No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL.,
Petitioners,
v.

GRANT BAKER, ET AL.,
Respondents.

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

BRIEF OF STATE OF MARYLAND AND 33 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Amici States have vital interests in the substantive rule of tort law that this Court will adopt to govern corporate liability for punitive damages in maritime law. Exxon's assertion that the availability of punitive damages in maritime law implicates no issues of federalism or state sovereignty, Petrs. Br. 27, pays little heed to the States' strong interest in deterring misconduct that could result in massive toxic spills, with potentially catastrophic effects to our coastlines, lakes, and rivers, and the economies that depend on those waters.

Nineteen of the States that have signed this brief have coastal shorelines, either on the Pacific, Gulf, or Atlantic coasts, or on the Great Lakes. Many others have navigable rivers and lakes. The threat of a major oil spill looms large for all.[1] Excluding Alaska, coastal States constitute 17% of the Nation's land area, but contain 53% of its population. Maritime law also applies to the many waterways in the noncoastal Amici States. The Amici States, therefore, have a critical interest in ensuring that the common law and overall regulatory scheme governing toxic spills allow for punitive damages in appropriate cases, in order to deter and punish reckless maritime conduct to the same degree that common law deters and punishes land-based reckless conduct.

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[1] In 2005, 1.1 billion tons of petroleum products and 175 million tons of toxic materials passed through U.S. coastal waters, a 20% increase since the Valdez catastrophe. U.S. Army Corp of Eng'rs, *Waterborne Commerce of the United States – Calendar Year 2005*, *available at* http://www.iwr.usace.army.mil/ndc/wcsc/wcsc.htm (last visited Jan. 27, 2008).

As the facts of this case illustrate, a large-scale maritime accident can have ruinous effects not only on the environment, but on public and private interests in large economic sectors such as the tourism[2] and fishing industries,[3] and the businesses surrounding fast-growing coastal areas and lakes and rivers.[4] In many instances, a region's culture, and the lives and livelihoods of its people, depend almost entirely on the health of our territorial waters, our coastlines, and our rivers and lakes.

A single catastrophic maritime accident can cause far-reaching economic harms to citizens of many States. The EXXON VALDEZ spill, once spread by wind and water, extended over 600 linear miles, roughly the distance from

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[2] Tourism is the Nation's largest employment sector and contributes $1 trillion to Gross Domestic Product. The Hon. Franklin L. Lavin, Under Sec'y for Int'l Trade, U.S. Dep't of Commerce, Test. Before Senate Commerce Committee's Subcomm. on Trade, Tourism, and Econ. Dev. (June 22, 2006), *available at* http://commerce.senate.gov/public/_files/Lavin062206.pdf (last visited Jan. 27, 2008). Coastal states receive 85% of U.S. tourism revenues and attract more than 89.3 million visitors annually. Dr. Vernon R. Leeworthy, Nat'l Oceanic and Atmospheric Admin., *Nat'l Survey on Recreation and the Env't* (May 15, 2001), *available at* http://marineeconomics.noaa.gov/NSRE/NSRE_V1-6_May.pdf (last visited Jan. 27, 2008).

[3] In 2004, U.S. commercial fishing revenues were $3.6 billion, and recreational anglers caught 35 million metric tons of fish within three miles of the United States coast. Nat'l Marine Fisheries Serv., Office of Science and Tech., *Fisheries of the United States* (2004), *available at* http://www.st.nmfs.noaa.gov/st1/fus/fus04/02_commercial2004.pdf (last visited Jan. 27, 2008).

[4] In the years since the EXXON VALDEZ spill in 1989, the population of coastal counties has increased 16.5% to 150 million Americans. Kristen M. Crossett, *et al.*, *Population Trends Along the Coastal United States: 1980-2008*, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv., Special Projects Office (September 2004), *available at* http://oceanservice.noaa.gov/programs/mb/supp_cstl_population.html (last visited Jan. 27, 2008).

Cape Cod, Massachusetts, to Cape Lookout, North Carolina, and over 10,000 square miles of the surrounding marine ecosystem. Apart from a spill's geographic reach, citizens of other States can be directly affected by the harms a spill causes. In fact, citizens of our States have been harmed by the EXXON VALDEZ oil spill itself. More than a third of the class members—over 11,000 people—reside for part of the year outside Alaska.

Toxic spills also cause changes in the environment that can have persistent, lingering effects on water resources. *See* Leon E. Panetta, PEW Oceans Comm'n, *America's Living Oceans* 64-65 (2003). Furthermore, the Amici States bear a large measure of the burdens associated with cleaning up hazardous chemicals, burdens which are typically borne by entities such as state port authorities. The availability of punitive damages under federal maritime law serves to deter conduct that can impose these harms and costs on the States.

Adoption of the unduly restrictive punitive damages regime that Exxon advocates, or a holding that the Clean Water Act precludes punitive damages altogether, would interfere with the Amici States' ability to protect our waterways from toxic spills through appropriate state regulations and common law. The Amici States have a strong interest in a rule of vicarious liability for federal maritime cases that harmonizes with the approach that the state courts have developed under state common law.

STATEMENT

The salient facts concerning Exxon's reckless misconduct and its devastating effect on the Prince William Sound region bring into sharp focus the threat that toxic spills pose to the economic viability of our States' industries, businesses, and citizens that depend on our waterways. These facts vividly demonstrate why States need the protection of a federal rule of vicarious liability for punitive damages that would deter and punish the kind of devastating recklessness on display here.[5]

For decades, Exxon has shipped oil on supertankers through the "icy and treacherous" waters of Prince William Sound and southward, Pet. App. 22a. The "economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities," and thousands of Native Alaskans in the area live a subsistence way of life that goes back centuries. JA1442; *see also* Pet. App. 41a, 155a; JA1439, 1475-81; *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) ("If [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life."). From the time Exxon began shipping oil through the Sound, it knew that "[a] major spill in the Valdez area would cause [an] incurable disaster to the rich fisheries." JA1488; *see also* Pet. App. 122a, 232a; JA213-14, 1437-41, 1475-94.

Despite this knowledge, Exxon put in command of a supertanker, the EXXON VALDEZ, a man Exxon whom knew to be an active, relapsed alcoholic and to be drinking while captaining the supertanker: Captain Joseph

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[5] The facts summarized here are those set forth in, *inter alia*, the opinions of the district court and the Ninth Circuit on *de novo* review, Pet. App. 22a-31a, 120a-124a, 147a-157a, which exhaustively reviewed and summarized the evidence presented at trial.

Hazelwood. JA1033-34; SJA135sa-36sa. In 1985, while employed by Exxon, Hazelwood attended a 28-day alcohol treatment program, but dropped out of the ensuing aftercare program and relapsed after returning to duty as captain. Pet. App. 63a-64a, 121a; JA306. Hazelwood's supervisors promptly began receiving reports that he "had fallen off the wagon." Pet. App. 63a, 154a-155a; JA409-26, 849. The first report was relayed to the *President* of Exxon Shipping, who was told that Hazelwood was acting "kind of crazy or kind of strange." JA960-61.

Hazelwood's relapse was known throughout Exxon Shipping, and it was common knowledge in the Valdez area that supertanker crews drank excessively on ship and in ports, routinely violating unenforced policies against drinking on board and against returning to duty within four hours of drinking. JA226-37, 306-08, 314-15, 331-38, 379-80, 423-24, 445-47, 499, 562-71, 639-40, 649, 750-54; SJA118sa-29sa. Between the time of his relapse until less than two weeks before the disaster, "the highest executives in Exxon Shipping" were receiving reports of Hazelwood's alcoholic conduct. Pet. App. 29a, 64a, 83a, 121a-122a, 153a-157a. As the Ninth Circuit held, "[t]he evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." Pet. App. 83a.

This was the state of Exxon's knowledge of the risk that Hazelwood's active alcoholism posed as of March 23, 1989. That night, Exxon entrusted Hazelwood with command of an Exxon supertanker carrying 53 million gallons of crude oil through Prince William Sound. Indeed, Hazelwood was the only officer aboard licensed to navigate through portions of the Sound. And he was drunk. His blood alcohol level upon leaving port was later determined to be .241. Pet. App. 64a, 87a, 256a.

After setting off, he moved the EXXON VALDEZ out of a shipping lane to avoid ice, and pointed the ship towards a known hazard, Bligh Reef. Then, because "his judgment was impaired by alcohol," Pet. App. 63a, he made a series of poor decisions. Pet. App. 63a-64a, 87a; JA460-84, 776. As a result, the ship hit Bligh Reef, and 11 million gallons of crude oil spilled from its ruptured hull into Prince William Sound.

The oil spill "disrupted the lives (and livelihood) of thousands of [people in the Prince William Sound area] for years," Pet. App. 24a, damaging approximately 1,300 miles of shoreline and destroying the subsistence livelihoods of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. With the economy in ruins, "the social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress disorder, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a; SJA386sa-572sa.

In sum, the case against Exxon for punitive damages was straightforward. As the district court put it:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving.

Pet. App. 154a; *see also* Pet. App. 29a, 64a, 83a, 89a-91a, 121a-122a, 153a-157a.

SUMMARY OF ARGUMENT

The Court should reject both Exxon's test for vicarious liability for punitive damages, and Exxon's argument that

the federal Clean Water Act implicitly preempts federal maritime law from providing for punitive damages in common law tort actions.

Federal courts in maritime cases tend to follow the general state common law of tort when there is no uniquely maritime aspect of the case. Nearly all of the 48 States that allow punitive damages follow one of two approaches to vicarious liability for punitive damages; Exxon's proposed test differs markedly from both approaches, is substantially narrower than either, and is in substance a rule of corporate immunity that would threaten to undermine the States' ability to deter and punish reckless misconduct through incremental common law-making.

Under Exxon's proposed test, the corporation must direct, countenance, or participate in the act. The proposed test is not only overly restrictive, but would also generate a host of difficult and confusing issues concerning whose "complicity" suffices to establish corporate ratification or approval of another managerial agent's misconduct. No corporate officer with the authority to ratify or approve corporate conduct would do so if the mere refusal to approve gross misconduct would immunize the corporation from punitive damages. Moreover, the proposed test is premised on nineteenth-century notions that a captain at sea is beyond the reach of a shipowner. With today's modern communication and navigational technologies, the relationship between a ship captain and shipowner is no different from that between a corporate officer at headquarters and one in a field office.

Exxon's Clean Water Act preemption argument should be rejected not only because it was not preserved and differs materially from the argument Exxon did make below, but also because there is no reason to conclude that Congress intended for the Clean Water Act to preempt the availability of punitive damages in private tort actions under federal maritime law.

ARGUMENT

I. The Court Should Be Guided By Widely Accepted State Common Law Principles Of Vicarious Liability For Punitive Damages And Reject Exxon's Test.

Almost all of the forty-eight States that allow for punitive damages have adopted one of two approaches to vicarious liability for such damages: 1) liability based on the misconduct of any agent or 2) liability based on the misconduct of a managerial agent. The states are nearly evenly balanced between these approaches, with a slight majority following the any-agent rule. Restatement (Third) of Agency § 7.03, cmt. e (2006). Exxon's test is more restrictive than either of the approaches that the States have adopted. Under Exxon's test, "the jury [is required] to find that the shipowner directed, countenanced, or participated in the conduct." Petrs. Br. 15. Someone at a high level in management must ratify or authorize the reckless misconduct, even, apparently, when the reckless misconduct was that of someone else at a high level in management. This unduly restrictive test would effectively immunize corporate maritime defendants, and only corporate maritime defendants, from liability for the same types of reckless misconduct that would warrant an award of punitive damages against land-based defendants. This disparate treatment makes no sense: there is "no reason . . . why vicarious liability should be treated differently on sea than on land." *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 704 (1st Cir. 1995).

1. This Court has long looked to state common law to inform its development of federal maritime law. *See Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 ("[C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing

exemplary damages."). When the Court has considered what substantive tort law to apply in maritime cases that do not involve uniquely maritime concerns, the extensive experience of state courts in evolving tort principles has provided guidance. *See Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996) ("In ruling upon whether a defendant's blameworthy act was sufficiently related to the resulting harm to warrant imposing liability for that harm on the defendant, admiralty courts may draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements . . . ."); *see also American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284-85 n.11 (1980) (adopting rule of "clear majority of States"); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1970) (adopting general Restatement test).

The Court's traditional consideration of state common law to inform maritime tort law makes sense, since state courts have particular expertise in developing tort law through the common law method, whereas the role of federal courts in making common law has "largely withdr[awn] to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly [and others involving] interstitial areas of particular federal interest." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004); *see Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 886 (1997) (Scalia, J., dissenting) ("[U]nlike state courts, we have little first-hand experience in the development of new common-law rules of tort . . . .").

In the context of vicarious liability for punitive damages, state common law has evolved workable rules that the States have found to be effective in deterring and punishing reckless misconduct. The majority "any-agent" rule rests on a familiar, straightforward *respondeat superior* theory. *See American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982). The more restrictive

minority rule, which the Ninth Circuit applied here, is based on the Restatement (Second) of Agency § 217(c) (1958) and the Restatement (Second) of Torts § 909 (1979), and provides corporations with an additional level of protection: a corporation is subject to punitive damages when one of its *managerial* agents acts recklessly in the scope of employment.[6] State courts have applied these principles to waterborne, as well as land-based, torts. *See, e.g.*, *Juno Marine Agency, Inc. v. Taibl*, 761 So. 2d 373, 374-75 (Fla Ct. App. 2000) (upholding punitive damages award against shipowner for wrongful death of person who died trying to rescue a crew member from the hold of shipowner's vessel); *Allen v. Camden & Philadelphia Steamboat Ferry Co.*, 46 N.J.L. 198, 199 (N.J. 1884) (allowing passenger to seek punitive damages against a ferryboat company for the forcible ejection of passenger by the company's agent). These rules of vicarious punitive liability typically apply regardless of whether the agent's action violated some corporate policy. *See* William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 4942, at 640-41 (2002 rev. vol.).[7]

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[6] Section 909 of the Restatement (Second) of Torts provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
> (c) *the agent was employed in a managerial capacity and was acting in the scope of employment,* or
> (d) the principal or a managerial agent of the principal ratified or approved the act.
>
> (Emphasis added.)

[7] In *Kolstad v. American Dental Association*, the Court held that an employer may not be vicariously liable for punitive damages based on discriminatory employment actions of managerial agents that are contrary to the employer's "good-faith efforts" to comply with the

Exxon's test, on the other hand, would effectively immunize the reckless misconduct of even managerial agents by requiring the corporation to ratify or authorize the misconduct. Moreover, it is far from apparent whose ratification is necessary: presumably some *other* high-level executive, or perhaps a board of directors, would have to approve the misconduct. The incoherence of Exxon's test contrasts with the relatively clear lines of accountability established in the rules that the States have adopted.

Taken together, the any-agent and managerial-agent rules reflect a collective judgment of the state courts, developed incrementally in countless factual contexts, that that the imposition of punitive damages on corporations, *at least* when a managerial agent engages in the reckless misconduct, best serves the States' interests in deterrence and punishment of reckless corporate misconduct. *See BMW of N. Am. v. Gore,* 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (imposing punitive liability for acts of any agent provides "strong incentive for vigilance").[8] The adoption of Exxon's test, on the other hand, would undermine the States' ability to calibrate, through the application of substantive tort law, the

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nondiscrimination laws. 527 U.S. 526, 545-46 (1999). The Court's decision in *Kolstad* reflected considerations unique to federal civil rights policy, namely, the concern about creating a disincentive for employers to educate employees about nondiscrimination laws. *Id.* at 544-45. But, as discussed below, the imposition of punitive damages under the managerial agent test creates proper incentives in the maritime industry.

[8] Notably, the Court in *Haslip* did not question the constitutional propriety of Alabama's imputation of any corporate agent's misconduct to the company for purposes of establishing corporate liability for punitive damages. 499 U.S. at 14.

appropriate measure of deterrence and punishment that governs reckless misconduct directly threatening their very substantial economic interests in tourism, commercial and recreational fishing industries, and coastal development.

The States have compelling and wholly legitimate interests in a punitive damages regime that provides for a consistent measure of deterrence and punishment on land and on water.[9] The imposition of a separate standard for punitive damages under maritime law would impinge on the States' legitimate need to protect their citizens and economic interests from dangerous conduct on the waters, contrary to maritime law's traditional respect for States' interests in this regard. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 n.13 (1996) ("Federal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters."). In this regard, an unduly restrictive rule of federal maritime law here may underdeter reckless misconduct that States, as a policy matter, have chosen to deter through their common

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[9] The generalized interest in restraining "punitive damages that 'run wild,'" *Haslip*, 499 U.S. at 18 (internal citation omitted), is more properly effectuated not through a substantive rule of vicarious liability for punitive damages in maritime law, but through this Court's continuing development of standards guiding courts and juries. *See TXO Prods. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993) (plurality) (due process places limits on "grossly excessive" punitive damages, but does not require a bright-line test); *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 574-75 (1996) (identifying "guideposts" of reprehensibility, ratio, and comparison to civil penalties in comparable cases); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) ("[C]ourts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (elaborating on *BMW v. Gore* guideposts); *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007) ("Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . . .").

law rules. *Cf. Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) (punitive damages regimes may "impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies.") (quoting *Gore*, 517 U.S. at 571–572).

2. Quite apart from the anomalies created by applying Exxon's test on waters adjacent to land where different rules apply, Exxon's test is unwise and unworkable. It is hard to imagine that any corporate actor would ever ratify or approve conduct that could give rise to punitive damages, when the simple act of disclaiming responsibility for the wrongdoer – or worse, intentionally avoiding contact and oversight – would shield the corporation from punitive liability. Aside from the fanciful notion that any such "ratification" or "approval" could ever be shown to have occurred, Exxon's test generates a host of uncertainties about where corporate responsibility ultimately lies. Whose complicity is necessary for a corporation to ratify or approve reckless misconduct? If the wrongdoer is a high-level manager, is it necessary for a higher-level manager to ratify or approve the misconduct? If the chief executive officer is the wrongdoer, must the board of directors ratify or approve the misconduct? What conduct must be ratified or approved? If the conduct requiring approval was the specific act of recklessness that caused harm, what corporate executive would ratify such an act? Why would any corporation ratify an act of misconduct, knowing that it could escape punitive damages -- no matter how high-level an agent the wrongdoer may have been -- merely by disassociating itself from the wrongdoer? Under Exxon's test, responsibility for corporate misconduct vanishes in an endless regression. *See* Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 Neb. L. Rev. __ (2008),

available at http://ssrn.com/abstract=1007337 (discussing the theoretical impossibility of determining whose ratification is required if the wrongful act occurs at high levels of corporate authority).

The confusion that such a rule would generate is evident in this very case. On the one hand, Exxon's own expert testified that a supertanker captain, such as Hazelwood, "is a CEO." Tr. 3866:6-22. On the other hand, Exxon argues that it should not be liable "solely" for Hazelwood's misconduct.[10] Exxon, however, asks to be excused for Hazelwood's misconduct because no one else at Exxon subsequently approved of his disastrous, drunken decisions. It is nonsensical to adopt a rule that would tie Exxon's liability for punitive damages to a finding that Exxon executives ratified or authorized the specific recklessness Hazelwood engaged in on March 23, 1989. Such a rule would create a perverse incentive for corporations to minimize oversight of their agents. *Haslip*, 499 U.S. at 14.

In effect, Exxon's test would reward with immunity a corporate governance scheme that avoids accountability: "[L]arge corporations that routinely delegate managerial authority to shape corporate policy by making important corporate decisions could unfairly escape liability for punitive damages by virtue of their size." *Albuquerque Concrete Coring Co. v. Pan Am World Servs.*, 879 P.2d 772, 778 (N.M. 1994). The proposed test "would permit punitive damages against smaller concerns, . . . but not against a large corporation whose size and ramifications

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[10] In fact, the record shows that Exxon's liability here does not rest "solely" on Hazelwood's misconduct on the night of March 23, 1989, whether as a "CEO" or otherwise. It rests on the misconduct of other high-level Exxon executives, who knew that Hazelwood was drinking again, captaining a supertanker through Prince William Sound, and creating an intolerable but foreseeable risk of catastrophic environmental, economic, and human harm.

make express authorization by the top executives of tortious acts of its working-level agents highly unlikely." *General Motors Acceptance Corp. v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959). A rule of vicarious liability that generates such disparate and unfair results based upon the organizational form of the offender must be avoided.

In contrast, the Restatement rule quite sensibly locates corporate responsibility in the "employment of unfit persons for important positions." Restatement (Second) of Torts § 909 cmt. b. The threat of vicarious punitive liability provides a "mechanism to focus attention at an organizational level on how to best exercise control over employees and other agents to reduce the risk of harm that their activities pose to third parties." Restatement (Third) of Agency § 7.03 cmt. e. The Amici States' experience with regulating corporations (both civilly and criminally) suggests that the managerial agent test, or something even broader, promotes careful selection of employees and accountability.

3. Exxon's test is not only out of step with state tort law and ill-conceived on its own terms, but is also untethered from the reality of the relationship between a shipowner and ship captain today. The fact is that, with the advent of modern ship-to-shore communication technologies, a corporate shipowner is functionally indistinguishable from any other corporate common carrier or, indeed, any other corporation with field offices or employees who work offsite. Modern communication and navigational technologies have transformed the relationship between a ship captain and shipowner, thereby undermining the operative premise of nineteenth century maritime law: that once a ship set sail, the captain was on his own at sea, out of touch with the shipowner.

The "ship master at sea" concept remained a reality no later than the late nineteenth century, when basic wireless communication using Morse code first enabled land-based

owners or managers to communicate with ships at sea. *See* R.J. Eassom et al., *HF Transmitters and Receivers for Naval Radio*, 1995 Int'l Conference on 100 Years of Radio 62. Today, however, "the ship master at sea" can readily communicate with other corporate managers, by telephone, e-mail, fax, and other means. *See* Mark Palmer, *Satellite Communications: Bringing the Vessel at Sea Closer to the Shore*, Lloyd's List, Dec. 21, 2001, at 1. Indeed, shoreside personnel simply lifted a phone and spoke with Captain Hazelwood after he grounded the EXXON VALDEZ. JA872-76. Not only can those on board the vessel readily contact their corporate colleagues and superiors on land, but satellite communications enable shore-based personnel to guide and direct captains on a regular basis, rather than only during times of crisis, as in the past. *See* Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, Lloyd's List, Nov. 17, 1999, at 17. Moreover, sophisticated vessel management systems, not unlike air traffic control systems, have been developed to guide ship movement.

In sum, because there is no real difference between a ship captain and other corporate managerial agents, there is no justification for a distinct maritime rule of vicarious liability.[11] At the same time, there would be no principled basis to deny non-maritime corporations the same protection from liability for punitive damages.

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[11] Exxon's plea that special vicarious liability rules are needed to protect maritime commerce hardly aids its cause. "[T]he fishing industry is clearly part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history." *Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9th Cir. 1974). Yet Exxon's reprehensible conduct put hundreds of maritime businesses into bankruptcy or in dire financial straits. Exxon, by contrast, has assured the district court that paying even the $5 billion jury verdict "would not have a material impact on the corporation." SJA334sa.

II. The Clean Water Act Does Not Preclude The Common Law Remedy Of Punitive Damages As Relief For A Claim That The Clean Water Act Indisputably Permits.

Exxon argues that the Clean Water Act occupies the field of regulation of oil spills in United States navigable waters and thus displaces punitive damages under federal common law. There is no merit whatsoever to this argument. First, as explained in Respondents' Brief, the argument was not preserved. Exxon contended unsuccessfully below that the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651-1656, preempted the negligence claim. TAPAA, not the Clean Water Act, was "*the* controlling statute with regard to trans-Alaska oil," *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991) (emphasis in original), and the lower courts held that TAPAA did not preempt Respondents' claims.

Even if the Clean Water Act were at issue, the cases on which Exxon relies would not support its sweeping argument that the Clean Water Act occupies the field of oil spill regulation. *See Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981). *Milwaukee* and *Sea Clammers* held that the Clean Water Act forecloses nuisance actions for effluent discharges under federal common law. In both cases, the Court was concerned that a federal common law cause of action for nuisance would interfere with the regulation of detailed effluent standards provided in the Clean Water Act. And, in both cases, the Court held that the underlying actions could, in effect, alter the effluent standards that would otherwise apply, and therefore directly interfere with the statutory scheme.

Here, by contrast, the Respondents' negligence claim poses no threat to the Clean Water Act's regulatory

scheme for oil spills. *See* 33 U.S.C. § 1321. Nowhere does the Clean Water Act limit available remedies provided under private tort claims arising from oil spills. In fact, the Clean Water Act expressly *preserves* obligations arising from damage to private property. 33 U.S.C. § 1321(*o*). Exxon gives no good reason why Congress would preserve a cause of action for negligence, but limit the common law remedies available under that cause of action.

The Respondents' position is supported by this Court's Clean Water Act precedents. *See International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). In *Ouellette*, the Court assessed whether the Clean Water Act preempted Vermont common law to the extent the law imposes liability on a New York point source. 479 U.S. at 491. The Court held that the state law action at issue was precluded because a "serious interference" would result "if affected States were allowed to impose separate discharge standards on a single point source." *Id.* at 493. But the Court then expressly limited its holding by specifying that it "preclud[es] only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act." *Id.* at 497. The Court further explained that the Clean Water Act's savings clause specifically preserves other state actions and that aggrieved individuals can bring a nuisance claim pursuant to the law of the source State. *Id.* Thus, the plaintiffs had a claim with the full panoply of remedies.

Likewise, in *Askew*, the Court examined the preclusive effect of the Clean Water Act's oil spill liability provisions to determine if they precluded Florida's state regulation of oil spills. 411 U.S. at 328-37. The Court concluded that the Clean Water Act was directed at recouping federal cleanup costs while leaving room for state action in cleaning up waters of a State and recouping the State cleanup costs. *Id*. at 332. The Court remarked that the

state and federal regulations were "harmonious parts of an integrated whole." *Id.* at 331.[12]

Here, there is no threat of "serious interference" with Congressional standards because the Clean Water Act's oil spill provisions do not create any standards that could be altered by a punitive award, and because those provisions do not limit the available remedies for private tort claims. *Cf. Ouellette*, 479 U.S. at 493. These provisions are directed at prohibiting the discharge of oil (as opposed to creating a permit system), and -- should a discharge occur -- collecting federal government clean-up costs and civil penalties. *See* 33 U.S.C. § 1321. Likewise, the Clean Water Act's citizen suit provision does not preclude the punitive damages award under the private tort action here because it allows individuals to sue only for injunctions to enforce the statute. 33 U.S.C. § 1365(a). Respondents' tort action arises from the private harm from an oil spill, while the Clean Water Act addresses the public harm. Along with state regulation, such private actions are "harmonious parts of an integrated whole." *See Askew*, 411 U.S. at 331.

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[12] Pursuant to *Askew*, many States have regulations governing toxic spills. At the time of the passage of the Oil Pollution Act of 1990, 24 states had oil spill liability and compensation laws, and 17 of them had liability without specified limits. Congress has recognized the importance of preserving the overlapping system of oil spill laws by taking care that federal statutes governing oil spills do not preempt state oil liability laws. The Oil Pollution Act of 1990 does not preempt state law and instead explicitly provides that states may impose additional requirements and liabilities. 33 U.S.C. § 2718. And as a Senate report explains, "[m]ore stringent State laws are specifically preserved in both the Clean Water Act (for cleanup of spills of oil) and in the Deepwater Port Act and title III of the Outer Continental Lands Act Amendments of 1978 (for cleanup and damages caused by spills of oil)." S. Rep. No. 101-94, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 727.

At bottom, Exxon's entire displacement argument proceeds from the same faulty premise: that the very existence of the Clean Water Act's statutory penalties for oil spills means that the Clean Water Act "fully addresse[s]" the public interest in punishing the reckless discharge of oil. Petrs. Br. 38. Contrary to Exxon's argument, penalty schemes under federal statutes do not manifest a legislative intent to leave no room for remedies available under traditional maritime law, nor do they conflict with punitive damages available under maritime law. As this Court has held:

> Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984) (holding that a civil suit for punitive damages "does not conflict" with a federal remedial scheme that imposed civil penalties); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 382-83 (1983) (holding that an express civil remedy under the 1933 Securities Act does not preclude a cause of action for fraud under Section 10(b) of the 1934 Act).

The reality is that it is commonplace for the law to impose multiple punishments for the same conduct in order to address different harms. *See People v. McFarland*, 765 P.2d 493, 495 (Cal. 1989) (noting that multiple punishment is permissible when a single act of violence harms multiple victims). For example, recovery of punitive damages for assault and battery is not precluded merely because the defendant has been punished criminally for the same offense. *See Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages*, 98 A.L.R.3d 870 (1980). *See, e.g.*, *Roshak v. Leathers*, 277

Ore. 207 (1977); *Wagner v. Gibbs*, 80 Miss. 53 (1902). Imposing multiple punishments for the same conduct in order to address different harms is all that the Clean Water Act, other federal statutes, and maritime law jointly accomplish here.

State laws directed at oil spills appropriately protect state interests in avoiding harm from oil spills. Even several decades ago, the Court recognized the "damage to state interests already caused by oil spills, the increase in the number of oil spills, and the risk of ever-increasing damage by reason of the size of modern tankers." *Askew*, 411 U.S. at 335. As the Court noted, oil spillage is "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." *Askew*, 411 U.S. at 328-29.

In sum, there is no merit to Exxon's contention that the Clean Water Act precludes the recovery of punitive damages here.

CONCLUSION

The Amici States ask the Court to affirm the judgment of the courts below.