No. 02-1028

IN THE

# Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
*Petitioner,*

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
*Respondents.*

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

## REPLY BRIEF

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## REPLY BRIEF

The court of appeals in this case decided two critical questions of federal maritime law, regarding the enforceability of bills of lading and the scope of Himalaya clauses, in conflict with the decisions of other courts of appeals and of this Court. Respondents fail to rebut the conflicts of authority and the importance of this Court's review, and their brief in opposition is rife with misstatements of both the case law and the proceedings below.

1. Respondents falsely claim that this case presents no important questions of federal law, but only factbound issues of contract interpretation. Opp. 2, 11. Respondents attempt to create confusion by combining two distinct issues, the first of which is not in dispute. Respondents argue that freight forwarders sometimes act simply as agents arranging transportation in the name of the cargo owner, thus assuming no liability for the safe delivery of the goods, and sometimes contract as a carrier and assume such liability. *Id.* at 3. But here there is no dispute as to the duties that the freight forwarder (ICC) assumed vis-à-vis the cargo owner (Kirby). The contract (the FBL) is plain on its face that the freight forwarder "assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a.

Petitioner does not seek review of the contract, but instead challenges the *legal rule* announced by the Eleventh Circuit: because ICC contracted with Kirby as a carrier, ICC "did not act as Kirby's agent when it received the bill of lading from Hamburg Sud," and thus "Kirby is not bound by the Himalaya clause in the Hamburg Sud bill." Pet. App. 10a-11a. That rule squarely conflicts with the established rule of other courts of appeals and of this Court that by operation of law the primary carrier is the agent of the cargo owner in contracting with a secondary carrier. Pet. 14-20; *infra* at 2-5. Likewise, on the second question presented, the Eleventh

Circuit could not have more clearly decreed a federal rule of contract interpretation: "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. It is these two critical questions of federal law that warrant this Court's review.[1]

2. On the first question presented, respondents fail to distinguish any of the conflicting decisions. There is a direct conflict with *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), *cert. pending sub. nom. Green Fire & Marine Insurance Co.* v. *M/V Hyundai Liberty*, 71 U.S.L.W. 3400 (U.S. Nov. 22, 2002) (No. 02-813). The Ninth Circuit squarely held that an intermediary non-vessel operating common carrier ("NVOCC") "acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods," even though the NVOCC "'contracts with its customers as principal.'" *Id.* at 1176 (quoting M. Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 395-96 (2000)). Respondents predictably claim that the Ninth Circuit's ruling was wrong, decided without adequate briefing, and involved a different type of clause (Opp. 16-17), but these assertions are beside the point. *Kukje Hwajae* states the rule of the Circuit, and holds, in conflict with the Eleventh Circuit, that the cargo owner was bound by the bill of lading issued to the nonvessel carrier by the vessel carrier. 294 F.3d at 1175-77; *accord Morrow Crane Co.* v. *Affiliated FM Ins. Co.*, 885 F.2d 612, 613-14 (9th Cir. 1989) (freight forwarder that contracts with owner to ship cargo and separately enters into a contract in its own name with a carrier is nonetheless the cargo owner's agent in placing cargo with the carrier).

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[1] Respondents do not contest the rule that bills of lading for international transportation of goods to the United States, which are subject to, and incorporate the mandatory terms of, the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, are governed by federal law. *See Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993) (citing cases); Pet. 1.

The conflict with the Second Circuit is equally stark. That court has held that "the NVOCC is a hybrid; it is a common carrier with respect to the shippers who use its services," but "[w]ith respect to the vessel and her owner, however, the NVOCC is an agent of the shipper, and thus merely a customer." *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 (2d Cir. 1984). Respondents are wrong in claiming (Opp. 18) that this rule was irrelevant to the outcome of that case; the vessel was deemed not to have ratified the NVOCC's separate bill of lading precisely because the NVOCC was an agent/customer, and not equivalent to a charterer. 732 F.2d at 303-04.

*Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992), is likewise in conflict with the rule below. Respondents wrongly state that the case did not involve a freight forwarder (Opp. 18); Stolt entrusted its cargo to Monsanto, which then shipped the cargo with (and received a bill of lading in its name from) Evergreen. 962 F.2d at 277-78. The Second Circuit squarely rejected the cargo owner's claim that it was not bound by a liability limitation in a bill of lading to which it was not a signatory. *Id.* at 279. Respondents point out that *Stolt* involved the mandatory liability limitation imposed by COGSA rather than a Himalaya clause, Opp. 18, but that is a distinction without a difference. COGSA imposes "compulsory terms" in a bill of lading, G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975), and those terms (just like a Himalaya clause) would be negated if the bill issued to the freight forwarder did not bind the cargo owner.

Respondents do not even attempt to distinguish *Nippon Fire & Marine Insurance Co.* v. *Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), because they cannot. In *Nippon*, the Second Circuit (drawing upon a wealth of cases involving air, water, and rail transportation) held that under federal common law the primary carrier is the "agent" of the shipper in subcontracting with the secondary carrier for

transport of the goods, and thus a limitation-of-liability clause in the subcontract binds the cargo owner even though it was not an express party to the subcontract. *Id.* at 61.[2]

The Eleventh Circuit's decision also conflicts with multiple decisions of this Court. Respondents call the assertion of a conflict with *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848), "inexplicable" (Opp. 13), but it is only their arguments that are inexplicable. Respondents state that "the Court held that the vessel owner's limitation was *not* binding on the cargo owners." *Id.* at 14. To the contrary, the Court held that the cargo owners, claiming through the vessel carriers' subcontract with the nonvessel carrier, "must affirm its provisions," and that the vessel carriers "succeeded in restricting their liability as carriers by the special agreement," 47 U.S. at 381, 384. The Court simply construed the binding contractual liability limitation not to cover gross negligence, and affirmed the damages award because the cargo owners had proven gross negligence. *Id.* at 383-85. Furthermore, the Court held that the cargo owners were bound to the contract, not because of any third-party beneficiary theory as respondents surmise, but because of established law that a carrier, having no independent right of possession in the goods, "is considered in law the agent or servant of the owner." Thus, the primary carrier's subcontract with a secondary carrier is "in contemplation of law" a contract between the cargo owner and the secondary carrier. *Id.* at 380.[3] This Court in *Chicago,*

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[2] *See also* Pet. 17-19 (discussing other circuits). Indeed, no case supports the Eleventh Circuit's rule. Respondents argue from general agency principles, Opp. 12, but the very treatises on which they rely reject those claims. P. Bugden, *Freight Forwarding and Goods in Transit* § 2-01, at 8 (1999) ("It is of course quite possible for the freight forwarder to act as agent to his customer and as principal to the third party, or indeed vice versa. In any event it is a fallacy to suppose that a person cannot be a party to a contract in two capacities, both as agent and principal.").

[3] Five justices concurring in the judgment agreed that the cargo owners were bound by the subcontract, *see also* 47 U.S. at 393 (Catron, J.), and

*Milwaukee, St. Paul & Pacific Railroad* v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), reaffirmed the *New Jersey Steam* rule that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27. Respondents deem *Acme* "irrelevant," Opp. 15, but it plainly states the established rule of common carrier law.

Respondents also cannot distinguish *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914). They wrongly claim that the *Great Northern* Court "viewed the freight forwarder simply as an agent and not as a carrier." Opp. 15. As is clear from the lower court opinion, however, the freight forwarding company "d[id] business in the nature of a common carrier," shipping consolidated cargo and receiving bills of lading from the railroad "in its name." *O'Connor* v. *Great N. Ry.*, 136 N.W. 743, 744 (Minn. 1912). In response to the owner's claim that she had only authorized the company to transfer her goods as a separate consignment, this Court held that the owner would be bound by the liability limitation in the contract between the company and the rail carrier "whether [the company] be treated as agent or forwarder." 232 U.S. at 514. This decision is irreconcilable with the rule below.[4]

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the plurality opinion is the holding of the Court because it supplies the narrowest ground for decision among the concurring justices. *Marks* v. *United States*, 430 U.S. 188, 193-94 (1977).

[4] Respondents' argument that this is a poor vehicle to resolve the conflicts of authority because "it is unclear whether ICC was an NVOCC and the courts below never ruled on that issue," Opp. 16, is both irrelevant and highly disingenuous. First, most of the conflicting decisions do not even use the term NVOCC, and those that do base their holdings on general common carrier law (such as *Acme*). *See*, *e.g.*, *Argosy*, 732 F.2d at 301. Second, NVOCC is simply the common term in American maritime parlance, drawn from Congress's usage in the Shipping Act, for a freight forwarder like ICC. *See* P. Jones, *FIATA Legal Handbook On Forwarding* 52 (1991) ("A forwarder acting as a principal to a contract of ocean carriage is now sometimes called a Non-Vessel Operating Common Carrier, or NVOC"); H. Kindred & M. Brooks, *Multimodal Transit Rules*

3. Even aside from the numerous conflicts of authority, this Court's review is imperative because the decision below undermines COGSA. Pet. 21-22. Respondents try to skirt this issue with the irrelevant point that no "issue of COGSA construction" is raised. Opp. 2. But respondents do not (and cannot) deny that COGSA is only enforced by compulsory terms in the bill of lading, and if a carrier's bill of lading is unenforceable against the cargo owner, then COGSA's mandatory provisions are also unenforceable. Pet. 21-22; Opp. 24. Thus, under the Eleventh Circuit's rule, for the most common form of international transportation of goods (container shipments by freight forwarder), a vessel carrier could not invoke the statutory liability limitation of COGSA against the cargo owner for a loss occurring at sea, simply because the cargo owner was not a signatory of the bill of

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5 (1997) ("Since forwarders own neither vessels nor vehicles, they take responsibility for the whole movement but procure its performance entirely through others (acquiring the moniker of non-vessel common carriers, or NVOCs).") (footnote omitted). Respondents indeed emphasized below that variations in terminology were immaterial; they chose to use the term "freight forwarder" because that was the term in the FBL, noting that "[w]hile NVOC is a common term internationally, Congress has preferred 'non-vessel-operating common carrier,' or 'NVOCC.'" C.A. Aplts. Br. 6. It is also a flat misrepresentation to say that "Norfolk Southern has taken inconsistent positions on the agency issue and thus its current arguments were never considered by the courts below." Opp. 23. Norfolk Southern *never* argued that ICC was not substantively an NVOCC. It argued only that "ICC Ltd. cannot claim NVOCC status under U.S. law because ICC Ltd. is not licensed as an NVOCC by the Federal Maritime Commission." C.A. Apllee. Br. 27. Respondents well understood this to be Norfolk Southern's NVOCC argument. *See* C.A. Aplts. Reply Br. 7 ("Norfolk Southern argues throughout its brief that ICC Ltd. cannot qualify as a 'carrier' because it did not have a Federal Maritime Commission ("FMC") license."). The Eleventh Circuit rejected this alternative argument, Pet. App. 10a n.9, and it is not renewed here. But the principal issue decided below of whether Kirby could be bound by the contract between the freight forwarder and vessel carrier was extensively briefed by both parties. C.A. Aplts. Br. 16-24; C.A. Apllee. Br. 19-24; C.A. Aplts. Reply Br. 3-6, 10-11. This question is cleanly presented for this Court's review.

lading. This Court cannot leave the Eleventh Circuit's effective nullification of the COGSA regime unreviewed. Furthermore, by permitting shippers and carriers "to contractually extend application of COGSA to the periods prior to loading and after unloading but before delivery, Congress authorized shippers and carriers to place all of their dealings under COGSA, if they so intend," in order to achieve "a greater degree of certainty and uniformity in their dealings." *Wemhoener Pressen*, 5 F.3d at 741. The enforceability of bills of lading, including their Himalaya clauses, cannot vary by circuit.

The decision below undermines significant reliance interests throughout the entire chain of subcontractors in international trade in goods, including all forms of inland carriers (as *amici curiae* attest). Pet. 20-21. Under the Eleventh Circuit's rule, a cargo owner can contract with a freight forwarder as carrier, pay only the lower rates associated with undeclared value that are based on COGSA liability limitations and the protections of Himalaya Clauses, and yet not be held to such limitations in a suit against any carrier that relied on them. Because the ruling below vitiates settled commercial understandings and creates windfalls for cargo owners and their insurers, *id.* at 22, this Court's review is imperative.[5]

[5] The reliance interests at stake cannot be narrowed just to Norfolk Southern's, Opp. 18-19, but even there respondents misconceive the railroad's interest. Whether cargo owners or carriers could bring suit, railroads set low rates based on ubiquitous Himalaya clauses and the universal practice of shippers not to declare value. Moreover, respondents' proposed "alternatives" are not viable. A common carrier (like a railroad) cannot "decline to participate in multimodal transactions" or "insist on its own contract with the cargo owner" (Opp. 21), *see Nippon*, 235 F.3d at 61, even if that were not wholly impractical, *see* Pet. 15-16. Indemnity clauses (Opp. 21) are also no substitute for limitation-of-liability clauses because of transaction costs and the risk of nonrecovery from the indemnitor. More fundamentally, no reason of law or policy justifies the cataclysmic reworking of commercial relationships that would be made necessary by the decision below.

4. Respondents' claim that ongoing discussion at UNCITRAL of proposals for a new international convention eliminates the need for review is specious. First, Congress has always charted a separate course in this area regardless of international conventions. COGSA is different from other countries' laws, and Congress has refused to ratify the Hague-Visby Rules, the UN's 1978 Hamburg Rules, or the 1980 Multimodal Convention. See M. Sturley, *Uniformity in the Law Governing Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553, 567-68 (1995); S. Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay*, 5 J. Transnat'l L. & Pol'y 1, 21 (1995). Second, the UNCITRAL "Draft Instrument" is based on a draft revision of COGSA that languished in the Senate for years and was never introduced as legislation, before its advocates (including respondents' counsel) began working through UNCITRAL to achieve the same objectives.[6] Third, the UNCITRAL effort, commenced in 1996, has yielded only a proposed draft that (as respondents admit) has been heavily criticized on this issue, Opp. 29. Any new international convention, if it happens, is years if not decades away, and it is highly speculative (and indeed doubtful) that Congress would ever adopt it as U.S. law. COGSA, which authorizes the contractual extension of statutory liability limitations for any transit point from origin to destination, is the law of this land, and this Court should grant review to restore the clarity to federal law that the Eleventh Circuit has destroyed.

5. It is ironic that respondents disclaim a circuit split on the second issue presented, even though they have consistently acknowledged the split in the courts below. Pet. 23; Pet. App.

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[6] *See* J. Bonney, *Charting a New Course*, J. Com. Wk., Oct. 8, 2001, *available at* 2001 WL 30628746. As respondents' counsel has commented, "Congress is unwilling to act in a complex and technical field where it has little expertise and sees no opportunity for political gain." M. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 613 (1996).

24a. Indeed, the stated rules of the respective circuits could not be more clearly in conflict. See Pet. 23.

Contrary to respondents' claims, Norfolk Southern has properly challenged the Eleventh Circuit's judgment on the FBL Himalaya clause. The court's privity and inland-carrier analyses led to a single holding that the FBL does not identify petitioner as "a member of the 'well-defined class of readily identifiable persons' entitled to claim the benefits of the clause." Pet. App. 18a. Norfolk Southern challenges the Eleventh Circuit's construction based on the FBL's plain language, which extends the COGSA liability limitation to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract," Pet. App. 59a, and it has attacked the Eleventh Circuit's construction for excluding from the FBL's protections all those who "perform the actual transportation of the goods to their ultimate destination, including subcontracting ocean carriers, stevedores, terminal operators, *and inland carriers of any kind* (by air, water, road or rail)." Pet. 27 (emphasis added) (footnote omitted). The question presented is framed in terms of the privity requirement because (a) that is the basis of the circuit conflict justifying certiorari, and (b) that is the dispositive rule excluding Norfolk Southern from the protections of the FBL, Pet. App. 12a-13a, and indeed any comparable bill of lading for overseas transport, because inland American carriers will never be in privity with a foreign freight forwarder. The fact that the Eleventh Circuit declared that a *differently worded* FBL specifically referencing "inland carriers," *id.* at 17a, may have overcome the privity presumption and protected the railroad does not affect its disposition of this FBL.[7]

[7] Respondents wrongly claim that "no circuit has ever allowed an inland carrier to claim the benefit of any Himalaya clause." Opp. at 28. Both the Ninth and Seventh Circuits have done just that, in cases where the clauses do not specifically refer to "inland carriers." *See Caterpillar, Inc.* v. *Columbus Line, Inc.*, 19 F.3d 26 (9th Cir. 1994) (table), *available at* 1994 WL 59763, at **2; *Taisho Marine & Fire Ins. Co.* v. *Maersk Line,*

Respondents also now claim for the first time that the *Akiyama* rule is dicta, Opp. 26, but that rule is not dicta, as respondents suppose, simply because the Ninth Circuit could have "come to precisely the same result under the Eleventh Circuit's articulation of the proper rule." *Id*. As their statement concedes, the circuits apply different rules. The Ninth Circuit applies the comparison-of-services test and rejects privity, *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998); the Eleventh Circuit requires privity, but does not apply that requirement where the term at issue is "descriptive" (like "stevedore") rather than "relational" (like "independent contractor"). Pet. App. 14a n.11. Regardless of how the Eleventh Circuit would have applied its distinct rule to the contract in *Akiyama*, the rules are in conflict, and respondents do not dispute that under the *Akiyama* comparison-of-services test Norfolk Southern would be covered by the FBL clause. Pet. 24-25. Indeed, the dissenting judge below recognized the conflict, and stated that he "would follow the decision in *Akiyama*" and apply the comparison-of-services test to rule in favor of Norfolk Southern. Pet. App. 20a. As demonstrated in the petition, this ruling, like the first one, undermines significant reliance interests. Pet. 28-29. Respondents' contention that the FBL, the most important document in international trade, *id.* at 6, should be rewritten to accomplish what its plain language already conveys, Opp. 29, solely on account of an aberrant Eleventh Circuit decision, is no answer at all. This Court should decide the issue to provide uniformity in the law regulating the international movement of goods every day.

## CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

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*Inc.*, 796 F. Supp. 336, 342 (N.D. Ill. 1992), *aff'd*, 7 F.3d 238 (7th Cir. 1993) (table); *see also, e.g., Aisin Seiki Co.* v. *Union Pac. R.R.*, 236 F. Supp. 2d 343, 347-48 (S.D.N.Y. 2002).

Respectfully submitted,

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