No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
JAMES N. KIRBY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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December 10, 2003

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

1. The government offers no explanation for its reformulated Question Presented, which alters the agency aspect of petitioner's Question 1 and omits the Himalaya clause aspect of Question 2. On the agency issue, the government never explains why this Court should override the contractual decision by Kirby and ICC under Australian law[1] for ICC to serve as "principal" in the transaction. *See* Pet. App. 8a, 67a (ICC undertakes "in [its] own name to procure the performance of the entire transport"). The government concedes the record does not show if ICC acted as an NVOCC, SG Br. 20; *cf.* Opp. 16-17, so no federal statutory issue is implicated in this case. The government's submission must be understood for what it is: a proposed rule, without any foundation in federal statute or this Court's maritime cases, to deny parties the contractual freedom to determine their own principal/agent relationship. And, to achieve that result, the government misstates the facts by casting the question in terms of "a railroad that subcontracted with the ocean carrier." SG Br. i.[2]

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[1] Notwithstanding the efforts by petitioner and the government to assert a federal "common law" issue, Australian law undoubtedly governs the interpretation of the ICC bill of lading. In this diversity suit, federal courts must follow Georgia choice-of-law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). They require the application of Australian law. *See Convergys Corp. v. Keener*, 276 Ga. 808, 811, 582 S.E.2d 84, 86 (2003) (reaffirming *lex loci contractus* rule). *See also* Pet. App. 67a (clause 19 providing that actions under ICC bill "shall be decided according to the law of [Australia]"). (Pet. App. 65a-68a mixes pages from the ICC bill, *id.* at 65a & 67a, and the Hamburg Süd bill, *id.* at 66a & 68a.) We disagree with any suggestion that Kirby waived the choice-of-law argument on the Himalaya clause issue. *See infra* at 10. Significantly, the government does not dispute that Australian law governs the agency issue. *Cf.* SG Br. 13.

[2] The record is clear that Norfolk Southern did not contract with Hamburg Süd. Indeed, petitioner rejected Kirby's initial claim because "the rail services buyer is Columbus Line USA Inc." Opp. 19. Twice the government recognizes (as did the district court, Pet. App. 28a) that Columbus Line is a separate corporate entity apart from Hamburg Süd. *See* SG Br. 4, 19. But twice the government "pierces the corporate veil" (with no justification) to assert that petitioner contracted with Hamburg

On the Himalaya clause issue, the government's reformulated question is curiously silent, but abandoning petitioner's language implicitly acknowledges its inadequacy. *See also infra* at 4-5 & n.6. The government's reformulation does not raise the Himalaya clause issue at all. The government asks whether Kirby is "bound by liability limitations in the intermediary's [ICC's] bill of lading," SG Br. i, but that formulation misunderstands the problem. Kirby has always acknowledged that it is bound by the ICC bill. The Himalaya clause issue (omitted from the government's Question) is whether a sub-sub-subcontracting railroad can benefit from those limitations.

2. The government suggests that there is a circuit conflict on "the nature of the relationship *that is presumed to exist* between a cargo owner and a shipping intermediary . . . when the *governing contract and the surrounding circumstances do not clearly establish* the nature of that relationship." SG Br. 7 (emphases added). In thus framing the issue, the government gravely distorts the record in this case and the decisions of other courts of appeals that have construed bills of lading. First, this case cannot be part of any such conflict because "the governing contract and the surrounding circumstances" *do* "clearly establish the nature of th[e] relationship" between Kirby and ICC. In the courts below, everyone recognized that the choice was whether ICC was (1) a principal, thus assuming responsibility as "carrier," or (2) Kirby's agent, thereby responsible only for arranging transportation on Kirby's behalf. Pet. App. 7a-9a; *see also* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING 7 (1993) (explaining that ICC's standard form was drafted to make that choice unambiguously); Shipping Act of 1984, 46 U.S.C. app. § 1702(6), (17) (congressional recognition of the same alternatives). In the court of appeals, petitioner argued that ICC was an

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Süd. *See* SG Br. i, 16-17; *cf. United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (discussing the "bedrock principle" of "respect for corporate distinctions" in a parent-subsidiary context).

agent because it *could not* be an NVOCC and thus could not be a principal. *See* Pet. App. 10a n.9. Only in this Court has petitioner finally acknowledged that ICC was indeed a principal. But petitioner now offers the wholly new argument – never raised or considered below – that ICC was both a principal and an agent with respect to the same obligation. This new position abandons the clear line between the principal/agent roles that the industry generally accepts, that petitioner advocated below, and that the Eleventh Circuit adopted. The government does not contend the Eleventh Circuit erred in construing the contract to hold that ICC was a "principal." Pet. App. 6a-11a. It instead offers a theoretical conflict not encountered by the court below. Unless this Court intends to ignore the court's fact-based conclusions, this case is not a suitable vehicle for resolving any "conflict" that may exist as to what courts should "presume[]" absent "clearly establish[ed]" facts.[3]

Second, the cases cited by the government (at 7) as conflicting do not announce a presumed background rule. In *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1175 (CA9 2002) (emphasis added), *petition for cert. pending sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002), the court specifically rested its decision on "*the facts of this case*"[4] for its conclusion that "Glory Express was acting as Doosan's agent." Although the Ninth Circuit erred, the errors were interpretations of facts and the application of the Shipping Act. The court nowhere derived, or purported to derive, its holding from any background rule.

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[3] The government also concedes that the record here creates a poor vehicle to resolve generally applicable agency issues. *See* SG Br. 20.

[4] The government argues that, if certiorari were granted in *Green Fire*, "the parties likely would disagree whether the [Ninth Circuit] correctly construed the . . . Glory Express-Doosan bill of lading." SG *Green Fire* Br. 11, No. 02-813. Yet the parties' disagreement over the Eleventh Circuit's construction of the ICC bill of lading is the issue presented here and would be central to the merits arguments.

In *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 524 (CA3 1994), the court specifically said that "[t]he underlying facts are not in dispute" in the sentence immediately preceding its statement that Blue Anchor was an NVOCC. Thus, the Third Circuit had no basis to "presume" a principal/agent relationship or to apply a "background" rule of law in drawing its conclusion. Similarly, in *Insurance Co. of North America v. S/S American Argosy*, 732 F.2d 299, 300-01 & n.2 (CA2 1984), the court specifically found that the intermediary met the regulatory requirements for NVOCC status. But the case did not turn in any way on the principal/agent status of an intermediary. *Id.* at 302-03.[5] Those cases, therefore, do not support the government's assertion that "the Eleventh Circuit has adopted a conflicting rule." SG Br. 8.

3. On petitioner's Question 2 concerning the "privity" required for Himalaya clause protection, the government acknowledges that every circuit except the Ninth agrees with the Eleventh. *See* SG Br. 8-9. But the government never addresses the Eleventh Circuit's explanation that the Ninth Circuit's *Akiyama* language was "*dicta*" that was "contradict[ed]" in *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450-51 (CA9 1993). *See* Pet. App. 14a-15a n.11. Before granting certiorari, this Court ordinarily gives a court of appeals an opportunity to resolve an intra-circuit conflict. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). The Ninth Circuit should have an opportunity to decide, in light of the Eleventh Circuit's thoughtful approach, whether to extend the *Akiyama dicta* to a court holding that could then be reviewed by this Court if the issue were important enough.

Such percolation is all the more appropriate here because the government ignores the Eleventh Circuit's sec-

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[5] The holding concerns "the doctrine of ship-ratification," which has nothing to do with the decision below. 732 F.2d at 303.

ond independent basis for rejecting petitioner's claim: "the principle that a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." Pet. App. 16a; *see also* Opp. 24-25. Neither petitioner's nor the government's Questions Presented addresses that aspect of the court of appeals' holding, thus raising the specter that anything this Court might conclude on the privity issue would be irrelevant to the ultimate disposition of the case.[6]

Nor do petitioner or the government cite any appellate decision in conflict with the Eleventh Circuit's alternate rationale for its holding. Indeed, no reported court of appeals' decision has ever held that any Himalaya clause protects an inland carrier. *See* Opp. 28.[7] And the govern-

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[6] We noted petitioner's waiver of the "inland carrier" issue. *See* Opp. 24-25. Petitioner's response that "[t]he court's privity and inland-carrier analyses led to a single holding" (Reply Br. 9) ignores the problem. The Eleventh Circuit had two independent grounds for its "single holding," either one of which was adequate to support that holding. Petitioner challenged only the first ground. (Its discussion of the decision below does not even mention the second ground, *see* Pet. 11, let alone challenge it, *cf.* Pet. 25-29 (discussing only the privity analysis).) Petitioner argues that it addressed only privity because that is the issue on which certiorari is "justif[ied]." Reply Br. 9. That argument implicitly concedes that certiorari is *not* justified on the inland-carrier issue. (Petitioner also argues that the privity analysis "is the dispositive rule," *id.*, but ignores that the inland-carrier analysis is equally dispositive.) Because the Eleventh Circuit's Himalaya clause holding is supported by an independent and adequate rationale that petitioner did not raise in its Questions Presented, that petitioner implicitly concedes to be uncertworthy, and that the government omits from its Question Presented, this Court should decline to review the issue.

[7] In addition to the decision below, two other circuits have rejected similar arguments. *See Caterpillar Overseas, S.A. v. Marine Transp. Inc.*, 900 F.2d 714, 725-26 (CA4 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 269-70 (CA3 1974). We cited these cases, Opp. 28; petitioner's reply brief ignored them. The government cites *Caterpillar* (at 8, 18) but not *De Laval*. Indeed, petitioner has found only two appellate decisions – in the 44 years since *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959) – that extend Himalaya clause protection to an inland carrier. *See* Reply Br. 9-10 n.7. Neither decision was reported, so it is unclear what the Himalaya clauses provided or what arguments the courts considered.

ment is simply wrong to say there is "no basis" for that distinction. COGSA is a maritime statute; the Hague and Hague-Visby Rules are maritime conventions. Himalaya clauses extending the benefits of these maritime rules to non-maritime parties *should* be strictly construed, lest rules designed for sea carriage be applied outside of their intended context. *See also* Pet. App. 16a-18a (reviewing evidence that the ICC Himalaya clause was not expected to govern inland carriers).[8]

4. The government asserts that this Court's review is necessary because the railroads are unable to fend for

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[8] The anomaly of applying holdings across carriage regimes is demonstrated in *Nippon Fire & Marine Insurance Co. v. Skyway Freight Systems, Inc.*, 235 F.3d 53 (CA2 2000), cited by the government (at 19) and petitioner (Reply Br. 3-4). First, the case involves a distinctive liability regime for air carriage. *See* 235 F.3d at 59 (interpreting Airline Deregulation Act of 1978). Second, the court appears to be confused about subcontracting. The court initially says that Skyway subcontracted with United and USAir. *Id.* at 56, 61. But then it changes its analysis completely and says that the plaintiff was Skyway's "undisclosed principal" and that Skyway was the plaintiff's "agent," presumably to contract with United and USAir. *Id.* at 61-62. Whatever its confusion, the court did not apply a rule of law that a "principal carrier" is always the shipper's agent to contract with "secondary carriers." The court admits the possibility that "other circumstances might exist in which secondary carriers may be held liable to shippers in tort," but notes that "the facts of this case . . . do not present any such circumstance." *Id.* at 62 n.4. By contrast, the court below meticulously reviewed the facts and decided that ICC was not Kirby's agent to contract with Hamburg Süd. Third, *Nippon* arises in a completely different business environment. Whereas the Skyway contract of carriage "lacked a 'Himalaya clause,'" *id.* at 60, maritime bills of lading routinely contain such clauses. Nothing indicates whether parties such as Skyway behave in anything resembling the same way as Australian freight forwarders. The specific details of the transaction were key to the Eleventh Circuit. The *Nippon* court did not reveal those details. Rather, the statement cited by petitioner was made in reliance on cases that obviously arose in a different factual context. *See id.* at 61 (citing *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914), in which the intermediary concededly was the owner's agent for purposes of contracting with the performing carrier). In any event, this Court has rejected the argument – at the government's urging – that a "federal common law" governs in the air carrier context. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995).

themselves in the commercial marketplace. *See* SG Br. 15 n.5. That assertion is remarkable, in light of the complete absence of cases raising the issues presented in this case against railroads and the well-established practices in numerous countries that recognize Himalaya clauses. The government acknowledges that the liability issue here "could have been addressed by a 'circular indemnification' arrangement." *Id.* Yet the government rejects that free-market alternative as "cumbersome," *id.*, and instead advocates a one-size-fits-all "background" rule that would comprehensively preempt state tort law and interfere with private parties' freedom to enter into contracts. In fact, such contractual arrangements – no more cumbersome than a Himalaya clause – are used routinely throughout the common law world. *See, e.g.*, Robert Newell, *"Privity Fundamentalism" and the Circular Indemnity Clause*, 1992 LLOYD'S MAR. & COM. L.Q. 97, 97. Norfolk Southern does not need this Court's help.[9]

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[9] The same is true in the political arena. The government's proposed "background" rule is better suited to legislative solution than incremental common law development. In Congress, all interested parties can participate in a comprehensive compromise. But railroads have consistently *rejected* legislative proposals to extend maritime limitations of liability inland. Thus, the government's assertion that the ongoing UNCITRAL negotiations "are not likely to resolve the issues addressed in this brief" (SG Br. 11 n.3) is incomplete. The assertion presumably relates only to Himalaya clauses, for the UNCITRAL negotiations have long been premised on the assumption that an intermediary acting as "carrier" does not act as the cargo owner's agent to subcontract with performing parties. It is true (as of the October 2003 session) that the negotiations are unlikely to produce automatic Himalaya protection for inland carriers. The proposed convention now appears likely to give automatic Himalaya protection only to *maritime* performing parties, itself a significant result. The Court may wish to know what approach the international community will take before addressing the government's argument that inland carriers should receive, in effect, what the international community decides not to provide. Moreover, a principal reason inland carriers will be excluded from the new convention is because petitioner's *amicus* AAR insisted (on the basis of its strong political power) that North American railroads must be excluded. This position hews to the line initially taken by petitioner that Kirby could not recover because it lacked privity of contract with petitioner. Having rejected legislative solutions to preserve their own archaic privity

5. On the merits, the government offers not a rule of law compelled by this Court's cases, but a policy proposal that eviscerates the details of private contracts so that each actor in a through bill of lading deemed by a court to be "foreseeable and essential to fulfillment of the contract" (SG Br. 18) enjoys the benefit of a limitation of liability. But that proposed rule – based on *dicta* in old non-maritime cases – would nullify this Court's more recent and apposite decision in *Herd*. Under the government's policy proposal, inland carriers would be protected under through bills of lading regardless of what the Himalaya clause actually says. Indeed, a clause specifically *excluding* inland carriers from the list of beneficiaries would be irrelevant. If a Himalaya clause's wording is irrelevant, then the clause itself is irrelevant. That is directly contrary to *Herd*, which no one has argued should be overruled.

Herd clearly stated the rule that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." 359 U.S. at 305. The government nowhere cites, quotes, or discusses that language – the foundation on which bills of lading have been drafted and litigated for more than 40 years. Instead, the government asserts as a "dispositive fact" the "clear" language of clause 10.1 in the ICC bill of lading ("independent contractor . . . whose services have been used in order to perform the contract"). The government does not address the Eleventh Circuit's reasons why that contract language does not extend to petitioner, which after all was *not* ICC's "independent contractor," but rather the independent contractor of Columbus Line, ICC's sub-subcontractor. *See* Pet. App. 12a-15a.

6. The government's argument on the merits also rests on the erroneous view that the ICC bill of lading "clearly

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analysis, *see* Opp. 19 n.16, the railroads now ask this Court to limit their liability without making any concession to other interests, and attack an accepted privity analysis in construing Himalaya clauses in the process.

extended the $500-per-package liability limitation to the inland transport of Kirby's goods from Savannah to Huntsville." SG Br. 16. There was no such extension, let alone a "clear" one. The $500 figure limits liability – even for claims against ICC itself – only "under COGSA, where applicable." Clause 8.6(b), Pet. App. 67a.[10] Under clause 7.3, COGSA "shall apply" only "if compulsorily applicable." And, under COGSA § 1(e), 46 U.S.C. app. § 1301(e), the statute by its own terms does not apply after "the time when the goods . . . are discharged from the ship," which in this case happened in Savannah. ICC actually limited its liability for damages during inland transport to either (a) the full value of the goods, under clause 8.6(a) and the Carmack Amendment,[11] or (b) 2 SDRs per kilogram, under clause 8.3 (which is about $450,000 in this case).

7. The government twice asserts that petitioner carried the goods under a contract that incorporated the Hamburg Süd bill of lading. *See* SG Br. 4-5, 18. Nothing in the record indicates the nature of the contract between petitioner and Columbus Line (except for petitioner's repeated assertion that Kirby was not a party to this contract and had no rights under it). In fact, the government reveals for the first time (based on petitioner's undocumented *ex parte* assertion with no record support) that petitioner's arrangement with Columbus Line was "contract carriage" under 49 U.S.C. § 10709. *See* SG Br. 12. Although that contract is not in the record, and thus we cannot know what it provides, it would be highly unusual (to say the least) if it really incorporated the Hamburg Süd bill of lading.

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[10] When COGSA is not "applicable," other limitation amounts govern. *See, e.g.*, Clauses 8.3, 8.5, 8.6(a) (imposing other – generally higher – limitation amounts in non-COGSA situations). Pet. App. 67a.

[11] The government is correct to note that the Carmack Amendment might apply in this case, *see* SG Br. 11-12, but wrong to suggest that the argument has been waived. A party is not required to raise every possible issue on an interlocutory appeal. The entire point of an interlocutory appeal is to focus on the "controlling question of law," 28 U.S.C. § 1292(b), that the district court has certified, not to address every issue that might be addressed over the course of the litigation.

8. In advocating a new "background" rule, the government quotes selectively from respondents' court of appeals brief to intimate (inaccurately) that we have conceded that United States federal law governs the Himalaya clause issue. *See* SG Br. 13. To the extent we have relied on general maritime law principles or cases that advocate construing bills of lading to achieve international uniformity, *see* Resp. C.A. Br. 46, these are principles that are common to the United States and Australia (and most of the maritime world). *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-38 (1995) (recognizing need for international uniformity in this field). The *Herd* Court followed Australian law in reaching a conclusion that would promote international uniformity, *see* 359 U.S. at 307-08, and the British House of Lords, in turn, followed *Herd*, *see Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446. But, as soon as this Court tries to develop new "background rules" that go beyond widely accepted norms of contract interpretation, it needs to focus more directly on what law properly governs. In this case, construction of the bills of lading is governed by Australian law. *See supra* at 1 & n.1.[12]

CONCLUSION

For the foregoing reasons and those stated in the brief in opposition, the petition should be denied.

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[12] The government's citation (at 13) of *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (CA4 1993), is off-point, but instructive. The pertinent issue (unlike here) was the contractual incorporation of COGSA into a bill of lading. *Id.* at 740. (By their own terms, the provisions incorporating COGSA into the ICC bill do not apply to Norfolk's inland accident. *See supra* at 8-9 & n.10.) *Wemhoener* noted the complexity of the incorporation issue by observing that circuits are divided on whether federal or state law applies to construe such a contract. *See* 5 F.3d at 739-40. Here, the issue is the meaning of "independent contractors" in the Himalaya clause. That contractual term would be construed not under some free-floating federal common law but according to the governing choice-of-law rules (which here point to Australian law). Indeed, the court of appeals' cases cited throughout both parties' briefs here typically turn, as they should, on the wording of the applicable bill of lading. *See* Opp. 26-28 (collecting cases).

Respectfully submitted,

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