No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,
Petitioners,

v.

GRANT BAKER, *ET AL.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS J. SCHOENBAUM IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May punitive damages be imposed under maritime law against a shipowner for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clear Water Act, but has not provided for punitive damages, may judge-made federal maritime law expand the penalties Congress provided by adding a punitive damages remedy?

3. Is this $2.5 billion punitive damages award within the limits allowed by federal maritime law?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a law professor and an attorney who has spent much of his professional life in the practice and study of maritime law. He currently holds two posts: Professor of International Studies at International Christian University in Japan and Visiting Research Professor of Law at The George Washington University School of Law. He has previously taught at the law schools of the University of North Carolina, Tulane University, and the University of Georgia.

He is the author of many books and articles, including Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW (Westgroup ed., 4th ed. 2004). This treatise and its previous editions are regularly cited in judicial opinions in maritime cases by federal and state courts, as well as occasionally by this Court.

Amicus has never before worked on or had any contact with the case at bar.[2] The only interest of amicus in this case is concern for justice and the proper and optimal development of the important field of admiralty and maritime law. Amicus regards this case as extremely important with respect to these concerns.

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[1] The parties have consented to this brief; no party has authored any part of this brief; and no one other than amicus has made a monetary contribution to fund this brief. I solicited several academic colleagues and asked them to join in this brief; however, while I received emails praising my work, they reported that conflicts of interest prevented them from doing so. Thus, I decided to file on my own.

[2] Amicus was a consultant for the State of Alaska on the issue of recovery of natural resource damages immediately after the oil spill occurred in 1989.

SUMMARY OF THE ARGUMENT

This brief will focus on the distinctly maritime law character of the issues involved. Four points are relevant in this regard:

1. No special maritime law rules regarding punitive damages are warranted or needed in maritime law cases. Punitive damages are a remedy of the common law that has a long history of indistinguishable application to maritime cases. This remedy serves the same purposes—punishment and deterrence—in maritime cases as in the common law. In oil spill cases such as the case at bar, punitive damages serve the societal purpose of deterring reckless conduct that endangers the marine environment.

2. In both the maritime law and the common law contexts some confusion presently exists with respect to vicarious liability for punitive damages. The Restatement (Second) rule on this topic is a useful analytical framework that may be employed by this Court to clear up this confusion because it retains the core idea that vicarious liability requires culpability but subjects the employer to liability in the case of an action by a managerial employee. There is no reason to formulate a special rule for vicarious liability limited to the conduct of masters of vessels.

3. Neither the Clean Water Act nor any rule of the general maritime law excludes the application of punitive damages in appropriate maritime cases. The Clean Water Act specifically preserves private tort actions, and punitive damages are available under the general maritime law.

4. No special doctrine of general maritime law presently regulates the size of an award of punitive damages. There is no principled way to impose a judicial limit on punitive damages applicable only to maritime law cases. The size of the award of punitive damages in maritime law cases is appropriately limited by the Due Process Clause of the U.S. Constitution. Non-constitutional restraints may be added by statute, but no statutory limit applies to the case at bar.

ARGUMENT

I. The General Maritime Law Contains No Special Rules for the Award of Punitive Damages that are Distinct from the Rules of the Common Law, and No Reason Exists for this Court to Create Such Rules.

The case at bar concerns the legal architecture to support an award of $2.5 billion in punitive damages assessed by a jury (and already greatly reduced by lower federal courts) in favor of tens of thousands of Alaska residents who suffered grievous disruption of their lives and livelihoods by the spill of some 11 million gallons of oil when the EXXON VALDEZ ran aground in 1989. Since all three of the legal questions that concern this Court are maritime in nature, an overarching and threshold question is whether it is appropriate or necessary to create a special rule (or rules) with respect to punitive damages that applies only to maritime cases.

This Court has advanced three reasons for the necessity of an exclusively maritime rule. First, when uniformity is a concern, there is need for a rule that

applies only in the maritime context. The primary reason for the founding fathers' concern to "federalize" maritime law was to ensure the development of uniformity in American maritime law.

This Court has many times reiterated this concern. E.g. *Moragne v. U.S. Lines, Inc.*, 398 U.S. 375 (1970) (declaring an action for wrongful death for unseaworthiness under the general maritime law). See also *Southern Pac. Co. v. Jensen,* 244 U.S. 205 (1917). However, the case at bar does not present any uniformity issue since whatever rule this Court applies will be the uniformly applicable rule.

Second, a purely maritime law rule is appropriate for areas of law that are distinctively maritime. For example, in the law of salvage this Court has created a distinctly maritime body of legal rules. E.g., *The Sabine*, 101 U.S. 384 (1879); and *The Blackwall*, 77 U.S. 1 (1869). But punitive damages are not distinctively maritime; they arise in other contexts as well.

Third, a special maritime law rule is sometimes necessary to establish a general maritime law rule that is "free from inappropriate common law concepts." *Keramac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (common law distinctions between licensee and invitee in personal injury cases do not apply in admiralty); *Pope & Talbott, Inc. v. Hawn*, 346 U.S. 406 (1953) (common law rule that contributory negligence bars recovery is incompatible with admiralty). However, the legal doctrines involving the assessment of punitive damages arise in both maritime and non-maritime cases, and, as this Court stated in *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107 (1893), "courts of

admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." In keeping with this injunction, no distinctions have ever been drawn by lower federal courts between punitive damages in the maritime law context and cases arising on land.

Punitive damages have been awarded in a variety of contexts, both maritime and non-maritime, by American courts over the past almost 200 years. Indeed, punitive damages were a feature of the English common law. See CHARLES MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275-279; 286-291 (1935). In the nineteenth century in England as well as in the United States, courts and juries did not sharply distinguish between punitive damages, which were commonly called "exemplary" or "vindictive" damages, and compensatory damages. What we would call today punitive damages was an allowance of additional compensatory damages in cases of outrageous conduct. MCCORMICK at 278. Some early maritime cases, in fact, distinguished between "vindictive" damages, involving conduct really outrageous, and "exemplary" damages, for conduct merely undesirable enough to warrant making an example of the penalty given. See *The Lively,* 15 F. Cas. 631 (C.C.D. Mass. 1812); *Ralston v. The States Rights*, 20 F. Cas. 201 (E.D. Pa. 1836); and *Steamboat Co. v. Whilldin*, 4 Har. 229 (Del. 1845). Apparently no case after 1900, however, has used the term "vindictive" damages, and the term "exemplary" was replaced by the current name of punitive damages. In the non-maritime 1851 case of *Day v. Woodworth*, 54 U.S. 363 (1851), this Court (in dicta, because the plaintiff had not claimed punitive damages) stated

that "[i]t is a well-established principle of the common law, that in . . . actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant." *Id.* at 371. In the more recent case of *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 17 (1991), this Court again noted the common law origin of punitive damages.

The history of punitive damages from the beginning of the republic until 1990 shows no distinction at all between maritime and non-maritime cases. This was the conclusion of Professor David W. Robertson, who made an exhaustive study of the subject in *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997). His conclusion is amply borne out by the cases. Punitive damages were considered appropriate in maritime as well as non-maritime cases when the defendant's conduct amounts to gross negligence, actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct. Amicus will spare the Court going through all the cases, which are set out in detail by Professor Robertson, and confine his argument to salient examples. In *Chamberlain v. Chandler,* 5 F. Cas. 413 (C.C.D. Mass. 1823) Justice Story, who was sitting on circuit, awarded punitive damages in a maritime case against the master of a vessel, stating, "If [a master] is guilty of gross abuse and oppression, I hope it will never be found, that the courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment." *Id.* at 414. In *Gould v. Christianson*, 10 F. Cas. 857 (S.D.N.Y. 1836), the court gave an augmented award of damages to a seaman who was mistreated by his ship's captain. In *Gallagher v. The Yankee*, 9 F. Cas. 1091 (D.C. Cal. 1859), aff'd,

30 F. Cas. 781 (C.C. Cal. 1859) the court awarded punitive damages against a vessel master who transported the plaintiff against his will to the Sandwich Islands (now Hawaii). Finally, in *Complaint of Merry Shipping*, 650 F.2d 622 (5th Cir. 1981), the court awarded punitive damages under the general maritime law against a shipowner found guilty of willful and wanton misconduct.

Only after this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)—a case that did not involve punitive damages at all—did some commentators and courts begin to advocate a distinctive punitive damage regime for maritime law. Despite some differences among the lower courts engendered by *Miles*, a matter to be addressed in a later section of this brief, cases after *Miles* have generally upheld the imposition of punitive damages under the general maritime law. For example, in *Gamma-10 Plastics, Inc., v. American President Lines,* 32 F.3d 1244, 1256 (8th Cir. 1994), the court ruled that the district court had abused its discretion in denying the plaintiff's motion to amend its complaint to include a claim for punitive damages, stating that "[i]t is well-settled that punitive damages may be recovered under the general maritime law 'for conduct which manifests reckless disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference,'" citing *Churchill v. F/V Fjord,* 892 F.2d 763, 772 (9th Cir. 1988).

A further reason why no special punitive damage rule should apply in admiralty cases is that such a special rule would be impractical. Should this Court declare a rule limiting punitive damages under the

general maritime law, the practical effect would be that in future maritime cases plaintiffs would invoke state law punitive damages which are available under the common law in most states. This would lead to further debate and possible conflicting court decisions concerning the question whether a general maritime law rule limiting punitive damages beyond what is required by the constitutional limits of Due Process preempts state common law.

II. Punitive Damages Are Available Under the General Maritime Law with Respect to the Conduct of a Ship's Master at Sea Under the Doctrine of Vicarious Liability.

The doctrine of vicarious liability for punitive damages is a major concern in the case at bar for the reason that differences in the circuits have arisen on this issue in the maritime context. However, differing views exist with respect to vicarious liability for punitive damages in the common law of the states as well. See DAN B. DOBBS, DOBBS LAW OF REMEDIES, vol. I, 495-97 (2d ed. 1993). Therefore, this Court's resolution of the vicarious liability issue will have repercussions beyond the general maritime law itself.

A. There is No Reason Why This Court Should Adopt a Special Maritime Vicarious Liability Rule for Masters of Ships.

A threshold question in the case at bar is whether this Court should fashion a special maritime version of the doctrine of vicarious liability for ship's masters at sea. Is the job of ship master so distinctive as to warrant a different approach than should be taken with respect to the myriad other occupations—from

nuclear power plant operator to investment banker—regarding vicarious liability? The argument in favor of a special rule for ship masters is that when a ship is at sea the master is beyond the control of his principal; therefore it is unfair to visit full liability on the principal in such a case.

Congress has in fact accepted carefully targeted versions of this argument in two federal maritime statutes. First, the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (2000), exonerates errors in the navigation of a vessel with respect to the carrier's liability for lost or damaged goods. *Id.*, §§ 1304(2)(a), 1305(2)(a). However, this statute, passed in 1936, reflects an historic legislative compromise originally agreed between carriers and shippers of goods in 1890 with the passage of the Harter Act, 46 U.S.C. app. §§ 190-196 (2000), whereby carriers assume statutory responsibility for providing sea-worthy vessels (the concept of seaworthiness includes a competent and functioning ship master) and the care of the cargo, in return for possible exoneration for matters such as navigation errors and perils of the sea. Moreover, COGSA is a narrow exemption that shifts the burden of proof of exoneration to the *carrier*. E.g., *Banana Services Inc. v. M/V Fleetwave,* 911 F.2d 519, 521 (11th Cir. 1990). COGSA, therefore has no application to the case at bar. There is no reason to carry over COGSA into the law of maritime torts.

A second statute that in some respects is forgiving of errors of ship masters is the 1851 Shipowners' Limitation of Liability Act, 46 U.S.C. § 30501 *et seq.*, which provides a special procedure in admiralty to allow the owner of a vessel to limit liability in certain

circumstances to the value of the vessel after an accident. This Act was passed in order to promote investment in the shipping industry and is still in force today. The standard for limiting liability under the Limitation Act is that the shipowner must show that the fault causing the loss occurred without his "neglect, privity or knowledge." *Id.* Moreover, the shipowner has the entire burden to show that there was no neglect, privity or knowledge on his part. E.g., *Petition of M/V Sunshine II*, 808 F.2d 762 (11th Cir. 1987).

Modern cases interpreting this phrase now deny limitation for a master's navigational errors if the company did not exercise reasonable care in selecting or training the master. See, e.g. *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983) (*en banc); Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978); and *Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992). In *Empresa Lineas Maritimas S.A. v. United States*, 730 F.2d 153 (4th Cir. 1984), the court denied limitation because the ship master's poor health, which contributed to the casualty, was known to the shipowner. Exxon's amici, Transportation Institute, et al., ignore these recent decisions, attributing a master's actions at sea to the shipowner for Limitation Act purposes. Br. for Amicus Curiae Transportation Inst., et al., at 16-17. Moreover, this Court has commented that "it has been thought that the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943). Indeed, in the case at bar Exxon took the decision not to petition the court for limitation of liability after the

grounding of the EXXON VALDEZ, reportedly upon the advice of counsel that a limitation petition would have been futile. BIO App. 38a-43a.

Not only is there no statutory reason to craft a special vicarious liability rule for masters of ships, such a rule would be bad policy as well. First, modern technology permits instantaneous communication and constant tracking of a vessel at sea by shore personnel and even high corporate officials. The record in the case at bar shows that Captain Hazelwood conferred by phone with an Exxon official before trying to dislodge the vessel from Bligh Reef. Pet. App. 122a, 234a, n.13. No longer is the master of a vessel completely free of supervision and control. See Colin Nickerson, *For Ships, End of the Dotted (and Dashed) line*, BOSTON GLOBE, Jan. 31, 1999, at A1 ("[A]dvances in communications technology . . . have made email, fax, and crystal clear phone calls as commonplace on the bridge of a ship in the most remote sea as in a business office"). A ship now functions, in effect, as the branch office of the company. Second, a special rule for ship masters would inevitably give rise to close cases and borderline situations as well as appeals from other occupations to be given the benefit of such a rule. Thus, a special rule for ship masters would not be practical and may inspire a morass of future litigation (for example, is a foreman on a dry-docked vessel a "ship master"? What if reckless conduct, such as Captain Hazelwood's drinking, occurs shoreside but has consequences at sea?).

B. Under the General Maritime Law, the Court of Appeals Applied the Correct Rule for Vicarious Liability for Punitive Damages.

While no special rule should apply only to ship masters, this Court is called upon to resolve conflicts of authority that have developed in maritime cases. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), this Court ruled that vicarious liability for punitive damages "is not fundamentally unfair and does not in itself violate the Due Process Clause." *Id.* at 14.

Although this Court has already ruled that full *respondeat superior* vicarious liability does not violate due process, in the case at bar the Court will determine the optimum rule on this issue exercising its authority under the general maritime law. Three different versions of vicarious liability for punitive damages are applied by the states and, at this point, by the lower federal courts.

1. The "majority rule." The first rule—termed by courts and commentators to be the "majority rule"—is that a corporation or business entity should bear full vicarious liability for both compensatory and punitive damages. See *In the Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642, 650 (5th Cir. 1989). This rule has the advantage of being simple and easy to apply for both judges and juries. This Court was not troubled by the application of this rule by the Supreme Court of Alabama in the *Haslip* case, supra.

2. The strict complicity rule. A second much more restrictive rule derived from the early decisions of this Court is termed the "strict complicity" rule. This rule

states that "punitive damages are not recoverable against the owner of a vessel unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *In the Matter of P&E Boat Rentals*, 872 F.2d at 650. In this case the Fifth Circuit relied greatly upon the Sixth Circuit's application of the strict complicity rule in *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969).

The strict complicity rule is ultimately derived, however, from the opinions of this Court in the case of *The Amiable Nancy*, 16 U.S. 546 (1818) and *Lake Shore & Michigan Southern Railway v. Prentice*, 147 U.S. 101 (1893). *The Amiable Nancy* involved an action for damages against the owners of an armed privateer whose crew had plundered and robbed a neutral vessel at sea. Justice Story, who delivered the opinion of the Court termed the case "gross and wanton outrage," and ruled that the honor of the country and the duty of the Court was to require "just compensation." 16 U.S. at 558. Justice Story, as an aside, also stated that "if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." *Id.* However, this statement was made purely as a hypothetical since not only were the "original" wrongdoers not before the Court, the libellants had not prayed for exemplary or vindictive (punitive) damages. Thus, Justice Story in *The Amiable Nancy* was not announcing any rule of law; his statement was intended as an expression of the Court's own outrage against the actual perpetrators of the incident.

In the 1893 *Lake Shore* case this Court announced as a rule of "general jurisprudence" that "[a] principal [employer] . . . cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent [employee]," but that punitive damages might lie if the employer "participated in, approved, or ratified" the employee's conduct. 147 U.S. at 117. The Court in *Lake Shore* also stated, very importantly, that punitive damages might also lie if the employer knew that the employee was an "unsuitable person." *Id.* The example that the Court gave was "employing a drunken engineer or switchman," *id.* at 116, which is sufficient to affirm the judgment in this case under *Lake Shore's* express terms.

This latter point—that the employer knew that the employee was an unsuitable person—is explicitly part of the modern formulation of the strict complicity rule. In the *P&E Boat Rental* case, the Fifth Circuit stated that "[p]unitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him." 872 F.2d at 652. The court in *Fuhrman* also stated this rule, citing *Lake Shore* and *The Amiable Nancy*. 407 F.2d 1148.

3. The Restatement rule. The Ninth Circuit in the case at bar applied a third rule based upon the RESTATEMENT (SECOND) OF TORTS § 909,[3] which contains four separate grounds for awarding punitive damages against a principal/employer (paraphrasing slightly):

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[3] The same rule is contained in the RESTATEMENT (SECOND) OF AGENCY § 217C.

(a) if the principal or a managerial agent authorized the action of the employee;

(b) if the agent/employee was unfit and the principal/managing agent was reckless in employing or retaining him;

(c) if the wrongdoer himself was employed in a managerial capacity; or

(d) if the principal/managing agent ratified or approved the action.

It is evident that the formulation of three of these grounds, RESTATEMENT § 909(a), (b), and (d), are drawn directly from *Lake Shore* and its progeny that have announced the strict complicity rule. Only Restatement paragraph (c) can be said to be an extension of this rule.

In the case at bar the Ninth Circuit affirmed the jury's findings that both Captain Hazelwood and Exxon acted recklessly. Captain Hazelwood's reckless actions were leaving the bridge of the supertanker on the night of the accident and leaving an unqualified crew member in charge of the navigation of the vessel. (Pet. App. 63a, 87a.) Captain Hazelwood was also reckless in leaving port while inebriated (Pet. App. 63a-64a, 87a-88a), which rendered the EXXON VALDEZ unseaworthy under maritime law principles. Exxon's reckless conduct was that responsible officials of the company knowingly allowed a relapsed alcoholic to have charge of the supertanker EXXON VALDEZ. (Pet. App. 83a.) The Ninth Circuit in affirming the award of punitive damages in this case relied upon its earlier opinion in *Protectus Alpha Navigation Co. Ltd. v.*

North Pacific Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985).

Protectus Alpha involved a fire that broke out on a vessel docked at a grain facility. Fire fighters were immediately called and the fire was quickly brought under control. However, when the dock foreman arrived, without consulting the firefighters, he immediately ordered the vessel to be cast off from the dock, thereby dangerously stranding firefighters on board and causing the loss of the vessel. In assessing punitive damages against the employer for the action of the foreman, the Ninth Circuit stated that the Restatement formulation "reflects the reality of corporate America." *Id.* at 1386. However, the court minimized the value of Restatement formulations (a) and (d), stating that "[i]t seems obvious that no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, no recovery for more than compensatory damages could ever be had against a corporation" under this rule. Thus, the court, considering the "realities" of corporate America, rejected what amounts to the "strict complicity" approach in favor of a more modern and realistic approach that emphasizes paragraphs (b) and (c) of the Restatement rule. The court relied upon the finding that the dock foreman in the *Protectus Alpha* case was a managerial employee acting within the scope of his employment.

The case at bar differs from *Protectus Alpha* in that, while *Protectus Alpha* was based upon Restatement paragraph (c), the case at bar is based upon both paragraphs (b) and (c), in that corporate

officials of Exxon as well as Captain Hazelwood were found to have acted recklessly. Nevertheless, the heart of the matter upon which this Court granted certiorari is Restatement paragraph (c), whether Captain Hazelwood should be considered a managerial employee with respect to Exxon Corporation. The strict complicity rule already includes Restatement paragraphs (a), (b), and (d). The really new question is the matter of Restatement (c) as applied in *Protectus Alpha* and in the case at bar.

It is respectfully submitted that Restatement paragraph (c) as applied in this case is the better rule of law not only in maritime cases, but as a general rule for vicarious liability for punitive damages. As the Ninth Circuit stated in *Protectus Alpha,* paragraph (c) of the Restatement represents a natural evolution of the strict complicity rule that corresponds to the realities of today's corporate America. This Court also has signaled that an extension of the *Lake Shore* formulation is needed. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (adopting the "any agent" rule for antitrust punitive damages), this Court stated (at 575, n. 14) that "[t]he Court may have departed from the trend of late 19th century decisions when it issued *Lake Shore . . .* , requiring the principal's participation, approval, or ratification." See also *Kolstad v. American Dental Ass'n,* 527 U.S. 526 (1999).

C. Restatement § 909(c) Should Be Interpreted to Render a Business Entity Vicariously Liable for Punitive Damages Assessed Because of the Actions of a Ship Master and Other Agents Employed in a Managerial Capacity.

The crux of this case as far as the vicarious liability issue is concerned is RESTATEMENT § 909(c). This section allows punitive damages to be awarded against a principal, "but only if . . . the agent was employed in a managerial capacity and was acting in the scope of employment."

To judge the appropriateness of this rule, we should consider the purpose of punitive damages as well as vicarious liability. Punitive damages are said to have two purposes: to punish and to deter, so that not only the defendant in the particular case but others will not commit the same faults. *International Brotherhood of Electrical Workers v. Faust,* 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). See also PROSSER AND KEETON ON TORTS at 9 and 13. This purpose makes such damages available not for ordinary legal wrongs but only in extraordinary circumstances involving conduct that is intentional or manifests a reckless disregard for the rights of others. *Smith v. Wade*, 461 U.S. 30, 51 (1983).

The purpose of vicarious liability in tort is that since a business entity commonly acts only through its agents, it is only fair that a business bear the risk of liability for the wrongdoings of its agents toward innocent parties. The best expression of this purpose was stated by Judge Friendly in *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968):

> Vicarious liability . . . rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.

Construing these two purposes together, to impose vicarious liability for punitive damages on a principal, it is reasonable to distinguish between managerial and non-managerial employees or agents. Business enterprises typically employ personnel with a wide range of responsibilities, from the Chief Operating Officer to the most menial or part-time employee. Each employee will have a delegated job or responsibility. Obviously in the case of so-called managerial employees, the business has a greater responsibility in selecting and supervising the person. This greater duty should carry correspondingly greater legal responsibility.

While with respect to compensatory damages it is reasonable that a business entity is responsible for the legal wrongs of its agents acting in the scope of their employments, this may not seem fair in the case of punitive damages. While every business has a duty to select quality employees, for non-managerial employees the duty of careful selection is not as high as for managerial employees who carry heavy responsibility. Thus, contrary to the so-called "majority" rule, a business enterprise should be vicariously liable for punitive damages only for wrongs committed by *managerial* employees. This rule retains the "complicity" idea behind *Lake Shore* and its progeny, but updates this idea to require not "strict complicity"

but rather simple "complicity." It is important to retain the complicity principle because of the purpose behind the imposition of punitive damages: the punishment and deterrence of reckless conduct. The complicity standard retains the idea of fault on the part of the principal. In the case of reckless conduct on the part of a *managerial* employee (as opposed to a menial or non-managerial employee) there is "complicity" (culpability, fault or guilt), so that it is proper for the business enterprise to be vicariously liable for punitive damages.

This was the interpretation of the RESTATEMENT § 909(c) rendered by the First Circuit in the case of *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). The *Seafarer* case involved the malicious actions of a shipmaster, Niles, who destroyed the plaintiff's lobster traps and gear during May and June of 1992. The *Seafarer* was trawling for monkfish on the ocean floor, and the plaintiff's lobster traps posed an obstacle to this trawling operation. Although there was no evidence the shipowner, Doyle, authorized, ratified or participated in the wrongdoing, the court held that the shipowner was liable for punitive damages under the doctrine of vicarious liability because, as the court stated, "we conclude that strict adherence to the complicity approach would shield a principal, who, though not guilty of direct participation, authorization, or ratification in his agent's egregious conduct, nevertheless shares blame for the wrongdoing." 70 F.3d at 705. In imposing vicarious liability on the shipowner, however, the court stated that it is very important to retain "requiring some level of culpability." *Id.* The court found this culpability in the fact that the shipmaster was a managing employee.

The court upheld the district court's findings that Captain Niles had "complete managerial discretion over the means and methods of fishing." *Id.*

The First Circuit's ruling in the *Seafarer* case is consistent on its facts with the Ninth Circuit's holding in *Protectus Alpha* as well as with the case at bar. In *Protectus Alpha* the court, while not making explicit the idea that the Restatement's formulation should be interpreted to persons who are delegated managerial authority, ruled that the foreman/employee involved in the reckless actions in that case "clearly occupied a managerial position. He performed a supervisory role, managing several employees." 767 F.2d at 1386. In the case at bar as well, Captain Hazelwood clearly exercised managerial responsibilities for all aspects of the navigation of the EXXON VALDEZ and her crew. In the case at bar, Exxon in fact has admitted that Captain Hazelwood was exercising managerial responsibilities at the time of the accident. Pet. for Cert. 6.

Courts and juries can easily distinguish between employees who have a managerial position and those who do not. For example, in *Muratore v. The M/S Scotia Prince,* 845 F.2d 347 (1st Cir. 1988), the First Circuit considered the imposition of punitive damages against the defendant carrier for the intentional infliction of emotional distress by photographers upon the plaintiff, who was a passenger on a vessel. The court, applying the Restatement standard, denied punitive damages because the photographers did not occupy a managerial position.

Thus, RESTATEMENT § 909(c) is the proper formulation as long as it is clear that managerial

employees are defined as those with discretionary responsibility for important business operations and decisions that may affect members of the general public. A second characteristic of managerial employees frequently is that they have authority over other business personnel. This interpretation of the Restatement ensures that the remedial purposes of punitive damages will be fulfilled and that punitive damages will not be imposed unreasonably upon a business enterprise. Such a ruling would make it clear that every business enterprise must exercise special vigilance and care in selecting and in retaining its managerial employees. The Restatement approach makes clear that the term "managerial agent" is not restricted to top corporate officials. Rather, the Restatement specifies a functional approach to the question of who is "managerial" that is more realistic and does not depend on artificial job labels.

While the question of who is a "managerial agent" will be dependent upon particular circumstances, the job of ship master of a large vessel such as an oil tanker is one that virtually always will qualify for this designation. Ship masters such as Captain Hazelwood have great responsibility not only for important business matters but also for public and environmental safety. The cases of the *Seafarer* and the case at bar are only the most recent instances when this has been recognized. The principle that a shipowner may be liable for punitive damages for the actions of a ship master was recognized long ago in the case of *Ralston v. The States Rights*, 20 F. Cas. 201, 209 (E.D. Pa. 1836). In that case, a Delaware River steamboat captain deliberately rammed his rival's boat. The court gave "exemplary damages," which it

defined as "a high and exaggerated estimate of the wrong or injury" in the form of lost profits, which at that time was not proper in property damage cases. *Id.* at 210.

While the case at bar is a maritime case, the Restatement rule as interpreted by the *Seafarer* court is appropriate outside admiralty as well. The *Seafarer* court, after carefully examining authorities, noted that "most courts outside the maritime context do not follow [the strict complicity rule of] *Lake Shore*." 70 F.3d at 704. The court also stated that "we discern no reason, and the defendants point to none, why vicarious liability should be treated differently on sea than on land." *Id.*

In summary, the best rule for vicarious liability for punitive damages is the RESTATEMENT (SECOND) OF TORTS formulation in § 909(c) as interpreted by the First and Ninth Circuit Courts of Appeal. This approach occupies a middle ground between the "majority rule," on the one hand, and the strict culpability rule on the other. This rule also retains the culpability principle while updating the *Lake Shore* formulation.

III. Congress Has Not Foreclosed the Imposition of Punitive Damages in the Case at Bar.

This Court has granted certiorari to examine whether Congress may have precluded the imposition of punitive damages by statute. The question arises because at the time of the EXXON VALDEZ oil spill in 1989, the Federal Clean Water Act (CWA) provided a remedial scheme that imposed damages for clean-up of an oil spill, damages for natural resources as well as

civil and criminal penalties against a violator. The question that arises from this statutory scheme is really twofold: does the CWA preempt private tort actions for property damage? And second, does the CWA preempt punitive damages?

To answer these questions the Court considers the regulatory framework of the CWA as was done in prior cases raising similar issues. *Illinois v. Milwaukee (City of Milwaukee I),* 406 U.S. 91 (1972); *Milwaukee v. Illinois (City of Milwaukee II)*, 451 U.S. 304 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); and *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). In the latter three cases, which were decided after comprehensive amendments were added to the CWA, the Court stated that the CWA provides a comprehensive regulatory scheme to combat water pollution including oil spills. E.g., *Int'l Paper,* 479 U.S. at 489. But as the Court stated, the CWA is a *regulatory* scheme designed to protect only public rights in water resources and to adopt and enforce standards for the nation's navigable waters. Damages to private property were not addressed under the CWA, and common law claims were explicitly saved by Congressional mandate pursuant to 33 U.S.C. §§1321(o)(1) and (2), which in 1989 provided as follows:

> (o) Obligation for damages unaffected; local authority not preempted . . . .
>
> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel . . . to any person . . . under any

> provision of law for damages to any . . . publicly owned or privately owned property resulting form a discharge of oil or hazardous substance . . . .
>
> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State . . . .

In *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 336 (1973) this Court explicitly stated that "the Federal [Water Pollution Control] Act does not preempt the states from establishing 'any requirement or liability' respecting oil spills." The general maritime law is closely analogous to state common law liability, and there is no statutory mandate of preemption.

This Court has never ruled that the CWA preempts private tort actions. In *City of Milwaukee II* this Court ruled that the CWA preempted the federal common law remedy of nuisance for interstate pollution, and this was followed by *International Paper*, which ruled that the CWA preempted state interstate nuisance law as well. The important policy behind these preemption rulings was the fact that common law nuisance law principles would interfere with the regulatory scheme of Congress in establishing a permit system for point source discharges, because common law nuisance law would permit courts to impose separate discharge standards and different compliance schedules from the U.S. Environmental

Protection Agency, creating a confusing dual system of administrative requirements. In *Sea Clammers* this Court ruled that the CWA (Federal Water Pollution Control Act) and the Marine Protection, Research and Sanctuaries Act cannot be interpreted to provide plaintiffs with an implied private cause of action under federal law. Although the plaintiffs had also sued on a maritime tort theory, this action had been dismissed by the lower court, and this Court did not address the matter. In *Conner v. Aerovox, Inc.,* 730 F.2d 835 (1st Cir. 1984), the court ruled that a maritime law *nuisance* action was preempted under the authority of this Court's opinions. Therefore, what this line of cases teaches is that the entire federal common law of nuisance, whether maritime or non-maritime, as well as state interstate nuisance law, is preempted by the Clean Water Act (Federal Water Pollution Act), and no implied federal cause of action can be derived from this Act. On the other hand, private rights of action for damages either under state law or the general maritime law are still available and are explicitly saved by the CWA.

The fact that the CWA unquestionably leaves untouched the underlying causes of action in the case at bar supports the conclusion that Congress did not intend to preempt any of the available private *remedies.*

The criminal and civil penalties provided in the Clean Water Act do not preempt any remedies provided in private tort actions under either state law or the general maritime law. Not only is there a complete absence of preemptive intent in the sections of the CWA dealing with criminal and civil penalties,

but such provisions are common in regulatory statutes, and no previous case has held such remedies to have preemptive effect. Criminal penalties obviously are no substitute for the recovery of private tort damages, and the civil penalties provided in the Act have the character of quasi-criminal monetary fines intended to deter conduct detrimental to the public interest. The liability in such cases is strict; there are virtually no defenses to civil penalties under the Act. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310 (7th Cir. 1978) (no third party causation defense is available to the discharger). The fact that a violator of the CWA is subject to civil and criminal penalties is not intended to substitute for or to preempt punitive damages in a private action in maritime tort.

As the Ninth Circuit ruled in the case at bar, where the private law remedy clearly does not interfere with administrative judgments or conflict with the statutory scheme, there is no preemption. Pet. App. 77a.

The punitive damage remedy is also not preempted under the authority of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which involved the question whether the parent of a seaman killed in territorial waters could recover loss of society and lost future income damages for wrongful death under the general maritime law of unseaworthiness. This Court, relying primarily upon the remedial statute for seamen passed by Congress, the Jones Act, ruled that the general maritime law would not afford the plaintiff a greater remedy than had been provided seaman suing for negligence under the Jones Act.

The case at bar can be distinguished from *Miles* on several grounds. First, *Miles* was a general maritime law wrongful death action that was parallel to a *private* cause of action created by Congress under the Jones Act. In enacting the Clean Water Act, however, Congress did not create any *private* cause of action for damages in cases of oil spills. Second, *Miles* did not involve punitive damages. Third, in *Miles* the Court was concerned with alleviating an anomaly created by the private law remedies specified by Congress in the Death of the High Seas Act (DOHSA); but no such anomaly is present in the case at bar, because Congress has not passed any statute on maritime tort property damages, but has left this matter to the common law.

Nevertheless, some courts have engaged in an unwarranted extension of *Miles,* although *Miles* did not concern punitive damages and this Court did not address this matter. Several lower federal courts have used what they term the "analytical framework" of *Miles* to deny punitive damages in maritime law cases. For example, many courts now deny punitive damages in seamen's personal death and injury cases See, e.g. *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993) (no punitive damages under the Jones Act or for unseaworthiness); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), *reversed in part on reh'g*, 59 F.3d 1496 (1995) (no punitive damages for wrongful withholding of maintenance and cure). The Ninth Circuit has followed the precedent set by *Guevara*. See *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995). Some lower courts have also denied punitive damages generally in maritime wrongful death actions based on *Miles.*

Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084 (2d Cir. 1993); *In re Amtrack "Sunset Limited" Train Crash v. Warrior & Gulf Navigation Co.*, 121 F.3d 1421 (11th Cir. 1997). As a result, confusion and conflicts of authority are occurring in the lower federal courts on the question of the impact of *Miles* on punitive damages. Some courts hold that punitive damages are still available after *Miles* even for seamen. *Atl. Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) (in disagreement with the Fifth and Ninth Circuits, punitive damages are available for wrongful denial of maintenance and cure). The confusion over punitive damages engendered by *Miles* is detailed by Professor Robertson in his article, *Punitive Damages in American Maritime Law*, supra. See also Robert Force, *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases,* 55 LA. L. REV. 745 (1995).

To put an end to this confusion this Court should reiterate the limited parameter of *Miles.* The rationale of *Miles* is clearly stated in the Court's opinion: "[i]n this era an admiralty court . . . must be vigilant not to overstep the boundaries imposed by federal legislation." *Miles*, 498 U.S. at 27. This rationale was identical to that articulated by this Court in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978) (DOHSA by its terms limits recovery in wrongful death actions to pecuniary damages). This Court repeated this rationale in the *Yamaha* case: "when Congress has prescribed a comprehensive tort recovery regime…, there is no room for enlargement of the damages statutorily provided." *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 215 (1996). Therefore, *Miles*

should be interpreted not to limit or to be concerned with punitive damages in the case at bar, which is not a personal injury claim and is not based upon federal statutory law. The concern of *Miles* was rather inconsistency with statutory law where specific and comprehensive remedies have been enacted by Congress. See also *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699-702 (1st Cir. 1995). The *Miles/Higginbotham* rule only applies when Congress has enacted a comprehensive statutory regime like the Jones Act or the Death on the High Seas Act that is directly on point and that specifically provides private tort victims with rights as well as remedies under federal law. In the case at bar, that is clearly not the case. The CWA does not create a federal right of recovery for plaintiffs in this case; the plaintiffs' substantive rights come solely from the general maritime law, a purely common law source. The Ninth Circuit therefore correctly rejected the argument based on *Miles* that was made by Exxon in the case at bar.

IV. The Size of the Award of Punitive Damages in the Case at Bar is Within the Limits Allowed by Federal Maritime Law.

In the case at bar Exxon challenged the size of the punitive damage award on due process grounds, and in response the Ninth Circuit reduced the award by fifty percent, from $5 billion to $2.5 billion, in order to comply scrupulously with the constitutional standards set out in the decisions of this Court. Since this Court has not granted review on the due process issue, the size of the award can be duly taken to satisfy the constitutional standards of the Due Process Clause.

Thus, the issue in the case at bar is whether this Court should single out *maritime* plaintiffs and the general maritime law to be treated differently with respect to punitive damages than the entire universe of tort law plaintiffs. In other words, should the Court in the exercise of its authority over the general maritime law announce that maritime plaintiffs shall be subject to more stringent limits on punitive damages than are required generally under the Due Process Clause?

Such a limitation for maritime plaintiffs would be unjust and unwarranted because no principled application of such a limit for a particular class of plaintiffs is possible. No distinctive doctrine or characteristic of maritime law requires a limit on the size of an award of punitive damages beyond that required by the Due Process Clause.

First, the long history of the application of punitive damages as a common law doctrine shows no distinction between maritime and non-maritime cases with respect to both the process of imposing punitive damages and the amounts involved. The cases demonstrating this point are collected in Part I of this brief and even more fully in the exhaustive article of David Robertson, *Punitive Damages in American Maritime* Law, 28 J. MAR. L. & COM. 73 (1997). The history of the imposition of punitive damages shows that this doctrine did not originate in maritime law but was simply applied as a common law doctrine that has been part of maritime law since earliest times.

Second, the traditional maritime law emphasis on uniformity is completely fulfilled by the adoption of the common law rule that bases vicarious liability for

punitive damages upon the fault of a managerial agent. There is no need for a special cap on punitive damages that applies only in maritime cases. Moreover, uniformity is not a concern in the case at bar because punitive damages concerns only remedy, not substantive rights; this Court has expressly ruled that uniformity of remedies is not essential in maritime law cases. *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (maritime law remedies may be supplemented by state law remedies for wrongful death). Moreover, the due process limits that were employed to limit the award in the case at bar and that apply to all maritime cases satisfy any lingering uniformity concern. There is no need for a special cap on punitive damages that applies only to maritime law cases.

Third, Congress has not seen fit to limit punitive damages for oil spills or in maritime cases. The civil and criminal penalties under the Clean Water Act are intended to punish and deter harm to public resources, not to substitute for private tort damages. The punitive damages award in this case is also well within the limits of the civil and criminal penalties for which Exxon could have been liable, which exceeded $3 billion. Pet. App. 173a-175a. This Court may also take note that the oil spill that is the subject of the case at bar moved Congress to pass the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, which greatly increased the financial penalties for dischargers of oil into navigable waters. Many states, including Alaska, did the same in response to this concern.

Fourth, an artificial limit on punitive damages imposed by this Court under the general maritime law

would be impractical and ultimately futile since injured parties would then likely avoid maritime law and seek punitive damages instead in the common law courts, where punitive damages will remain available under more generous terms.

Fifth, there is no basis in the cases imposing punitive damages of any size differences or, indeed, any special maritime law rules. In the *Lake Shore* opinion this Court stated that "courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." 147 U.S. at 107. The general maritime law generally embraces the doctrinal principles of the common law, and no court has ruled that punitive damages run counter to any essential characteristic of maritime law. See *CEH v. F/V Seafarer*, 70 F.3d at 704-705.

Punitive damages serve identical purposes in both maritime and non-maritime cases: punishment and deterrence of reckless conduct. In the case at bar these purposes are particularly important and relevant. Compensatory damages in the case of oil spill virtually always under-compensate and have little deterrence value. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 728 (3d ed. 2002). There are two reasons for this: first, the rule of *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), generally applies in oil spill cases so that there is no recovery for pure economic losses sustained without associated property damage. See, e.g., *Lousiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*); and second, the environmental damages of an oil spill are frequently of a magnitude that

compensation by any measure is inadequate. Punitive damages in the case at bar are particularly needed to serve the purpose of deterring reckless conduct that endangers the marine environment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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