No. 02-1028

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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This brief is submitted in response to the Court's order of September 24, 2004, which invited the Acting Solicitor General to file a brief on behalf of the United States to address the following question: "Does federal or state substantive law govern the questions presented?" For the reasons set forth below, the position of the United States is that the questions presented by this case are issues of federal law.

As a threshold matter, however, we submit that the Court need not definitively resolve whether federal or state law generally would apply to questions of this type. As we explained in our brief at the petition stage (at 12-13), the parties litigated this case in the courts below on the clear (albeit implicit) premise that federal maritime law applies, and the court of appeals decided the case on that premise. Having prevailed on that theory below, respondents are in no position to deny the federal nature of the questions

presented. *New Hampshire* v. *Maine*, 532 U.S. 742, 749-750 (2001). The question whether federal law governs this case was raised at the petition stage by the United States (but not by respondents in their brief in opposition, see Sup. Ct. R. 15.2), and we stated that "this Court may rely on the parties' joint position and address the federal-law questions decided by the Eleventh Circuit and presented in the petition." U.S. Br. (Pet. Stage) 13. The Court chose to grant certiorari, and it should now proceed to decide the case in reliance on the parties' position that federal law governs.

I. THIS COURT SHOULD APPLY FEDERAL LAW IN CONSTRUING THE ICC/KIRBY BILL OF LADING

The court of appeals held that respondents' entitlement to damages was unaffected by the ICC/Kirby bill of lading because petitioner was not in privity of contract with ICC and is an inland rather than a maritime carrier. The correctness of that holding depends solely on the *interpretation* of the Himalaya Clause of the ICC/Kirby bill. For two reasons, this Court should apply federal law in construing that provision.

A. By Litigating This Question As One Of Federal Law In The Courts Below, Respondents Waived Any Argument That A Different Body Of Law Applies

1. In their supplemental brief at the petition stage of this case, respondents argued (at 1 n.1) that "Australian law undoubtedly governs the interpretation of the ICC[/Kirby] bill of lading." Respondents' conduct below, however, evinces a clear understanding that federal law would govern the interpretation of the ICC/Kirby bill's Himalaya Clause. Thus, in their Joint Motion requesting that the district court certify its partial summary judgment order for immediate appellate review, the parties explained (at 6) that a "substantial ground for a difference of opinion" existed in light of a "well-established conflict in authority between two of the leading maritime circuits"—the Second and the Fifth—

"with multiple decisions over several years in each circuit, on an issue that the Eleventh Circuit has never addressed." See Pet. App. 24a (describing Joint Motion). That motion's description of the various court of appeals decisions as presenting a common "issue," and its assertion of a circuit conflict, necessarily presupposed that each of the relevant Himalaya Clauses was governed by the same source of law.

Respondents' briefs in the court of appeals similarly assumed that the interpretation of the ICC/Kirby bill's Himalaya Clause was governed by federal law. Respondents relied on an array of federal cases, and they argued that the Eleventh Circuit's prior decision in *Hale Container Line, Inc.* v. *Houston Sea Packing Co.*, 137 F.3d 1455 (1998), "should have been dispositive on this question" (Resp. C.A. Br. 29). The suit in *Hale Container* was filed in admiralty (137 F.3d at 1464), however, and therefore was decided under the general maritime law. See, *e.g.*, *East River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law."). Respondents further argued that, in determining the effect of the ICC/Kirby bill's Himalaya Clause, the court of appeals "must choose between two competing lines of jurisprudence arising under [COGSA]" and "should be guided by which approach would better promote national and international uniformity." Resp. C.A. Br. 46. Neither respondents' opening brief nor their reply brief in the court of appeals cited any Georgia or Australian cases, analyzed Georgia or Australian law, or discussed Georgia choice-of-law principles. Compare Resp. Supp. Br. in Opp. 1 n.1. The court of appeals likewise decided the case on the apparent understanding that the general maritime law applied, since the court based its interpretive standard on its prior decision in *Hale Container* and, ultimately, on this Court's decision in *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297 (1959). See Pet. App. 11a-12a.

2. Because the parties to this lawsuit agreed to treat the disputed issue of contract interpretation as one of federal law, this Court may decide the question on that understanding. When the "parties have agreed about what law governs, a federal court sitting in diversity is free, if it chooses, to forgo independent analysis and accept the parties' agreement." *Borden* v. *Paul Revere Life Ins. Co.*, 935 F.2d 370, 375 (1st Cir. 1991); accord, *e.g.*, *Texaco A/S (Denmark)* v. *Commercial Ins. Co.*, 160 F.3d 124, 128 (2d Cir. 1998); *Renick* v. *O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 313 (9th Cir.), cert. denied, 519 U.S. 865 (1996); *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185, 1190-1191 (7th Cir. 1985); see Restatement (Second) Conflict of Laws § 187 (Supp. 1988). That principle applies even when the parties' agreement as to the applicable law is implicit in their litigation conduct rather than expressly stated. See, *e.g.*, *Santalucia* v. *Sebright Transp., Inc.*, 232 F.3d 293, 296 (2d Cir. 2000) ("The parties' briefs assume that New York law controls this dispute, and such implied consent is sufficient to establish choice of law.") (ellipsis and internal quotation marks omitted). Cf. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (holding that the respondent in that case, by failing to raise the argument in the courts below, had waived its contention that the suit was governed by federal maritime law rather than by state law).[1]

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[1] Respondents' reliance (Supp. Br. in Opp. 1 n.1) on Clause 19 of the ICC/Kirby bill of lading is misplaced. Clause 19 states: "Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business * * *, and shall be decided according to the law of the country in which that place of business is situated." Pet. App. 67a; J.A. 98. By its terms, that Clause applies only to suits "against the Freight Forwarder," which in this case is ICC. And if Clause 19 did apply to this litigation, its effect would be to bar respondents' federal district court suit altogether.

B. Even If The Choice-Of-Law Issue Had Been Contested Below, Federal Law Would Govern The Interpretation Of The ICC/Kirby Bill Of Lading

1. "The bill of lading and the charter party are both maritime contracts and, hence, enforceable in a court of admiralty." *Armour & Co.* v. *Fort Morgan S.S. Co.*, 270 U.S. 253, 259 (1926). To be sure, this Court has rejected the proposition that "every term in every maritime contract can only be controlled by some federally defined admiralty rule." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955). Nevertheless, concern for "the proper harmony and uniformity of [the general maritime] law in its international and interstate relations," *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)), will typically support the application of federal maritime law to the construction of maritime contracts absent some strong countervailing state interest. See, *e.g.*, *Albany Ins. Co.* v. *Anh Thi Kieu*, 927 F.2d 882, 887 (5th Cir.) ("Federal maritime law properly controls any maritime dispute in the absence of a substantial and legitimate state interest."), cert. denied, 502 U.S. 901 (1991).[2]

The court of appeals held in this case that "relational" terms such as "agent," "servant," or "independent contractor," when used in the Himalaya Clause of an intermodal bill of lading issued by a transportation intermediary, should be construed to encompass only those who are in direct privity of contract with the intermediary. See Pet. App. 14a n.11. Under the court's analysis, even persons performing traditional maritime functions (*e.g.*, connecting ocean carriers, sailors, or stevedores) would be denied the protection of a

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[2] The general maritime law is relevant here notwithstanding the fact (J.A. 31) that respondents brought this action as a diversity case. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 410-411 (1953); see also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 222-223 (1986).

similarly-worded Himalaya Clause if they contracted with the vessel operator rather than with the intermediary. The question whether particular language in a maritime transportation contract will be deemed to cover such persons implicates substantial federal interests in uniformity and predictability and should therefore be decided by reference to the general maritime law. See *Robert C. Herd & Co.*, 359 U.S. at 308 (applying "the common law as declared by this Court"); *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 740, 743 (4th Cir. 1993); but cf. *Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313, 315-317 (2d Cir. 1983), cert. denied, 466 U.S. 963 (1984).

2. The question whether the ICC/Kirby bill's Himalaya Clause extends to inland carriers is of a somewhat different character. By its very nature, that issue could not arise in the interpretation of a purely maritime contract. The issue nevertheless implicates important federal interests that support the application of a uniform federal rule.

The purpose of multimodal shipping agreements, such as the standard FIATA bill of lading utilized in this case, is to allow cargo owners to arrange through a single contract for both the sea and land phases of the transportation. The efficacy of that integrated approach depends on consistent and predictable resolution of *all* disputes concerning the interpretation of the agreement, including those controversies that involve the land phase alone. The ability of an intermediary such as ICC to arrange for through transportation of goods from Sydney to Huntsville could be hindered if the potential exposure of inland subcontractors depended on the law (including the choice-of-law rules) of the particular State in which an accident might occur. See U.S. Br. (Pet. Stage) 9-11; World Shipping Council Br. 2-6.

A federal rule of decision may be appropriate "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis* v. *Pan Am.*

Petroleum Corp., 384 U.S. 63, 68 (1966)); see, *e.g.*, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that the substantive law to be applied in suits alleging breach of a collective bargaining agreement in violation of 29 U.S.C. 185(a) "is federal law, which the courts must fashion from the policy of our national labor laws"). Even if the choice-of-law issue had been contested in the courts below, the foregoing considerations would justify the application of federal maritime law to resolve disputes concerning the application of Himalaya Clauses in multimodal transportation agreements to the land phase of the carriage. The argument in favor of applying federal law is particularly strong in the instant case, because the land phase of the contractual undertaking involved the *interstate* transportation of goods. See *Cincinnati, New Orleans & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-327 (1916) (questions concerning the interpretation and effect of a railroad bill of lading for an interstate shipment are decided under federal law); Bills of Lading Act, 49 U.S.C. 80101 *et seq.*[3]

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[3] A number of lower courts have held that the federal admiralty courts ordinarily lack admiralty jurisdiction over breach-of-contract claims when the relevant contract is not "wholly maritime" but instead includes both maritime and non-maritime components, unless the maritime aspects are "separable" or the non-maritime aspects are "merely incidental." See, *e.g.*, *Sea-Land Serv., Inc.* v. *Danzig*, 211 F.3d 1373, 1378 (Fed. Cir. 2000); *Kuehne & Nagel* v. *Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989); cf. *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 456 (1947) (describing admiralty jurisdiction over mixed maritime and non-maritime contracts as "doubtful"). Whatever the validity *vel non* of the "wholly maritime" test in other settings, however, it would "interfere[] with the proper harmony and uniformity of [the general maritime] law in its international and interstate relations" (*American Dredging Co.*, 510 U.S. at 447) to subject Himalaya Clauses in international multimodal bills of lading to the potentially conflicting interpretive regimes of 50 state jurisdictions. In any event, there is no persuasive ground for applying non-federal law to the interpretation of a multimodal transportation contract when even the non-maritime component of the transportation involves an undertaking

Because respondents implicitly consented to the court of appeals' application of federal law in construing the ICC/Kirby bill of lading, however, the Court need not decide what law would have governed if the choice-of-law question had been disputed.

II. THE QUESTION WHETHER THE SHIPPING ACT PREEMPTS A STATE-LAW DAMAGES AWARD IN EXCESS OF THE LIMIT SPECIFIED IN THE HAMBURG SUD/ICC BILL OF LADING IS A QUESTION OF FEDERAL LAW

Respondents do not dispute that the Hamburg Sud/ICC bill established a $500-per-package limit that extended to the inland phase of the transportation. They contend, however, that they were not parties to that contract, and that their potential entitlement to damages under state tort law is therefore unaffected by the liability limit specified in the Hamburg Sud/ICC bill.

Our principal brief argues (at 22-26) that any state-law damages award in this case in excess of $500 per package is preempted because it "stands as an obstacle to the accomplishment and execution" (*Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (citation omitted)) of Congress's purposes in enacting the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.* Maritime common carriers like Hamburg Sud are required by the Shipping Act to maintain published tariffs that cover "any through transportation route that has been established" and that include sample copies of "any bill of lading * * * evidencing the transportation agreement." 46 U.S.C. App. 1707(a)(1) and (a)(1)(E); see 46 C.F.R. Pt. 520. Such carriers are forbidden by the Act to engage in unreasonable discrimination, including discrimination between

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—interstate rail carriage—whose conduct and contracts have historically been governed by federal law.

non-vessel-owning common carriers (NVOCCs) and shipper-owners. See 46 U.S.C. App. 1709; U.S. Br. 24-25.

As a matter of longstanding and consistent industry practice, carriers' published tariffs have offered shippers a choice of carriage rates, depending on the shipper's decision whether to declare the full value of the goods or to accept a limitation of the carrier's potential liability. See U.S. Br. 3 & n.2, 22-23.[4] The rule announced by the court of appeals would substantially disrupt that regime by precluding the carrier from effectively limiting its potential exposure and that of its subcontractors when carrying freight shipped by an NVOCC.

Like any other issue concerning the meaning or legal effect of an Act of Congress, the question whether the Shipping Act's tariff regime and non-discrimination principle preclude respondents' attempt to avoid the liability limits set forth in the Hamburg Sud bill of lading presents an issue of federal law. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 221-228 (1998); *Southern Ry.* v. *Prescott*, 240 U.S. 632, 638-640 (1916) (where "the conditions of liability * * * are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling" as a matter of federal law). To be sure, a claim of preemption could not itself have provided the basis for district court *jurisdiction* under 28 U.S.C. 1331. See, *e.g.*, *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 13-14 (1983). But where (as here) federal jurisdiction is clearly present on other grounds, the determination whether respondents' claims are preempted by the tariff regime and anti-discrimination principle embodied in the Shipping Act

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[4] Thus, Hamburg Sud's bill of lading, which was incorporated into its tariff (46 U.S.C. App. 1707(a)(1)(E)), expressly set forth the limitation of liability terms applicable at standard freight rates and noted the shipper's right to declare a higher value upon payment of any additional required freight charge. J.A. 73 ¶ 17.

presents a federal question. And because that question is "so integral to decision of the case that [it] could be considered 'fairly subsumed' by the actual questions presented," *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540 (1999) (citation omitted), this Court should consider the preemptive effect of the Shipping Act if it addresses the first question presented in the petition.

* * * * *

For the reasons stated above, and in our principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

OCTOBER 2004

APPENDIX

1. 46 U.S.C. App. 1701 provides:

Declaration of policy

The purposes of this chapter are—

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs; and

(4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

2. 46 U.S.C. App. 1702 provides in pertinent part:

Definitions

As used in this chapter—

* * * * *

(6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country * * *.

* * * * *

(16) "ocean common carrier" means a vessel-operating common carrier.

(17) "ocean transportation intermediary" means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this paragraph, the term—

(A) "ocean freight forwarder" means a person that—

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(B) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

* * * * *

(21) "shipper" means—

(A) a cargo owner;

(B) the person for whose account the ocean transportation is provided;

(C) the person to whom delivery is to be made;

(D) a shippers' association; or

(E) an ocean transportation intermediary, as defined in paragraph(17)(B) of this section, that accepts responsibility for payment of all charges applicable under the tariff or service contract.

* * * * *

3. 46 U.S.C. App. 1707 provides in pertinent part:

Tariffs

(a) In general

(1) Except with regard to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, and paper waste, each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariffs the inland divisions of a through rate. Tariffs shall—

(A) state the places between which cargo will be carried;

(B) list each classification of cargo in use;

* * * * *

(D) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part or the aggregate of the rates or charges;

(E) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement;

* * * * *

(2) Tariffs shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations, and a reasonable charge may be assessed for such access. No charge may be assessed a Federal agency for such access.

* * * * *

4. 46 U.S.C. App. 1709 provides in pertinent part:

Prohibited acts

(a) In general

No person may—

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

* * * * *

(b) Common carriers

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

(1) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(2) provide service in the liner trade that—

(A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 1707 of this Appendix unless excepted or exempted under section 1707(a)(1) or 1715 of this Appendix; or

(B) is under a tariff or service contract which has been suspended or prohibited by the Commission under section 1708 of this Appendix or the Foreign Shipping Practices Act of 1988 (46 U.S.C. App. 1710a);

(3) retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—

(A) rates or charges;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims;

* * * * *

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;

* * * * *

(10) unreasonably refuse to deal or negotiate[.]

* * * * *