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Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD. AND
K-LINE AMERICA, INC.,
Petitioners,

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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June 18, 2009

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QUESTION PRESENTED

Whether the Carmack Amendment to the Interstate Commerce Act of 1887, which governs certain rail and motor transportation by common carriers within the United States, 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers), applies to the inland rail leg of an intermodal shipment from overseas where the shipment was made under a "through" bill of lading issued by an ocean carrier that extended the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, to the inland leg, there was no domestic bill of lading for rail transportation, and the ocean carrier privately subcontracted for rail transportation.

PARTIES AND RULE 29.6 STATEMENT

Petitioners Kawasaki Kisen Kaisha, Ltd. and K-Line America, Inc. were defendants in the district court and appellees in the court of appeals. Petitioner Union Pacific Railroad Company, which is petitioning from the judgment below by separate petition, also was a defendant in the district court and an appellee in the court of appeals. 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.

Petitioner Kawasaki Kisen Kaisha, Ltd. has no parent corporation, and there is no publicly held company that owns 10% or more of its stock. Petitioner K-Line America, Inc. is not publicly traded, and its parent corporation is Kawasaki Kisen Kaisha, Ltd.

Union Pacific Railroad Company, formerly Southern Pacific Transportation Company, is majority owned by Union Pacific Corporation, which also wholly owns Southern Pacific Rail Corporation. Petitioners are unaware of any other person or entity that owns more than 10% of either Union Pacific Railroad Company, Southern Pacific Rail Corporation, or Union Pacific Corporation.

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U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, *America's Container Ports: Delivering the Goods* (March 2007) 23

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kawasaki Kisen Kaisha Ltd. and K-Line America respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-35a) is reported at 557 F.3d 985. The opinion of the United States District Court for the Central District of California (Pet. App. 36a-47a) is reported at 462 F. Supp. 2d 1098.

JURISDICTION

The Ninth Circuit entered judgment on February 17, 2009. On April 20, 2009, Justice Kennedy extended the time for filing this petition for certiorari up to and including June 18, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §§ 11706, 14706, is reproduced in the Appendix (Pet. App. 69a-78a). Other relevant portions of the Interstate Commerce Act as well as the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 Note, also are reproduced in the Appendix (Pet. App. 48a-61a).

STATEMENT OF THE CASE

Two Terms ago, in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), this Court granted certiorari to resolve an entrenched conflict among the circuits over a key question of statutory interpretation that affects billions of dollars in international shipping business each year. Most goods imported into the United States are now transported in large metal containers that can be carried by ocean vessels and then offloaded intact onto trains and trucks for inland shipping. Parties contracting for the transportation of goods in this manner commonly use a "through" bill of lading, which constitutes a single contract both for sea and land transportation.

There is no single federal statute that applies, by its own force, to all segments of such international, intermodal shipments. Transportation by rail and motor common carrier is governed by the Carmack Amendment to the Interstate Commerce

Act ("Carmack"), 49 U.S.C. §§ 11706 (rail carriers) & 14706 (motor carriers); transportation by ocean carrier is governed by the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936) (reprinted in the Note following 46 U.S.C. § 30701). These two statutory regimes impose liability on different grounds and differ in significant procedural respects.

The circuits are deeply split over whether Carmack applies to the inland leg of an international shipment that commences by ocean and continues by land under a single through bill of lading. This Court granted review in *Altadis* to resolve this split but was unable to do so because the case settled. *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1189 (2007). This case presents anew the opportunity to resolve this question. Here, goods that were transported under intermodal through bills of lading issued overseas by an ocean carrier were damaged while being transported inland by a railroad company subcontracted by the ocean carrier. The bills of lading provided that COGSA governs all of the carriers' responsibilities through all segments of the transportation. Respondents claimed, however, that Carmack applies and bars application of a forum selection clause in the bills that is enforceable under COGSA. This Court should grant certiorari to resolve the question of which statute applies to the inland leg of such through bills of lading and controls the liability of ocean carriers issuing them—a question of fundamental importance to shippers, carriers, insurers, and others in the international shipping industry.

A. Statutory Background

In 1887, Congress enacted the Interstate Commerce Act to govern shipments by railroad, and it later amended the Act to cover motor carriers. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified at 49 U.S.C. § 10101 *et seq.*); *see also* Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (extending the Interstate Commerce Act to cover motor carriers). The Carmack Amendment to the Interstate Commerce Act, which governs liability for loss or injury to property in overland transit, was enacted in 1906, Pub. L. No. 59-377, § 7, 34 Stat. 593, 593-95 (1906) (currently codified at 49 U.S.C. § 11706), and extended to motor carriers in 1935, Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, 563 (currently codified at 49 U.S.C. § 14706).

In 1936, Congress enacted COGSA to govern ocean-going transportation. COGSA, ch. 229, 49 Stat. 1207 (reprinted in the Note following 46 U.S.C. § 30701). 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 Note, Preamble.

COGSA and Carmack differ significantly. Under COGSA, a carrier's liability for injury and loss to goods in transit is based upon negligence. 46 U.S.C. § 30701 Note § 4. COGSA also permits carriers to enter into agreements that, for example, limit their liability absent a declaration of value by the shipper, *id.* § 30701 Note § 4(5), or contain forum selection clauses, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995). By contrast, Carmack imposes "something close to strict liability upon originating and delivering carriers." *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir. 2003).

Carmack generally prohibits carriers from limiting their liability contractually. 49 U.S.C. §§ 11706(c), 14706(c). Carmack also specifies the venues in which civil actions against carriers may be brought, *id.* §§ 11706(d), 14706(d), and thus has been interpreted to bar forum selection clauses, *see, e.g., Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir. 1976).

The strictures of the Carmack Amendment were relaxed when Congress partially deregulated rail carriers in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. As a result, rail carriers are now authorized to make private contracts with purchasers of rail services, and the transportation provided under such contracts is not subject to the Interstate Commerce Act, including Carmack. 49 U.S.C. § 10709; *see also* H.R. CONF. REP. NO. 96-1430, at 100 (1980) (providing that service pursuant to a contract under this provision "is exempt . . . from . . . all of the requirements of the Interstate Commerce Act"). In addition, the Surface Transportation Board, which now administers the Interstate Commerce Act, is authorized to exempt services and classes of transactions from most regulations under the Act. 49 U.S.C. § 10502(a). Rail carriers providing transportation that has been exempted under Section 10502 are not excused from Carmack's requirements, but they remain free to offer alternative terms and thereby contractually opt out of those requirements. *Id.* § 10502(e).

No statute by its own terms governs liability for property damage during all segments of intermodal transportation by sea and land. The Carmack Amend-

ment originally did not apply at all to goods traveling in international commerce. *See* Pub. L. No. 59-377, § 7, 34 Stat. 593, 595. In 1915, Congress extended Carmack beyond purely domestic transportation, but only to goods transported "from a point in the United States to a point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1196, 1197. Although this language was revised in 1978 as part of a recodification of the Interstate Commerce Act and other transportation statutes, Act of Oct. 17, 1978, Pub. L. No. 94-473, § 10501, 92 Stat. 1337, 1359, Congress explicitly stated that the recodification was not intended to alter the statute's substantive meaning. *Id.*, § 3(a), 92 Stat. 1337, 1466; *see* H.R. REP. NO. 1395, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018. Moreover, in the Staggers Rail Act, Congress authorized the Surface Transportation Board to exempt "transportation that is provided by a rail carrier as part of a continuous intermodal movement," Pub. L. No. 96-448, § 213, 94 Stat. 1895, 1913 (currently codified at 49 U.S.C. § 10502(f)), which the Board has done, *see* 49 C.F.R. § 1090.2.

Although COGSA does not apply by its terms to the land segment of intermodal shipments, it permits parties to an overseas through bill of lading to extend its terms by agreement to transportation both before the loading of an ocean carrier and after its discharge. 46 U.S.C. § 30701 Note § 7. In addition, the Federal Maritime Commission, which administers COGSA, regulates the rates charged by ocean carriers "on any through transportation route." 46 U.S.C. § 40501(a)(1); *see* also *Surface Transp. Bd. (S.T.B.) Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (1987) ("Ocean carriers providing joint TOFC/COFC [container] service with rail car-

riers and motors carriers may file joint through rates in tariffs with the FMC but they should not file them with [the Surface Transportation Board] . . . .").

B. The Rise of International Intermodal Transportation and the Increasing Use of Through Bills of Lading

Historically, goods imported from overseas were transported using different modes of transportation (*e.g.*, sea, rail, or truck) and each segment of transportation was subject to independent contractual arrangements. For example, a foreign exporter or manufacturer might have contracted separately with a foreign land carrier to transport goods to a foreign port, with an ocean carrier to transport the goods from that port to a domestic port, and (through a forwarder or consignee) with a domestic land carrier to transport the goods to their final destination. Because there was no single carrier responsible for providing all segments of transportation, each carrier would issue a separate "bill of lading," a document that "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract of carriage." *Norfolk So. Ry. Co. v. Kirby*, 543 U.S. 14, 18-19 (2004).

In recent decades, shipping practices have changed as a result of an innovation that has been termed "the container revolution." *See NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 493-94 & n.2 (1980). Containers are large, reusable metal receptacles that generally range in length from 20 to 40 feet and are capable of carrying more than 30,000 pounds of freight. *Id.* at 494. These containers can be moved on and off an ocean vessel, and transferred unopened to trains or trucks for inland transportation. *Id.*

Such containers substantially reduce handling costs because goods inside a container do not require separate offloading and repacking at the seaport, and because a container ship can be loaded or unloaded much more quickly than a conventional ship. *Id.* at 494-95.

The use of containers has altered contracting practices. Instead of contracting with separate carriers for each leg of an overseas shipment, cargo owners now can "contract for transportation across oceans and to inland destinations in a single transaction" covering all legs of the voyage. *Kirby*, 543 U.S. at 26. When a carrier enters into such a contract, it issues a single "through" bill of lading covering all ocean and land carriage, rather than any separate bills of lading for the overseas and domestic legs. *See, e.g.*, 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2009). Such through bills reduce costs by allowing the contracting carrier to choose the least expensive form of ground transportation. *Id.*

C. The Shipments at Issue

In this case, petitioner Kawasaki Kisen Kaisha, Ltd. ("'K' Line"), an ocean carrier, contracted with foreign shippers to carry their goods from various ports in China via the port of Long Beach, California to destinations in the Midwest. Pet. App. 2a. When "K" Line received containers of cargo from the foreign shippers in China, it issued "through" bills of lading providing for both ocean transportation from China and land transportation from Long Beach to the Midwest destinations. *Id.* These bills of lading contained a provision extending COGSA to cover the land transportation. Pet. App. 6a ("Carrier's responsibilities during the entire period . . . from the time of

receipt of Goods to the time of delivery of Goods shall be governed by [COGSA]."); *see also* Pet. App. 6a (authorizing "K" Line to "subcontract on any terms whatsoever"). The bills also contained a forum selection clause requiring that any actions against "K" Line concerning the carriage of goods "be brought before the Tokyo District Court in Japan." Pet. App. 5a; *see also* Pet. App. 6a (extending terms of the bills of lading to downstream parties and carriers performing services contemplated by the bills).

"K" Line's agent in the United States, petitioner K-Line America, Inc. ("KAM"), arranged for United Pacific Railroad Company ("Union Pacific") to transport the cargo by rail from Long Beach to the Midwest. Pet. App. 7a. Because this rail transportation was made pursuant to a private contract, no separate bill of lading was issued by Union Pacific. *Id.* The containers were safely delivered to Union Pacific in Long Beach, but the train containing them derailed in Oklahoma, and the cargo allegedly was damaged. *Id.*

D. The Proceedings Below

Respondents are consignees and insurers of the cargo allegedly damaged in the Oklahoma derailment. They sued "K" Line, KAM, and Union Pacific in California state court for the alleged damage to their goods. Pet. App. 7a. After the case was removed to federal court based upon federal question jurisdiction, "K" Line, KAM, and Union Pacific moved to dismiss pursuant to the forum selection clauses in the bills of lading designating Tokyo as the exclusive forum for suits relating to the bills. Pet. App. 7a-8a. Respondents argued that the forum selection clauses were unenforceable because the Carmack Amendment applies to the bills of lading and its venue

provision is exclusive. Finding otherwise, the district court granted the motion to dismiss. Pet. App. 8a. On appeal, the Ninth Circuit held Carmack applicable and vacated the judgment. Pet. App. 31a-35a. *But see* Pet. App. 35a (remanding to consider whether "K" Line offered alternative Carmack terms in the bills of lading).

In finding the Carmack Amendment applicable, the Ninth Circuit deemed "K" Line a "rail carrier," even though "K" Line is an ocean carrier, because the goods in question were transported by rail under through bills of lading issued by "K" Line. Pet. App. 12a-17a. In addition, relying upon its own precedent, the Ninth Circuit held that Carmack governs the through bills of lading because Carmack applies "to 'shipments to or from overseas ports' without any requirement for a separate domestic bill of lading for the inland carriage." Pet. App. 17a (quoting *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000)). Finally, the Ninth Circuit held that "K" Line had not opted out of Carmack by entering into a private contract with Union Pacific for rail service because in its view Section 10709 does not apply to exempt transportation, and Section 10502 permits rail carriers providing such transportation to opt out only if they offer Carmack terms. Pet. App. 26a-35a; *see also* Pet. App. 28a (requiring an offer to the cargo owners rather than "K" Line, the party actually contracting for rail service).

The Ninth Circuit conceded that, in holding that the Carmack Amendment applies to an overseas through bill of lading, it was taking a minority view held only by the Second Circuit, and acknowledged "[c]ontrary holdings in the Fourth, Sixth, Seventh,

and Eleventh Circuits." Pet. App. 18a. Quoting from the Eleventh Circuit's decision in *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006), the Ninth Circuit noted that these other circuits "have held 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.'" Pet. App. 17a (quoting *Altadis*, 458 F.3d at 1291) (emphasis omitted)). While finding the majority view foreclosed by prior circuit precedent, Pet. App. 17a, the Ninth Circuit did not state that it considered that precedent correct, nor how its ruling could be reconciled with Carmack's text or history.

REASONS FOR GRANTING THE WRIT

In the last several decades, international shipping has been revolutionized by the development of containers that can be placed in ocean-going vessels and then transferred to railroad cars or trucks without unloading their contents. As a result of this "container revolution," a significant percentage of the goods imported into this nation is now shipped under "through" bills of lading that provide for both ocean and land transportation.

This case presents an important and recurring question concerning such arrangements: whether the inland leg of transportation under an ocean carrier's through bill of lading is subject to the provisions of the Carmack Amendment, even when no separate domestic bill of lading is issued. The circuits are deeply divided over this question: The Ninth Circuit held below, in accord with the Second Circuit, that Carmack does apply in that situation, but four other circuits (the Fourth, Sixth, Seventh and Eleventh) have held that it does not. As this Court recognized

in granting certiorari two Terms ago in *Altadis USA, Inc. v. Sea Star Line, LLC*, 549 U.S. 1106 (2007), this question is of fundamental importance to the transportation industry, and the entrenched circuit conflict over it should be resolved.

This Court should grant this petition as well as the separate petition for certiorari filed by Union Pacific Railroad Company from the same judgment, and consolidate both petitions for argument.

I. THE NINTH CIRCUIT'S DECISION APPLYING THE CARMACK AMENDMENT TO THE INLAND LEG OF AN INTERMODAL SHIPMENT ORIGINATING OVERSEAS THAT MOVED SOLELY UNDER A "THROUGH" BILL OF LADING CONFLICTS WITH THE DECISIONS OF FOUR OTHER CIRCUITS.

The conflict among the circuits over application of Carmack to the inland leg of an overseas shipment under a "through" bill of lading is well-recognized. It has been observed by commentators,[1] the Solicitor

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[1] *See, e.g.*, 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-4, at 598 (4th ed. 2004) (observing that "the applicability of the Carmack Amendment to the inland leg of multimodal transportation is in dispute"); William C. Baldwin, Note, *Land Versus Sea; Carmack v. COGSA: Why the Carmack Amendment Should Not Apply to Inland Portions of Multimodal Shipments*, 82 Tul. L. Rev. 731, 734 (2007) (noting the current "four-to-two circuit split"); Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea*, 79 TUL. L. REV. 1461, 1485-86 (2005) (same).

General,[2] and the decision below, which noted that four circuits have held that Carmack does not apply to such through bills of lading and that one other circuit "has disagreed." Pet. App. 18a. Nevertheless, the Ninth Circuit reaffirmed its minority view that Carmack applies to the domestic leg of overseas shipments under through bills of lading. Thus, the conflict among the circuits over this issue (which encompasses nearly all the maritime circuits) is firmly entrenched and unlikely to be resolved absent this Court's intervention.

The decision below conflicts with the Eleventh Circuit's decision in *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006), which this Court granted certiorari to review two Terms ago. In *Altadis*, the plaintiff contracted with an ocean carrier to transport cigars by sea from Puerto Rico to Jacksonville, Florida and then by land to Tampa, Florida; and a single through bill of lading was issued for the entire transportation. *See* 458 F.3d at 1289. The cigars were stolen from a truck en route from Jacksonville to Tampa, and the cargo owner sued the ocean carrier and the trucking company. *Id.* at 1290. When the defendants moved to dismiss based upon the one-year limitations period in COGSA, *see* 46 U.S.C. § 30701 Note § 3(6), which the bill of lading expressly extended to cover the land leg, the cargo owner argued that the Carmack Amendment applied and preempted the one-year limitations period. 458 F.3d at 1290. The Eleventh Circuit disagreed and

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[2] *See* Br. of the United States as *Amicus Curiae* at 11, *Kirby v. Norfolk So. Ry. Co.*, No. 02-1025 (U.S. Nov. 14, 2003) ("It is unsettled whether the Carmack Amendment applies to land transportation under international multimodal through bills of lading.").

held 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.

The Seventh Circuit also has held that the Carmack Amendment does not apply to the inland leg of a shipment originating overseas under a through bill of lading. In *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992), an ocean carrier issued a through bill of lading for transporting machinery by sea from Italy to Norfolk, Virginia and then by land to Chicago, Illinois. *Id.* at 392-93. When the machinery failed to arrive, the cargo owner sued the transporter that arranged the shipment. *Id.* at 393. When the transporter invoked a provision in its invoice limiting liability, the cargo owner argued that Carmack applied to the shipment and invalidated the limitation provision. *Id.* The Seventh Circuit disagreed, holding that Carmack "does not extend to shipments by water, rail or motor carrier from a foreign country to the United States . . . unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.* at 394.

The Fourth and Sixth Circuits likewise have held that the Carmack Amendment does not apply to overseas shipments under a "through" bill of lading. In *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993), the Fourth Circuit held that Carmack "does not extend . . . to shipments from a foreign country to the United States unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.* at 703. Similarly, in *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003), the Sixth Circuit held that Carmack "does not extend to a shipment under a

through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading." *Id.* at 568.

These rulings cannot be reconciled with the decision below. Like *Altadis*, *Capitol Converting*, *Shao*, and *American Road Service*, this case involves an overseas shipment under a through bill of lading. When the cargo owners here sued for alleged damages caused during the inland leg of the shipment, defendants moved to dismiss under a forum selection clause, and the owners argued that Carmack invalidated the clause. Pet. App. 11a-12a. In the decision below, the Ninth Circuit held that the Carmack Amendment applies "to shipments to or from overseas ports without any requirement for a separate domestic bill of lading for the inland carriage." Pet. App. 18a (quotation omitted). As the Ninth Circuit acknowledged, this holding is "[c]ontrary [to] the holdings in the Fourth, Sixth, Seventh, and Eleventh Circuits" in the cases discussed above. Pet. App. 18a.

As the decision below also observed, there is one circuit, the Second Circuit, that similarly has applied the Carmack Amendment to an overseas shipment under a through bill of lading. Pet. App. 18a. In *Sompo Japan Insurance Co. v. Union Pacific Railway Co.*, 456 F.3d 54 (2d Cir. 2006), an ocean carrier agreed to transport tractors by sea from Tokyo to Los Angeles and by land from Los Angeles to Georgia, and issued a through bill of lading that extended COGSA to the entire transportation. *Id.* at 56. The tractors were damaged when the train derailed in Texas, and the cargo owner sued the railroad that had subcontracted to provide the land transportation. When the railroad invoked COGSA's limitation on per package liability, 46 U.S.C. § 30701 Note § 4(5),

the cargo owner argued that Carmack applied and rendered the limitation void. 456 F.3d at 56-57. Expressly rejecting the Seventh Circuit's decision in *Capitol Converting* as well as the Fourth Circuit's decision in *Shao*, 456 F.3d at 61-63 & n.11, the Second Circuit held that "Carmack applie[d] to the domestic interstate leg" of transportation despite the absence of any separate bill of lading for that leg. *Id.* at 61, 69.

Thus, six circuits have considered whether the current version of the Carmack Amendment applies to the inland leg of overseas shipments moving solely under a through bill of lading, and they are deeply split: two hold that Carmack applies while four hold that it does not. Moreover, it is unlikely that further consideration by the lower courts will clarify this issue. With the exception of the Fifth Circuit, all of the major maritime circuits have considered the issue, and the reaffirmation of the Ninth Circuit's minority view demonstrates that the conflict among these circuits is unlikely to work itself out absent this Court's intervention.

II. THE NINTH CIRCUIT ERRED IN APPLYING THE CARMACK AMENDMENT, WHICH REGULATES DOMESTIC RAIL AND MOTOR CARRIERS, TO AN INTERMODAL SHIPMENT ORIGINATING OVERSEAS THAT MOVED SOLELY UNDER A "THROUGH" BILL OF LADING ISSUED BY AN OCEAN CARRIER.

In addition to contradicting the decisions of four other circuits, the decision below misconstrued the Carmack Amendment. Carmack addresses the liability of rail and motor carriers. It is not intended to govern shipments from overseas under through bills

of lading, much less to govern the liability of an ocean carrier that expressly contracted to have its responsibilities governed by COGSA, not Carmack.

The Carmack Amendment does not apply to shipments that originate overseas under through bills of lading issued by ocean carriers. In interpreting a statute, courts "look first to its language, giving the words their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citations and quotation marks omitted); *see Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S.Ct. 1870, 1878 (2009). Carmack, as currently codified, imposes liability upon a "rail carrier" that is "providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board" for any loss or injury to the property it is transporting caused by it or by another rail carrier transporting the property. 49 U.S.C. § 11706(a). This language plainly does not contemplate suits against ocean carriers for shipments that originate overseas.

First, "K" Line is not a "rail carrier" subject to the jurisdiction of the Surface Transportation Board. *See* 49 U.S.C. § 10501(a)(1) ("The Board has jurisdiction over transportation by rail carrier."). "K" Line is an "ocean common carrier" because it offers transportation of goods on the high seas to the general public. 46 C.F.R. § 520.2. It does not act as rail common carrier because it does not provide rail transportation to the general public—it privately subcontracts for rail services as needed to fulfill its obligations under through bills of lading—and therefore does not qualify as a rail carrier under the Interstate Commerce Act and Carmack. *See* 49 U.S.C. § 10102(5) (defining "rail carrier" to mean a person providing "*common carrier* railroad transportation" (emphasis

added)); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 458 (2002) (defining "common carrier" in the federal regulatory context to mean a carrier "offering services to all comers"). In addition, "K" Line is regulated by the Federal Maritime Commission, not the Surface Transportation Board, even when providing "through transportation with inland carriers." 46 C.F.R. § 520.1(a); *see also Surface Transp. Bd. (S.T.B.) Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (1987) (noting ocean carriers that provide container service with rail transportation file tariffs with the Federal Maritime Commission, not the Surface Transportation Board). Thus, "K" Line is not a "rail carrier," and Carmack does not apply.

Second, the Carmack Amendment does not apply to through bills of lading for transportation originating overseas. Under Carmack's venue provision, claims under Carmack may be brought against "the originating rail carrier" only "in the judicial district in which the point of origin is located." 49 U.S.C. § 11706(d)(2)(A)(i). "Judicial district" in turn is defined to mean the geographic region over which federal district courts or state courts exercise jurisdiction. *Id.* § 11706(d)(2)(B). But when an ocean carrier such as "K" Line issues a bill of lading for a shipment originating overseas, the "point of origin" is overseas, where no federal district court or state court exercises jurisdiction. Thus, Carmack does not apply to shipments originating overseas.

Indeed, prior to codification of the Interstate Commerce Act in 1978, the Carmack Amendment was expressly limited to transportation originating in the United States. Before codification, Carmack's only application outside the United States was to transportation "from any point in the United States to a

point in an adjacent foreign country." Act of Mar. 4, 1915, ch. 176 § 1, 38 Stat. 1196, 1197 (later codified at 49 U.S.C. § 20(11) (1977)). Thus, courts,[3] the agency originally responsible for administering Carmack,[4] and a treatise on common carriers from the time this language was enacted[5] all recognized that the pre-codification Carmack did not apply to shipments from or to overseas destinations. Because Congress intended the codification of the Interstate Commerce Act to be "without substantive changes," Act of Oct. 17, 1978, Pub. L. No. 94-473, § 3(a), 92 Stat. 1337, 1466; *see* H.R. REP. NO. 1395, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018, the codified version of Carmack also must be interpreted not to apply to shipments originating outside of the United States. *See, e.g., John R. Sand &*

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[3] *See, e.g., Sklaroff v. Penn. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950) (holding the Carmack Amendment inapplicable to shipment originating in Canada made under a through bill of lading); *Strachman v. Palmer*, 177 F.2d 427, 429-30 (1st Cir. 1949) (same); *Alwine v. Pa. R.R. Co.*, 15 A.2d. 507, 509-10 (Pa. 1940) (same); *Dexter & Carpenter, Inc. v. Davis*, 281 F. 385, 388 (4th Cir. 1922) (holding Carmack inapplicable to shipment to Europe on through bill of lading); *see also Reider v. Thompson*, 339 U.S. 113, 117 (1950) (applying Carmack Amendment to inland leg of shipment from Argentina because "there was no through bill of lading from Buenos Aires to Boston").

[4] *See In re Cummings Amendment*, 33 I.C.C. 682, 693 (1915) (finding that the Carmack Amendment, as amended in 1915, does not cover "import shipments to and from foreign countries not adjacent to the United States" because Carmack "makes no reference to shipments . . . from a nonadjacent foreign country").

[5] *See* 1 M. G. ROBERTS, FEDERAL LIABILITIES OF CARRIERS § 360, at 710 (2d ed. 1929) (noting that carriers "engaged in transporting property in foreign commerce other than to adjacent foreign countries, are not included" in the Carmack Amendment).

Gravel Co. v. United States, 128 S. Ct. 750, 754-55 (2008).

This conclusion also follows from this Court's unanimous decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2009). *Kirby* involved facts remarkably similar to those here. In that case, goods were transported from a foreign country to a port in the United States and then delivered to a rail carrier pursuant to through bills of lading issued by an ocean carrier that extended COGSA to govern the inland leg of the transportation. *Id.* at 21. When the train derailed, the goods were damaged, and the cargo owner and its insurer sued the railroad, which in turn invoked the COGSA package limitation provision incorporated into the bills. *Id.* at 21-22. *Kirby* held that the ocean carrier's through bill of lading was a maritime contract governed by COGSA, which applied to both the ocean and land legs of the transportation. *Id.* at 24. While the Court did not expressly discuss potential application of the Carmack Amendment, it upheld application of COGSA and the limitation provision, emphasizing that "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." *Id.* at 29.

The Ninth Circuit's application of Carmack to the inland leg of a shipment under a through bill of lading cannot be reconciled with *Kirby*. Under the decision below one statute, COGSA, applies to the ocean leg and another, the Carmack Amendment, to the land leg of an intermodal shipment under a single through bill of lading that states that the carriers' liability shall be governed by only one statute, COGSA. This ruling casts doubt upon the applicable standard of liability—because COGSA bases liability

upon negligence and Carmack upon strict liability—and upon the enforceability of provisions such as the forum selection clause. *See supra* pp. 4-5 (contrasting COGSA and Carmack). Thus, the interpretation adopted by the decision below creates exactly the sort of "uncertainty and . . . lack of uniformity" that *Kirby* sought to prevent. *Altadis*, 458 F.3d at 1293; *see Indem. Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 633 (7th Cir. 2003) (applying one law to a shipment makes "eminent good sense, as compared with the inefficient alternative of applying different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck").

The Ninth Circuit failed to offer any persuasive reason for construing the Carmack Amendment to apply to shipments originating overseas made under through bills of lading issued by an ocean carrier. The decision below did not attempt to reconcile its application of Carmack to an overseas through bill of lading with the language, structure, and history of Carmack or the policy of uniformity recognized in *Kirby*. Instead, it relied upon a prior Ninth Circuit decision, *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Railway Co.*, 213 F.3d 1118, 1119 (9th Cir. 2000), which applied Carmack to the inland leg of an overseas shipment without any explanation. *Id.* at 1119.

Although the Second Circuit's decision in *Sompo* discussed the language of the Carmack Amendment, it did not consider whether Carmack applies to ocean carriers, and a subsequent Second Circuit decision held that it does not. *See Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 355-64 (2d Cir. 2008). Moreover, in holding that prior to codi-

fication Carmack applied to overseas shipments, *see Sompo*, 456 F.3d at 65-69, the Second Circuit admittedly failed to reconcile its holding with the plain language of Carmack (*see id.* at 66, 68 n.13), and largely ignored the contemporaneous authority to the contrary. *See supra* p. 19 nn. 3-5.[6]

Finally, even if the Carmack Amendment could apply to shipments from overseas under a through bill of lading, it still would not apply to the inland transportation here because Congress permits rail carriers to enter into contracts for private carriage that are not subject to the rail provisions of the Interstate Commerce Act. *See* 49 U.S.C. § 10709(c). *See generally Babcock & Wilcox v. Kansas City So. Ry. Co.*, 557 F.3d 134, 138 (3d Cir. 2009). The Ninth Circuit held that this provision does not apply to types of transportation that have been exempted and that Section 10502 applies to private contracts for

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[6] The *Sompo* decision construed Carmack before codification based on this Court's decision in *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 254 U.S. 357 (1920). *See Sompo*, 456 F.3d at 65-67. *Woodbury*, however, construed Section 1 of the Interstate Commerce Act, not the Carmack Amendment. *See Woodbury*, 254 U.S. at 359-60. The language of Section 1 at issue in *Woodbury* was similar to the Carmack Amendment's before codification. *See id.* at 359 (noting Section 1 conferred jurisdiction over transportation "from any place in the United States to an adjacent foreign country"). But while *Woodbury* was pending, Congress amended Section 1 to clarify that it applies to importing as well as exporting of goods. *See* Act of Feb. 28, 1920, sec. 400, 41 Stat 456, 474 (1920) (providing the Interstate Commerce Commission with jurisdiction over transportation "from *or to* any place in the United States *to or from* a foreign country, but only insofar as such transportation . . . takes place within the United States") (emphasis added). As no similar amendments was made to Carmack, Congress plainly intended Carmack to be narrower.

such transportation. Pet. App. 26a-35a. There is nothing in Section 10709, however, suggesting an exception for types of transportation that have been exempted. *See* 49 U.S.C. § 10709 (providing that "[o]ne or more rail carriers . . . may enter into a contract with one or more purchases of rail services"). Nothing in Section 10502 suggest that it applies to private contracts for exempt transportation: that Section simply notes that nothing "shall prevent rail carriers from offering alternative terms for exempt transportation." *Id.* § 10502(e). Moreover, there is no reason to believe that Congress intended to make it *harder* for carriers providing exempt transportation to enter into private contracts free from Carmack's requirements. For this reason as well, the Ninth Circuit erred in applying the Carmack Amendment.

III. THE NINTH CIRCUIT'S DECISION PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE TRANSPORTATION INDUSTRY.

As this Court recognized in granting certiorari in *Altadis*, the question presented there and again here warrants this Court's review. The volume and value of goods transported overseas under through bills of lading is rapidly increasing. From 1995 to 2006, the volume of maritime container traffic has more than doubled from 22.6 million twenty-foot equivalent units (TEUs), to 46.3 million TEUs, U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, *America's Container Ports: Delivering the Goods* 2 (March 2007), and the volume of imports is increasing even more quickly, having nearly doubled between 2000 and 2005, *id.* at 3, 10; *see also* U.S. DEP'T OF TRANSP., MARITIME ADMIN., *U.S. Water Transportation Statis-*

tical Snapshot 1 (May 2008) (noting 45.3% increase in volume of container imports between 2002 and 2006). Correspondingly, the volume of intermodal transportation has rapidly increased as well: Between 1993 and 2002, the value of goods shipped with intermodal transportation in the United States increased from $665 billion to $1.1 trillion. U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, *Freight Shipments in America: Preliminary Highlights from the 2002 Commodity Flow Survey* 7 (2004). Moreover, because international shipments are typically made under intermodal through bills of lading, *see Kirby*, 543 U.S. at 25 (noting the "popularity of 'through bills of lading"); *see also* U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., *A Basic Guide to Exporting* 143 (10th ed. 2008) ("International shipments are increasingly made on a through bill of lading under a multimodal contract."), the overseas bills of lading at issue in this petition affect a significant and rapidly growing portion of the economy.

The conflict among nearly all the maritime circuits over the law governing the land leg of these shipments creates uncertainty for shippers and carriers that extends to issues of fundamental importance to contracts in this area. For example, while the Carmack Amendment imposes essentially strict liability upon carriers, *see* 49 U.S.C. §§ 11706(a), 14706(a), COGSA bases liability upon negligence, *see* 46 U.S.C. § 30701 Note § 4. But bills of lading issued by ocean carriers routinely extend COGSA by contract to through bills of lading to cover the inland portions of overseas shipments. *See, e.g. Starrag v. Maersk, Inc.*, 486 F.3d 607, 614 (9th Cir. 2007). Thus, uncertainty over Carmack's applicability to the inland leg of an ocean carrier's through transportation creates uncertainty over the standard under which carriers will be held

liable, which in turn creates uncertainty over the prices that should be charged and the insurance that should be sought.

In addition, because the Carmack Amendment invalidates forum selection clauses and other provisions commonly included in bills of lading, *see Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir. 1976) (holding Carmack's venue provision exclusive), uncertainty over Carmack's application to the land leg of shipments under international through bills of lading creates uncertainty about the enforceability of bills of lading, which typically are the parties' only contract of carriage. This uncertainty is compounded by the limits that the Ninth Circuit has imposed upon the ability of carriers to enter into private contracts with purchasers of rail services that are outside the scope of the Interstate Commerce Act and therefore of Carmack. As this Court has recognized, such uncertainty is especially destructive in the international trade context, as contracts for international intermodal transportation of goods to the United States may be made anywhere in the world. *Kirby,* 543 U.S. at 28.

This case is an excellent vehicle for dispelling the uncertainty over Carmack's application to the land leg of transportation under international through bills of lading. The question is squarely presented, and the facts material to Carmack's application are undisputed. Moreover, reversal of the decision below may be outcome determinative: If Carmack does not apply, the bill of lading's forum selection clause is enforceable and the case should be dismissed.

In addition, this petition, if granted and consolidated with the petition from the same judgment filed by the Union Pacific, would allow the Court to con-

sider the full array of issues affecting the application of the Carmack Amendment to international through bills of lading. This case involves claims against both an ocean carrier and a railroad; the shippers' contracts with the ocean carrier—the through bills of lading—extend COGSA to cover land transportation; and the ocean carriers and the railroad privately subcontracted pursuant to Section 10709 for land transportation. Thus, this case is an excellent vehicle for resolving in its broadest context the issue that this Court sought to address in *Altadis* but was prevented from reaching by the parties' settlement.

CONCLUSION

This Court should grant this petition as well as the separate petition for certiorari filed by the Union Pacific Railroad Company from the same judgment, and consolidate both petitions for argument.

Respectfully submitted,

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