmack. *Id.* at 75. The court remanded the case to the district court to address whether the carrier had done so.

Ninth Circuit. The Ninth Circuit's holding below was foreshadowed by its earlier holding in *Neptune*, where the court stated that "the language of [Carmack] encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading." 213 F.3d at 1119. Following *Neptune* on that question, and adopting the Second Circuit's holding concerning the

requirements for exempt carriage to contract out of Carmack, the Ninth Circuit held—contrary to *Kirby*—that the inland carrier could not enforce the terms of the maritime contract to which the shippers had agreed.

II. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE TO INTERNATIONAL SHIPPING

A. Shippers And Carriers Need Predictable, Uniform Rules Governing All Legs Of Intermodal Shipments

Whether the Carmack Amendment applies to inland segments of multimodal shipments under a through bill of lading is an exceptionally important question because it affects 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. *See, e.g., Kirby*, 543 U.S. at 26 (noting "[t]he popularity of that efficient choice" and observing that "it is to Kirby's advantage to arrange for transport from Sydney to Huntsville in one bill of lading, rather than to negotiate a separate contract—and to find an American railroad itself—for the land leg"); 1 Schoenbaum, *supra*, at 595 ("[I]nstead of using separate bills of lading for each mode of carriage, an ocean carrier typically issues an *international through bill of lading* either directly or through an agent."); U.S. *Kirby* Invitation Brief, *supra*, at 10 ("[A] single 'through bill of lading' commonly covers transport of a shipper's goods all the way to an inland destination.").

The question presented in this case implicates the same need for certainty and uniformity that this Court

recognized in *Kirby*: cargo interests and carriers alike must be able to assess and insure against the risks to which they are exposed under multimodal through bills of lading.

This case is an excellent vehicle through which to resolve the confusion in the circuits. It involves claims against both a rail carrier and an ocean carrier. 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 Carmack does not apply. And unlike in some of the prior cases (including *Kirby*) the parties here vigorously litigated, and the Ninth Circuit resolved, *both* the scope of Carmack and the operation of its contractual opt-out mechanism.

B. The Ninth Circuit Has Adopted An Erroneous Interpretation Of The ICA That Threatens To Destroy Consistency And Uniformity In Intermodal Shipping Transactions

Prior to the decisions of the Ninth Circuit in *Neptune* and the Second Circuit in *Sompo*, the long-settled judicial consensus and the understanding of the transportation industry was that Carmack does not apply to the domestic inland leg of an international multimodal shipment unless a separate bill of lading is issued. That was the plain meaning of the pre-1978 statutory language, *see supra*, at 21-23, and is the best reading of this Court's holding in *Reider v. Thompson*.

Regardless, UP's contract for rail carriage with "K"-Line opted out of Carmack under §10709, which does not require that the shipper must be offered Carmack-compliant terms. Even if there were such a

requirement, offering Carmack terms to the railroad's direct customer must be sufficient.

1. Carmack Does Not Apply To The Inland Leg Of A Maritime Shipment Under A Through Bill Of Lading

This Court held in *Reider* that the applicability of Carmack turns upon "where the obligation of the carrier as receiving carrier originated"—in that case, New Orleans, where the "contract for ocean transportation terminated." 339 U.S. at 117. This Court clearly believed in *Reider* that Carmack would *not* have applied if the shipment had moved from Argentina (a non-adjacent foreign country) to Boston on a single through bill of lading. *Id.*

Congress emphasized that the 1978 codification made "no substantive change in the law" and that "the precedent value of earlier judicial decisions and other interpretations" remained in force. H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018. Despite the differences between the pre- and post-codification text of Carmack, the courts that interpreted Carmack between 1978 and 1995 adhered to the settled understanding that Carmack applied to international multimodal shipping only if a separate domestic bill of lading was issued. *See Swift*, 799 F.2d at 701; *Capitol Converting Equip.*, 965 F.2d at 394-95; *Shao*, 986 F.2d at 703-04. "Congress was aware of ... and, in effect, adopted" that consistent judicial interpretation when it again reenacted Carmack in 1995 without substantive change. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

The Second Circuit recognized in *Sompo* that the 1978 codification was supposed to be non-substantive and that Carmack should be interpreted in a manner consistent with the prior statutory language. In rejecting the longstanding interpretation of that pre-1978 language, the Second Circuit placed far too much weight on this Court's curious decision in *Woodbury*, and far too little weight on Congress's action immediately before *Woodbury*, on the decades of judicial interpretation of Carmack and repeated congressional ratification of that interpretation, and on the policies discussed in *Kirby*.

Even if *Sompo* were otherwise persuasive, Carmack *still* would not apply to the vast majority of intermodal shipping on a single through bill of lading—including the shipment in this case—because of the statutory limitation to countries "adjacent" to the United States. The *Sompo* panel acknowledged that limitation, but followed prior Second Circuit precedent that was not well reasoned. 456 F.3d at 68 n.13. The limitation to shipments involving "adjacent" countries reinforces Congress's obvious desire to exclude maritime shipping, including associated inland rail transport on a single through bill of lading, from the scope of Carmack.

Any remaining doubt should be resolved by the strong federal policy favoring uniform rules for maritime contracts, explained by this Court in *Kirby*. "COGSA ... gives the option of extending its rule by contract." *Kirby*, 543 U.S. at 29. A great many ocean shippers now choose to extend COGSA's rules to the entire period for which the ocean carrier is responsible for the cargo—including the inland transport. *Id.* Maritime commerce "would not enjoy the efficiencies of

the [COGSA] default rule" and "the apparent purpose of COGSA ... would be defeated" if it "did not apply equally to all legs of the journey." *Id.* It would be incredibly "inefficient ... [to apply] different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck." *Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 636 (7th Cir. 2003). Damage often is not even discovered until a sealed container reaches its destination, at which point there may be no way to know whether the damage occurred at sea or over land. In the Ninth and Second Circuits, therefore, the entire legal regime governing damage (including the appropriate forum for litigation) depends on a factual question that will often be highly disputed.

Congress cannot have intended such an unwieldy and unpredictable regime. Enforcing the contractual extensions Congress contemplated when it enacted COGSA is also perfectly consonant with Congress's aggressive deregulation of the railroad industry over the last four decades.

2. The Ninth Circuit's Decision Undermines The Opt-Out Provisions Of The ICA

Even if Carmack does apply to the inland leg of an intermodal shipment under a through bill of lading, shippers and carriers may opt out of Carmack by contract. The Ninth Circuit below acknowledged that the direct parties to the rail service contract here (UP and "K"-Line) intended to do so. But the Ninth Circuit wrongly believed that for exempt shipments (which would include all intermodal shipments) such opt-outs should be construed as "alternative terms" permitted by §10502(e), not contracts governed by §10709, and

that Carmack-compliant terms must be offered as an alternative.

Congress enacted the Staggers Act in 1980 "to rid railroads of unnecessary and inefficient regulations that impeded the railroads' ability to compete with other modes of transportation." *Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir. 1993). Section 213 of the Staggers Act added subsection (e) to the provisions now codified at §10502, and §208(a) of the Act added the provision now codified at §10709. *See* Pub. L. No. 96-448, §§208(a), 213, 94 Stat. 1895, 1908, 1913 (1980). Through different mechanisms, §§10709 and 10502 operate to remove rail carriers from the requirements of the ICA.

Section 10502 empowers *the STB* to "exempt" "a person, class of persons, or a transaction or service" from the ICA's requirements. Section 10502 is directed solely at the STB's regulatory exemption power, as demonstrated by its heading—"Authority to exempt rail carrier transportation"—and the plain language of its various subsections. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2336 (2008) (explaining that "statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute'" (quoting *Porter v. Nussle*, 534 U.S. 516, 528 (2002))). Subsection 10502(e) limits the STB's exemption power in one crucial respect. An STB exemption order will not alone relieve a rail carrier from Carmack's default liability provisions:

> *No exemption order* issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims

> which are consistent with the provisions of section 11706 of this title [*i.e.*, Carmack].

49 U.S.C. §10502(e) (emphasis added). Although Congress withheld this power from the *STB*, Congress made clear in the next sentence of §10502(e) that this limitation does not affect the ability of the exempt *carrier* to contract out of Carmack:

> *Nothing in this subsection* or section 11706 of this title *shall prevent* rail carriers from *offering alternative terms* nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

Id. (emphasis added).

Section 10502(e) thus simply carves out from the STB's power the ability to issue a blanket exemption from Carmack, while preserving the ability of shippers and carriers to modify Carmack's terms by whatever means the ICA permits—including the simultaneously enacted §10709. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006) (provisions of the same Act of Congress should be construed *in pari materia*). The Ninth Circuit clearly erred in concluding that §10502(e) is meaningless if §10709 is available in the context of exempt carriage; it limits the effect of an STB exemption. *See* 49 C.F.R. §1090.2 ("The exemption does not ... operate to relieve any carrier of any obligation *it would otherwise have, absent the exemption*, with respect to providing contractual terms for liability and claims." (emphasis added)).

The Ninth Circuit also erred by holding that §10709 does not apply because exempt shipments are no longer "transportation subject to the jurisdiction of the Board" within the meaning of §10709(a). The Ninth

Circuit's holding rests on the implausible premise that this transportation is within the jurisdiction of the Board for purposes of triggering the Carmack Amendment, §11706, but *not* within the jurisdiction of the Board for purposes of Carmack's contractual opt-out provision, §10709, even though the relevant language of the two provisions is *identical*. There is nothing in the text or the history of the provisions to suggest that Congress intended such a result.

The text and structure of §10502 demonstrate that a discretionary exemption does not strip the Board of jurisdiction over the exempted transportation. The STB retains the power to revoke an exemption at any time. *See* 49 U.S.C. §10502(d). As the ICC explained, "unless this revocation power is a nullity, the granting of an exemption is not—and cannot be—a permanent abrogation of federal jurisdiction. The potential for total or partial reimposition of regulation is always present." *Consolidated Rail Corp.–Declaratory Order–Exemption*, 1 I.C.C.2d 895, 899 (1986). "Granting an exemption on the basis of the statutorily required findings merely affects 'the *application* of a provision of [the ICA].' Facially, the statute does not empower the ICC to remove any matter from its statutory jurisdiction." *Id.* at 898 (citation omitted) (alteration in original).

The United States has recognized that exempt transportation may contract out of the ICA through §10709. In its Invitation Brief urging the Court to grant certiorari in *Kirby*, the United States stressed that "the rail transport in this case was provided as contract carriage *under 49 U.S.C. 10709*, which would make the transport exempt from the Carmack Amendment's liability rules." U.S. *Kirby* Invitation

Brief at 12 (emphasis added). The United States was well aware that the rail carrier in *Kirby*, as in this case, was providing exempt transportation under 49 C.F.R. §1090.2. *Id.* at 11 n.4. The Ninth Circuit's decision thus conflicts in every respect with the United States's position in *Kirby*. And this Court squarely held in *Kirby* that Norfolk Southern could enforce the non-Carmack liability terms in the through bill of lading—indicating that this Court either agreed with the United States about §10709 or believed that Carmack simply does not apply to intermodal shipping under a through bill.

Nothing in §10709 requires a carrier to offer Carmack-compliant terms before entering into a contract. The Ninth Circuit's confusion about whether such terms were offered here is therefore legally irrelevant.

3. Union Pacific Complied With Any Obligation To Offer Carmack-Compliant Terms

Even if the combined effect of §§10502(e) and 10709 is that UP was required to offer "Carmack-compliant" liability terms as an alternative, it did so. Plaintiffs do not dispute, and the Ninth Circuit acknowledged, that UP's contract with its customer, "K"-Line, specifically provides that "'[o]n domestic shipments that originate in the United States, Shippers may, at their option, select the liability provisions set forth in [Carmack].'" Pet.App.33a (quoting MITA) (first alteration in original). Like the shipper in *Reider*, "K"-Line easily could have written its ocean bill of lading such that "the foreign portion of the journey terminated at the border of the United States," 339 U.S. at 117, and then could have contracted with UP for a separate shipment

originating in the United States. It simply chose not to, because the domestic rates (and particularly the Carmack-compliant domestic rates) are significantly higher. UP therefore complied with any requirement to offer a "Carmack alternative" before entering into a §10709 contract with the "purchaser[] of [its] rail services." 49 U.S.C. §10709(a).

The Ninth Circuit believed, however, that UP and its customer could not contract out of Carmack unless Carmack-compliant terms were also offered to the original shippers in China. Pet.App.33a ("To comply with §10502, K-line needed to offer Carmack's protections when contracting with Plaintiffs."). That is utterly impractical and inconsistent with *Kirby*.

The shipper plaintiffs in this case made an efficient choice to contract with "K"-Line for through transportation, rather than arranging for rail transportation directly. They agreed to a maritime bill of lading that expressly applied to inland carriage through a Himalaya clause and authorized the ocean carrier to subcontract for rail services "*on any terms whatsoever*." The shippers' recourse against "K"-Line, and any subcontracting carrier, for damage to the cargo is explicitly limited by the terms of that bill—and the shippers obtained separate insurance to protect themselves from loss. That common arrangement reflects the obvious reality that shippers are far better insurers than carriers of the risks of damage to sealed, containerized cargo. If the shippers had wanted a bill of lading with different terms (such as a requirement that "K"-Line choose Carmack-compliant rail carriage in the United States) the shippers could have negotiated for such terms, presumably at a higher cost. After opting for the convenience and efficiency of one-

stop shopping, and a price reflecting "K"-Line's right to arrange rail transport "on any terms whatsoever," Plaintiffs and their insurers now seek to avoid the bargain they struck.

This Court explained in *Kirby* that even when authority to subcontract "on any terms" *is not* granted, "[w]hen an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." 543 U.S. at 33. Relying on *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508, 514 (1914), this Court held that a "'carrier ha[s] the right to assume that [the intermediary] could agree upon the terms of the shipment,'" *id.* at 34 (second alteration in original), and "could not be expected to know if the [intermediary] had any outstanding, conflicting obligation to another party," *id.* at 33. This Court explained that "[i]n 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. *Id.* 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. This Court explained that its holding "produces an equitable result" because the cargo owner could always sue the party with which it initially contracted. *Id.*; *see also* Brief for United States as Amicus Curiae Supporting

Petitioners at 29-30, *Kirby* (merits) (arguing that allowing the intermediary to bind the cargo owner to terms of shipment permits "the underlying carrier [to] base its rates on an accurate understanding of its potential exposure to suit, without discriminating among shippers in a manner that federal law forbids").

The Ninth Circuit's holding that UP cannot rely on terms negotiated with "K"-Line unless those terms were somehow presented to the shippers on the other side of the world is directly contrary to this Court's holding in *Kirby* that shipping intermediaries can bind shippers to limited liability terms with downstream carriers (even if, unlike here, the intermediary lacks contractual authority to do so). UP offered Carmack-compliant terms to its own customer, which is the most that was necessary (or even possible).

CONCLUSION

This Court should grant this petition for certiorari and the separate petition filed by "K"-Line. The two petitions should be consolidated for argument.

Respectfully submitted,

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