No. 07-219

IN THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

Spring 2008 Term

EXXON SHIPPING CO., et al.,

Petitioners

v.

Grant BAKER, et al.,

Respondents

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

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Should punitive damages be imposed under maritime law against a ship owner 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?

II. Where Congress specifies the criminal and civil penalties for maritime conduct in a controlling statute, the Clean Water Act, which does not provide punitive damages, may judge-made federal maritime law nonetheless create an additional punitive damage remedy?

PARTIES TO THE PROCEEDINGS

Petitioners:

Exxon Mobile Corp.
Exxon Shipping Co.

Respondents:

Grant Baker
Sea Hawk Seafoods, Inc.
Cook Inlet Processors, Inc.
Sagaya Corp.
William McMurren
Patrick L. McMurren
William W. King
George C. Norris
Hunter Cranz
Richard Feenstra
Wilderness Sailing Safaris
Seafood Sales, Inc.
Rapid Systems Pacific Ltd.
Nautilus Marine Enterprises, Inc.
William Findlay Abbott, Jr.

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The opinion for the United States Court of Appeals for the Ninth Circuit is published at 490 F.3d 1066 (9th Cir. 2007) [*Exxon II*]. The opinion for the United States District Court for Alaska is reported at 296 F. Supp. 2d 1071 (D. Alaska 2004). The opinion of the United States Court of Appeals for the Ninth Circuit remanding to the district court is reported at 270 F.3d 1215 (9th Cir. 2001) [*Exxon I*]. The district court opinion denying Exxon's motion for a new trial is available at 1995 U.S. Dist. LEXIS 12953, 1995 AMC 1930 (D. Alaska Jan. 27, 1995).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on May 23, 2007. The petition for a writ of certiorari was filed on August 20, 2007, and granted on October 29, 2007. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 242 (2007). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTORY PROVISIONS INVOLVED

33 U.S.C. §§ 1365(e), 2702(b), and 2704 are attached in the Appendix.

33 U.S.C. § 1321 provides in relevant part:

> (b) . . . [L]iability; penalties; . . . penalty limitations . . .
>
> (3) The discharge of oil . . . (i) into or upon the navigable waters of the United States . . . is prohibited . . . .
>
> (6) (A) . . . Any owner, operator, or person in charge of any vessel from which oil . . . is discharged in violation of paragraph (3)(i) of this subsection . . . shall be assessed a civil penalty . . . of not more than $5,000 for each offense.
>
> (B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any person subject to penalty under subparagraph (A) . . . based on the effect of the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made . . . to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except . . . where . . . such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner . . . such penalty shall not exceed $250,000. . . .
>
> (f) Liability for actual costs of removal
>
> (1) . . . [The] owner or operator of any vessel from which oil . . . is discharged in violation of subsection (b)(3) of this section shall . . . be liable . . . for the actual costs . . . for the removal of such oil . . . in an amount not to exceed . . . $150 per

> gross ton of such vessel . . . or . . . $250,000 . . . whichever is greater, except that where . . . such discharge was a result of willful negligence, or willful misconduct within the privity and knowledge of the owner . . . such owner . . . shall be liable . . . for the full amount of such costs. . . .
>
> (4) The costs of removal of oil . . . shall include any costs or expenses incurred . . . in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil . . . .
>
> (o) Obligation for damages unaffected . . .
>
> (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 or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of oil . . . .

33 U.S.C. § 1321 (1988).

STATEMENT OF THE CASE

On March 24, 1989, the oil tanker *Exxon Valdez* embarked on a typical journey carrying oil from Alaska to California. Captain Hazelwood, an experienced mariner, was in command of the *Valdez*, a top rated ship for the previous two years, and was assisted by a third mate and helmsman. National Transportation Safety Board, Marine Accident Report: Grounding of the U.S. Tankship Exxon Valdez on Bligh Reef, Prince William Sound Near Valdez, Alaska 28-29 (1989) [hereinafter NTSB report]. During the beginning of the transit, Captain Hazelwood correctly diverted the *Valdez* from the normal shipping lanes in order to avoid considerable ice accumulations; the new transit route took the *Valdez* towards Bligh Reef. Hazelwood directed the ship's third mate to conduct a maneuver that would have turned the ship before approaching Bligh Reef; however, against the explicit policy of Exxon, Hazelwood left the bridge at the time of the crucial maneuver. Without Hazelwood on the bridge ensuring his order was carried out, the third mate failed to turn the *Valdez* in time and the ship ran aground on Bligh Reef in Prince William Sound, Alaska. The resulting unfortunate oil spill is the subject of this litigation. *Exxon I*, 270 F.3d at 1222-4.

Following the accident, Exxon acted as "a model corporation"; it spent nearly $3 billion to remove the oil and restore damaged natural resources and compensated the plaintiffs for most

of their losses before the jury ever entered a verdict. *Exxon II*, 490 F.3d at 1070 (Kozinski, J., dissenting from denial of rehearing en banc). Approximately $2.1 billion went to cleanup costs, and, as part of its comprehensive settlement with various government entities, Exxon paid an additional $900 million to restore damaged natural resources. *Exxon I*, 270 F.3d at 1223. Exxon also paid $125 million in fines and restitution as part of a plea bargain in its criminal prosecution. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1079 (D. Alaska 2004).

Because Exxon had separately paid fines and damages for the environmental harm caused by the accident, this litigation was based solely on damage to commercial fisherman. *Exxon II*, 490 F.3d at 1072. Exxon stipulated to liability for compensatory damages. *In re the Exxon Valdez*, 296 F. Supp. 2d at 1080. The district court held a three phrase trial. During Phase I, which determined recklessness of Hazelwood and Exxon, the district court instructed the jury that the Petitioner was responsible for the reckless acts of Captain Hazelwood if he was "employed in a managerial capacity while acting in the scope of [his] employment." *Exxon II*, 490 F.3d at 1069 (Kozinski, J., dissenting).

Phase I Jury Instruction No. 36, in relevant part, stated:

> However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer *whether or not those acts are contrary to the employer's policy* or instructions. (emphasis added).

Phase I Jury Instruction No. 33, in relevant part, stated:

> A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

Based on these instructions, the jury found Exxon and Captain Hazelwood reckless and therefore liable for punitive damages. *In re the Exxon Valdez*, 296 F. Supp. 2d at 1080. Phase II of the trial

fixed Exxon's liability for compensatory damages at $303 million. *Id.* Finally, during Phase III, the district court levied a $5 billion punitive damage award against Exxon. *Id.*

After post-trial motion litigation, both parties appealed and the Ninth Circuit vacated the $5 billion award and remanded for further proceedings to reduce the award to comply with this Court's precedents. *Exxon I*, 270 F.3d at 1246-7. Subsequent developments in this Court's punitive damage jurisprudence led this case to be remanded twice for reconsideration and reduction of awards. The Ninth Circuit reduced the initial $5 billion award to $2.5 billion in its final consideration of the matter. *Exxon II*, 490 F.3d at 1073.

SUMMARY OF ARGUMENT

Longstanding federal maritime law precedent prohibits punitive damages against ship owners absent a finding that the owner directed, countenanced, or participated in the conduct. *The Amiable Nancy*, 16 U.S. 546, 559 (1818). This Court and the majority of lower courts have upheld the *Nancy* principle, limiting vicarious punitive liability in admiralty cases. While the opinion below recognized that "Exxon's conduct with respect to the spill was not intentional" and the "conduct was not willful," *Exxon II*, 490 F.3d at 1073, it nonetheless upheld the punitive damage award as consistent with the Restatement (Second) of Torts § 909(c) "scope of employment" provision. Section 909(c), while appropriately applied in certain agency contexts, is ill-suited for admiralty cases. This Court recognized the benefits of having different standards for vicarious liability depending upon the subject matter at issue when it rejected use of § 909 in Title VII cases. *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

This Court should vacate the $2.5 billion punitive damage award since under the correct maritime standard, *The Amiable Nancy*, Exxon could not be punitively liable since it never directed, countenanced, or participated in the agent's wrongful conduct. Furthermore, even if this Court accepts the Restatement, the punitive damage award still should be vacated, as Hazelwood

violated explicit policies that render his actions beyond the scope of his employment. This Court should reaffirm its commitment to a separate admiralty standard for vicarious punitive liability; the practical reality of activity on the high seas necessitates such a result.

Moreover, punitive damages are unavailable for oil spills under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988) [CWA]. The CWA provides a comprehensive scheme for punishing, deterring, and providing compensation for oil spills. In *Milwaukee v. Illinois*, 451 U.S. 304 (1981), this Court recognized that the CWA established "an all-encompassing program of water pollution regulation" that displaces federal common law claims. *Id.* at 309. The CWA makes spillers of oil strictly liable for cleanup costs, subjects them to civil and criminal penalties, and limits their liability under certain circumstances. 33 U.S.C. §§ 1321(b)(6), 1321(f), 1311(a), 1319(c)(1) (1988). These damages are calibrated to the blameworthiness of the conduct. *Id.* §§ 1321(b)(6)(B); 1321(f). The oil spill provisions of the CWA preserve claims for compensatory damages to property, but do not authorize punitive damages. 33 U.S.C. § 1321(o)(1).

Federal courts may not supplant Congress' statutory scheme with an additional punitive damage remedy. The role of the federal common law is to harmonize the statutes passed by Congress, not to supplant them. *Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, 820 (2001). Where Congress has authorized only certain types of damages within a particular statutory context, general maritime law cannot create additional damage remedies for analogous claims. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Rather than authorizing punitive damages, the CWA relies on criminal penalties, civil fines, and cleanup liability to punish and deter oil spills.

Awarding a punitive damage windfall in this case would conflict with the longstanding public policy of addressing maritime injuries through means other than massive liability. Limiting liability has been "an important theme of admiralty law" because it is necessary for realistic insurance coverage and a reasonable apportionment of the costs of a maritime disaster. *See* 2 Thomas Schoenbaum, Admiralty and Maritime Law, § 15-1 (4th ed. 2003). Exxon has already faced liability far in excess of what is necessary to alter its conduct, *Exxon I*, 270 F.3d at 1244, and fully compensated those affected by the disaster. *Id.* 1248. Both Congress and Exxon have acted to prevent future oil spills through better training, oversight, hull design, and technology. Finally, this punitive damage award would paradoxically punish damage to commercial interests far in excess of harm to the environment or human life. The punitive damage here—awarded for solely economic harm—is twenty times the punishment Exxon received for damage to the environment. Maritime law bars punitive damages for injuries and death at sea, but plaintiffs argue that such damages should nonetheless be available to punish Exxon for their lost profits. For these reasons, this Court should vacate the $2.5 billion punitive damage award.

ARGUMENT

I. PUNITIVE DAMAGES MAY NOT BE IMPOSED UNDER FEDERAL MARITIME LAW AGAINST A SHIP OWNER FOR THE CONDUCT OF A SHIP'S MASTER AT SEA, ABSENT A FINDING THAT THE OWNER DIRECTED, COUNTENANCED, OR PARTICIPATED IN THE WRONGFUL CONDUCT.

A. This $2.5 billion punitive damage award violates longstanding federal maritime law principles that allow for punitive damages only in limited circumstances.

This Court, all circuits which have dealt with this issue, and the majority of district courts across the country are in agreement on vicarious punitive liability. In particular, courts have followed the maxim that "admiralty cases deny punitive damages in cases of imputed fault, holding that a principal or master cannot be liable for an agent or servant's wanton or willful

misconduct unless it participated in or ratified the wrongful conduct." 1 Schoenbaum § 5-17. This fundamental principle underscores the longstanding notion that "[l]imitation of liability is an important theme of admiralty law." *Id.* at § 15-1. The Ninth Circuit's $2.5 billion punitive damage award violates these principles and improperly imputes recklessness to the Petitioner despite the fact that it never "participated in or ratified the wrongful conduct." *Id.* at § 5-17.

1. The Supreme Court's decision in *The Amiable Nancy* denies punitive damages in admiralty cases unless the owner of the vessel directed, countenanced, or participated in the wrongful conduct.

For nearly two hundred years, the federal maritime law of the United States has denied recovery of punitive damages from ship owners for the conduct of their employees. The Supreme Court first spoke on this issue in *The Amiable Nancy*, holding that the owner of the vessel could not be vicariously liable for punitive damages based on the tortious conduct of its employees since the owner "neither directed it, nor countenanced it, nor participated in it in the slightest degree." *The Amiable Nancy*, 16 U.S. 546, 559 (1818). This admiralty principle exemplifies the distinction between "the original wrong-doers" and the owners of the vessel, "whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them" because of the "nature of the service" in question. *Id.* at 558.

This Court has not addressed the issue of vicarious punitive liability in the maritime context since *The Amiable Nancy*; however, its subsequent decisions have recognized that the common law of agency restricts vicarious liability. Most notably, the Court in *Lake Shore & Michigan Southern Railroad Company v. Prentice*, 147 U.S. 101 (1893), expounded on the limitations of liability *Nancy* set forth in the admiralty context by applying them to the common law of agency; it restricted the punitive liability of a railroad corporation for the negligent actions

of its conductor. *Id*. *See also Kolstad*, 527 U.S. at 541 ("[t]he common law has long recognized that agency principles limit vicarious liability for punitive awards.").

Just as in *Nancy*, *Lake Shore* recognized the responsibility of a corporation "to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal." *Lake Shore*, 147 U.S. at 109. However, the Court made the distinction between *compensating* the injury and *punishing* the conduct through punitive damages, the latter requiring the defendant to have "participated in, approved, or ratified" the conduct. *Id*. at 117. Something akin to "criminal intent" is required for punitive damages to be "brought home to the corporation." *Id*. at 111.[1]

2. Every circuit addressing this issue has applied *The Amiable Nancy* and has limited vicarious punitive liability in admiralty cases.

The First, Fifth, Sixth, Seventh[2] and even Ninth Circuit, along with numerous district courts, have faithfully followed this Court's decision in *The Amiable Nancy*, limiting vicarious punitive liability under general maritime law. As a result, the decision of the Court of Appeals below is "at loggerheads with every other circuit that has considered this issue." *Exxon II*, 490 F.3d at 1069 (Kozinski, J., dissenting).

For nearly 100 years, the Ninth Circuit had followed *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905) (following *Nancy* and holding that in maritime law vicarious punitive liability for should not be imputed to the owners of a vessel absent a finding that the corporation participated in the wrongful conduct). The next major affirmation of the

[1] In *American Society of Mechanical Engineers (ASME) v. Hydrolevel Corporation*, this Court noted that courts have deviated from this standard and also intimated that *Lake Shore* may have "departed from the trend of late 19th century decisions"; however, the *ASME* Court still only awarded treble damages as part of a compensatory, not punitive, scheme. 456 U.S. 556, 576 n.14 (1982). Furthermore, the deviations from *Lake Shore* described in *ASME* are in non-maritime punitive damages cases; *The Amiable Nancy* remains the authoritative statement for punitive damages under general maritime law.

[2] *See The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (holding in an admiralty action, "damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the master for the unauthorized tort of the servant" but if the master "was here to respond in damages," exemplary damages might be proper.)

Nancy rule came over 60 years later when the Sixth Circuit denied recovery of punitive damages for a ship captain's mistake in judgment that resulted in deaths from the sinking of the vessel. *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). Following *Nancy*, the Sixth Circuit held: "We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *Id*. at 1148.

In *In re P & E Boat Rentals, Inc*., the Fifth Circuit reversed a $16 million punitive damage award against Chevron for the decision of its foreman instructing a ship captain to use excessive speed during foggy conditions; an action that resulted in a fatal collision with another vessel. 872 F.2d 642, 645 (5th Cir. 1989). The court justified its holding on both procedural and policy grounds. First, it identified the procedural uniqueness of admiralty claims stating: "Most admiralty courts have taken an even more restrictive view of the principal's liability for punitive damages for the acts of an agent; those courts generally hold that the principal is liable in punitive damages only if it authorizes or ratifies wanton actions of an agent. *Id*. at 650. Second, it rejected the reasoning of *Protectus Alpha* discussed *infra*, and held that limiting punitive damages against an owner best adheres to "our notion of the proper reasons for awarding punitive damages": to punish the *actual* wrongdoers. *Id*. at 652.

The First Circuit has set forth a slightly broader standard for punitive liability, yet this expansion was justified by the specific facts of the owner's conduct. The court awarded punitive damages to a plaintiff whose lobster traps were destroyed by a fishing trawler. *CEH, Inc. v. F/V SEAFARER*, 70 F.3d 694 (1st Cir. 1995). In expanding vicarious punitive liability for an agent's action within the scope of employment, the court required the owner to have exhibited "some level of culpability for the misconduct." *Id*. at 705. The owner of the fishing trawler knew of the

tension between lobstermen and fishers yet enacted no policy on how to operate vessels in such areas. *Id*. The absence of a policy warranted punitive damages, a result consistent with *Nancy*.

Other courts have agreed with the *Nancy* principle for admiralty actions, denying punitive damages in a variety of cases. *See, e.g.*, *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (denial of maintenance and cure); *Glynn v. Roy Al Boat Management*, 57 F.3d 1495 (9th Cir. 1995) (same); *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988) (unapproved wrongful conduct of photographers on ship); *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987) (absence of license to command vessel is not enough to prove willful conduct); *McGuffie v. Transworld Drilling Co.*, 625 F. Supp 369 (W.D. La.1985) (reckless foreman not approved by principal).

The Ninth Circuit's decision in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) [*Protectus Alpha II*] rejected nearly two centuries of federal admiralty law when it created a new vicarious punitive liability rule in dictum. *See Exxon I*, 270 F.3d. at 1236 n.84 (stating that "*Protectus Alpha*, in relevant part, could have been dictum" and that a challenge to the case could be made "to a higher court.").

In *Protectus Alpha*, firefighters were battling a fire on a ship tied to the dock and had the fire almost under control when the dock foreman untied the ship and set it adrift to sea. The remnants of the fire began to spread and the ship subsequently sank resulting, in the death of a rescue worker. Consistent with the precedent set forth in *Nancy*, the district court awarded punitive damages against the dock owner since his foreman "acted in accordance with company policy." *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 585 F. Supp. 1062, 1068 (D. Or. 1984) [*Protectus Alpha I*]. The "endorsement" of the foreman's conduct by the owner is the participation and countenancing needed to award punitive damages under *Nancy*. *Id*.

However, in affirming the punitive damage award, the Ninth Circuit substituted its own findings for that of the district court—and by extension also ignored this Court's reasoning in *Nancy*. The Ninth Circuit adopted the Restatement (Second) of Torts § 909, which extends vicarious liability for punitive damages beyond the traditional rules set forth in admiralty, allowing liability even when an "agent was employed in a managerial capacity and was acting in the scope of employment." *Protectus Alpha II*, 767 F.2d at 1386. The justification given by the Ninth Circuit for abandoning centuries of maritime jurisprudence is that they believed the Restatement rule "better reflects the reality of modern corporate America" and that "no recovery for more than compensatory damages could ever be had against a corporation if express authorization or ratification were always required." *Id*. However, "nothing has changed in the relationship between ship owner and captain that would justify importing this innovation [§ 909(c)] into maritime law." *Exxon II*, 490 F.3d at 1069 n.1 (Kozinski, J., dissenting). Even in *Protectus*, the dock owner explicitly ratified the foreman's conduct and had a company policy on the subject; punitive damages could have been affirmed based on the owner's actions. Instead, the Ninth Circuit substituted an erroneous standard in its place. This Court must reaffirm the principles of *Nancy* and return to "uniformity in the exercise of admiralty jurisdiction." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 28-9 (1990) (internal citations omitted).

3. The use of Restatement (Second) of Torts § 909 is inappropriate in admiralty cases and directly conflicts with Supreme Court precedent.

Over the years, some non-admiralty courts have deviated from the ratification standard put forth by this Court in *Lake Shore*; instead, these courts have adopted the vicarious punitive liability standard of the Restatement (Second) of Torts § 909 (1979) (also known as the Restatement (Second) of Agency § 217(C)). The "scope of employment" provision in subsection (c) dramatically increases the potential liability of owners. While the use of the § 909(c) may be

appropriate in certain non-admiralty contexts, this provision is ill-suited to admiralty cases, especially in light of applicable Supreme Court precedent on the matter set forth in *Nancy*. "Most admiralty courts…hold that the principal is liable in punitive damages only if it authorizes or ratifies wanton actions of an agent." *In re P & E Boat Rentals*, 872 F.2d at 650. The district court below used § 909(c) as the basis for the jury instructions that resulted in the finding against the Exxon. *In re the Exxon Valdez*, 1995 U.S. Dist. LEXIS 12953; 1995 AMC 1930 at 12 (1995).

The Restatement (Second) of Torts § 909 (1979) states:

> 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.

Advocates of § 909(c) argue that imposing punitive liability will encourage owners to be more cautious in choosing who they place in a managerial capacity since companies want to avoid paying punitive damages. *Protectus Alpha II*, 767 F.2d at 1386. *See also* John J. Kircher & Christine M. Wiseman, Punitive Damages: Law and Practice, Chapter 24. Vicarious Liability for Punitive Damages (2d ed. 2008) (discussing Prosser for the proposition that imposing punitive damages for agents acting in the scope of employment is done for deterrent purposes). However, this deterrent is simply inapplicable to the maritime environment, specifically with the shipping of oil and hazardous cargo. The *Exxon Valdez* oil spill cost the company over $3.4 *billion* for cargo worth $25.7 million. *Exxon I*, 270 F.3d at 1244. The company has every economic incentive to prevent accidents; awarding punitive damages based upon the § 909(c) standard when an agent violates company policy will not serve as a deterrent in the maritime shipping industry and inappropriately punishes the wrong party. The § 909(c) scope of employment

provision is overly broad and does not reflect the realities of the maritime principal-agent relationship, especially in the context of oil and hazardous cargo shipping.

4. This Court has acknowledged the need for different punitive damage standards based on the type of activity involved.

The Restatement approach to vicarious punitive liability should not be imposed in every situation; this Court should follow its precedent and determine which principles should lead to vicarious liability based upon subject matter of each case. This Court has recognized the need for separate admiralty rules that may not be applicable to other substantive areas of law, and vice versa. *See Executive Jet Aviation v. City of Cleveland, Ohio*, 409 U.S. 249, 270 (1972) ("When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules [which have evolved over many years] to determine fault, liability, and all other questions that may arise from such a catastrophe.) Using the subject matter approach will lead to more equitable solutions.

Similarly, this Court in *Kolstad* specifically rejected the Restatement § 909(c) scope of employment provision because it was not suited to the subject matter at issue. *Kolstad*, 527 U.S. 526 (holding that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." [internal citations omitted]). The Court noted that § 909(c) "would reduce the incentive for employers to implement antidiscrimination programs" and "the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages." *Id*. at 544. (internal citations omitted)

Kolstad demonstrates that the Restatement § 909 principles are not applicable in all circumstances. The *Kolstad* Court had the opportunity to adopt § 909 as its standard for vicarious punitive liability but explicitly chose not to since it did not make sense in the context of Title VII discrimination cases. *See also*, Timothy J. Moran, *Punitive Damages in Fair Housing Litigation:*

Ending Unwise Restrictions on a Necessary Remedy, 36 Harv. C.R.-C.L. L. Rev. 279, 322-24 (2001) (arguing that *Kolstad's* rejection of § 909, while appropriate discrimination cases, is not appropriate in the housing context). A subject matter approach to vicarious punitive liability is appropriate and preferable to wholesale adoption of the Restatement; this Court should reaffirm its commitment to an admiralty standard that is faithful to *The Amiable Nancy*, recognized by *Executive Jet Aviation*, and makes the most intuitive sense based upon the nature of activity on the high seas.

B. The district court's finding of vicarious liability relied on jury instructions that incorrectly stated the applicable maritime law controlling this case; under the correct standard, this Court should vacate the $2.5 billion punitive damage award since there has been no finding that Exxon directed, countenanced, or ratified the conduct of its employee.

During Phase I of the trial, the district court instructed the jury that the Petitioner was responsible for the reckless acts of Captain Hazelwood if he was "employed in a managerial capacity while acting in the scope of [his] employment." *Exxon II*, 490 F.3d at 1069 (Kozinski, J., dissenting). "Once the jury found that the captain acted recklessly, it was also *required* to find that Exxon acted recklessly." *Id.* (emphasis added). The jury was asked to make this decision *without* independently evaluating whether the Petitioner directed, countenanced, or ratified the conduct as required under federal maritime law.

Phase I Jury Instruction No. 36, in relevant part, stated:

> However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer *whether or not those acts are contrary to the employer's policy* or instructions. (emphasis added).

Phase I Jury Instruction No. 33, in relevant part, stated:

> A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

These instructions given to the jury were contrary to law and prejudicial to the Petitioner. Instruction 36 prohibited the jury from rendering a finding whether Hazelwood directly violated the established policies of the Petitioner—an omission that is critical to performing the appropriate vicarious punitive liability analysis under federal maritime law. *See, e.g.*, *CEH v. F/V SEAFARER*, 70 F.3d 694 (finding the lack of clear policy directives permitted punitive culpability on the part of the owner of the vessel); *Protectus Alpha I*, 585 F. Supp. 1062 (holding a foreman's malicious conduct in accordance with the owner's stated policy permitted vicarious punitive liability against the owner). As a result, in accordance with Instruction 33, the jury automatically found the Petitioner reckless when it found Hazelwood reckless. *See also* David Lebedoff, *Cleaning Up: The Story Behind the Biggest Legal Bonanza of our Time* 243 (1997) (describing juror accounts of the jury deliberations that found Captain Hazelwood reckless and subsequently imputed that recklessness to Exxon based upon Instruction 33).

The district court justified its instructions on the grounds that the Ninth Circuit had adopted the Restatement § 909 "scope of employment" standard for vicarious liability in *Protectus Alpha II*. *In re the Exxon Valdez*, 1995 U.S. Dist. LEXIS 12953 at 12. This explanation is unpersuasive for two interrelated reasons: 1) The Supreme Court has fully spoken on this issue in *The Amiable Nancy* and that precedent controls in this matter; and 2) The Ninth Circuit's holding in *Protectus Alpha* is merely dictum. In substituting its judgment for that of this Court, the Ninth Circuit "consign[ed] *The Amiable Nancy* and *Pacific Packing* to the dustbin of history." *Exxon II*, 490 F.3d at 1069 (Kozinski, J., dissenting). The reasoning behind the Ninth Circuit's holding in *Protectus Alpha* is suspect, as discussed in Part I.A., *supra*; this Court should not allow the Ninth Circuit to "undermine[] the uniformity of maritime law and contravene[]

long-settled Supreme Court precedent, as well as the unanimous view of [its] sister circuits." *Id.* at 1071.

Petitioner never approved of the conduct that was found to be the legal cause of the accident. Lebedoff at 234. Hazelwood left the bridge at the crucial point in the ship's transit. Company policy specifically disapproved of such conduct: "The Exxon Bridge Organization Manual directed that under conditions, such as those existing in Prince William Sound on March 23, the master or the chief mate was to be on the bridge with the watch officer." NTSB report at 116. A copy of this manual was kept on the bridge and "[o]fficers were required to acknowledge by signature that they had read and understood the manual." *In re the Exxon Valdez*, 1995 U.S. Dist. LEXIS 12953 at 8 n.7. Petitioner did not direct, countenance, or participate in the conduct that led to the grounding of the *Valdez*. Therefore, Petitioner can only be held liable for the compensatory harm caused by its employee and this Court must vacate the punitive damage award in accordance with the admiralty standard for punitive damages.

C. Even under the Restatement standard—which is inappropriate in admiralty cases—Exxon cannot be held liable for punitive damages.

1. Exxon cannot be held liable under the Restatement § 909(c) "scope of employment" provision because Hazelwood's actions were in direct violation of established company policies.

Under the Restatement (Second) of Agency § 228 (1958), which further defines the scope of employment under § 909(c), "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized…." A company carries out its functions by implementing policies that its employees must follow. While Petitioner acknowledges that policies on paper that are not enforced may not indicate a good faith effort to monitor the conduct of employees, Exxon had appropriate policies in place and had no reason to believe that Hazelwood would violate those policies. Therefore, Petitioner is not liable even under § 909(c).

For the two years preceding the grounding of the *Valdez*, the ship received an award for being the best performing ship in the Exxon fleet, with Hazelwood as one of two masters on the ship during that time. NTSB Report at 28-29. Additionally, in 1988, the year preceding the accident, Hazelwood received his highest rating as a master and had previously been noted in his performance evaluations as exercising "good judgment." *Id*. at 28, 183-4. Based upon these performances by Hazelwood, Petitioner would have no reason to believe Hazelwood would not follow company policies on the night of the accident. As master, he had a proven track record of superior performance; his unexpected departure from basic company practice was unforeseeable and outside his scope of employment. *See, e.g.*, *Fuhrman*, 407 F.2d at 1148 (using the fact that the captain was a "seasoned veteran with many years of experience" as indicative that the company was to believe he was a fit master).

Respondents argue that anything Hazelwood did while on the ship constitutes action within the scope of his employment and that his leaving the bridge was for the benefit of the employer. However, this argument misses the mark; staying on the bridge during a crucial maneuver is exactly the "kind [of act] he is employed to perform." Restatement (Second) of Agency § 228(1)(a). At the time of the accident he was not acting in the scope of his employment since he deviated from the Exxon Bridge Organization Manual, a document that Hazelwood explicitly acknowledged that he read and understood; his reckless act should not be imputed to the Petitioner.

This case is similar to *Kolstad*, since Petitioner specifically had policies in place that were deliberately violated by Hazelwood. As the Court determined in *Kolstad*, using the scope of employment rule would reduce the incentive for companies to implement policies regulating conduct. *Kolstad*, 527 U.S. at 544. Similarly, if § 909(c) were used in admiralty, an employer

would not have the incentive to implement policies concerning the operation of vessels; giving more discretion to a master on issues such as whether or not to leave the bridge is undesirable and increases the risks for accidents. Title VII and admiralty law were designed for and are better effectuated in preventative contexts, rather than simply providing punitive remedies. *See* Tamara Schiffner, *Employment Law: The Employer Escape Chute from Punitive Liability Under Kolstad v. American Dental Ass'n*, 54 Okla. L. Rev. 181, 203-209 (2001) (describing the good-faith compliance defense in the context of preventing harm).

Furthermore, a distinction should also be made between the conduct of Hazelwood in this matter and the actions of the ship captain and owner who was liable for punitive damages in *CEH v. F/V SEAFARER*. The First Circuit pointed to the "complete managerial discretion" the ship's master retained over the operations of the boat. *CEH,* 70 F.3d at 705. There was a "complete delegation of authority" and "also a complete absence of any policy directive." *Id.* "This combination of circumstances places this case well within the sphere of culpability." *Id.* By contrast, Hazelwood did not have such latitude and discretion; he had clear policy directives enforced by the Petitioner. Under the First Circuit's scope of employment analysis, in this case, Hazelwood would have been found to be in violation of his commitments and punitive damages could not be awarded against Exxon for Hazelwood's conduct.

2. Exxon cannot be held liable for recklessly hiring Hazelwood under § 909(b) because that theory was never presented to the jury.

Even if this Court applies Restatement § 909(b), Exxon should not be found reckless in employing Hazelwood. The § 909(b) "reckless employment" provision was never articulated in the jury instructions. The Ninth Circuit alludes to Petitioner being reckless in retaining Hazelwood as an employee after discovering his alleged alcohol problems, *Exxon I*, 270 F.3d at 1223; however, the jury never affirmatively made this finding. The court defined reckless

conduct in Instruction 27, but this instruction was irrelevant to any finding of recklessness against the Exxon because the jury found *Hazelwood* reckless under this instruction, and subsequently *had* to find Exxon reckless according to Instruction 33. *In re the Exxon Valdez*, 1995 U.S. Dist. LEXIS 12953 at 32-3. No separate finding was made on whether Exxon was reckless in employing Hazelwood. Without such a finding, it was inappropriate for the Ninth Circuit to affirmatively substitute its own opinion in the absence of a finding made by the jury.[3]

D. Because the nature of activity on the high seas necessitates a specific admiralty standard, this Court should maintain and reaffirm the separate admiralty standard set forth in *The Amiable Nancy* for punitive damage awards based solely on vicarious liability.

For hundreds of years, this Court has held that federal admiralty law is its own entity and is not subject to changes in the laws of the several states. *See The American Insurance. Co. v. Canter*, 26 U.S. 511, 545-6 (1828) ("These cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our Courts to the cases as they arise."); *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law"). *See also* William H. Theis, *United States Admiralty Law as an Enclave of Federal Common Law*, 23 Tul. Mar. L.J. 73 (1998) (stating the common notion that admiralty law is distinct from other federal laws). Despite some courts expanding the scope of vicarious punitive liability in non-admiralty cases, "[a]dmiralty courts may apply a more restrictive standard for punitive damages than do their state-court counterparts." Reporter's Notes (e), Restatement (Third) of Agency § 7.03 (2006).

[3] Lebedoff's book describes the jury deliberations based upon accounts by six jurors. The jury did not find Hazelwood drunk at the time of the incident. "Alcohol really had no bearing" stated one of the jurors. The jury "concluded that one need not have been drunk to have been reckless." The finding of recklessness came from a series of mistakes that Hazelwood made while in command, violations that were clearly against Exxon policy. Since the drinking had nothing to do with the verdict, the way the jury imputed recklessness to Exxon came from Jury Instruction No. 33, which required vicarious liability if the jury found Hazelwood reckless. Lebedoff at 241-3. Furthermore, Hazelwood was acquitted of state charges for operating a water craft under the influence of alcohol. Michael Lev, *Hazelwood's Acquittal Clouds the Exxon Case*, N.Y. Times (March 28, 1990).

Maritime law remains distinct in our federal jurisprudence; there is no persuasive reason for this court to abandon centuries of admiralty law and this Court should reaffirm its commitment to the standard set forth in *The Amiable Nancy*.

The job of a master on the high seas is distinct from traditional agency relationships on land. Courts have recognized that it would be impractical for a master to consult its employer on every *tactical* decision made during a voyage; the ship is too far removed from the shore for a corporate office to be making decisions that often require split-second reactions to changes on the high seas. *Fuhrman*, 407 F.2d at 1147. However, *strategic* decisions can be made by corporate officers, and are usually done so through policy directives that a master must obey while undertaking tactical operations. Petitioner reasonably expected that Hazelwood would follow the correct procedures in commanding the *Valdez*, since the ship had been performing at a high level for the past two years.

Conversely, in the traditional agency context on land, strategic and tactical decisions, are made regularly by both principals and agents. While ship masters act as managerial employees only for a defined amount of time (the length of the voyage), typical managerial agents are more involved in corporate operations and retain a fiduciary duty at all times.

This intuitive distinction between admiralty and non-admiralty relationships underscores the rationale for retaining separate admiralty law standards. However, there are other justifications for a separate standard. "From earliest times, maritime law was shaped by the practical needs of those engaged in maritime commerce. The unique character of the sea and its hazards created the need for legal solutions and doctrines that, in some cases, had no application on land." 1 Schoenbaum § 1-1. Vicarious punitive liability is one such case that needs a separate standard on the sea; the remoteness and unpredictability of the sea necessitate a higher bar for

liability, provided that the owner has implemented policies and had the foresight to provide directives for risks it is responsible for mitigating.

Furthermore, "[a]nother distinctive feature of maritime law is its international character." *Id*. United States maritime law should have some basic notions of agreement with the international community. *See* Theis, *supra*, at 75 (arguing "judicial development of United States admiralty law should be guided by a sound appreciation of admiralty laws as practiced in other countries, not by the law of the several states of the United States as it developed in nonmaritime contexts."). From a U.S. self-interest perspective, this is important; "[w]ithout at least broad agreement among nations as to basic principles of maritime law, maritime commerce would be difficult or impossible." 1 Schoenbaum § 1-1. Other nations have limited vicarious punitive liability and this Court risks making business conducted in the United States unattractive to foreign shippers because of liability concerns. *See* Adam Liptak, *Courts outside U.S. wary of punitive damages,* International Herald Tribune (March 26, 2008) (stating: "Most of the rest of the world views the idea of punitive damages with alarm.").

Finally, under the Respondents' interpretation of the case, there is nothing Exxon could have done to avoid liability; even if a captain got on a ship under the influence for the very first time, Exxon would still be liable under their definition of "scope of employment." This leaves a corporation with almost no way to protect itself from punitive damage awards for actions of their employees for which they have implemented and enforced policies to limit the risk of accidents. It is hard for an employer to predict reckless or malicious conduct of employees since the conduct is generally sporadic. *McGuffie v. Transworld Drilling Co.*, 625 F. Supp 369 (W.D. La.1985). For these reasons, this Court should reaffirm the uniform nature of federal maritime law and vacate the $2.5 billion punitive damage award.

E. Punitive damages should only be awarded by a showing of clear and convincing evidence in admiralty cases.

The Ninth Circuit held that the appropriate standard of proof for punitive damages is preponderance of evidence. *Exxon I*, 270 F.3d at 1232-3. It did acknowledge that "the common law of admiralty could require a higher standard of proof for punitive damages" yet failed to implement one in this case. *Id*. at 1232. Clear and convincing evidence is more consistent with the principle of admiralty law limiting liability. The "long experience [of] the law of the sea . . . is concerned with . . . limitation of liability." *Executive Jet Aviation*, 409 U.S. at 270. Given the high stakes of punitive damage liability in the admiralty, this Court should adopt a clear and convincing evidence standard for assessing vicarious punitive liability in maritime cases.

This Court has acknowledged that "[t]here is much to be said in favor of a State's requiring…a standard of clear and convincing evidence" when imposing punitive damages despite declining to mandate such a standard in all cases. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991). There are two reasons why this Court should adopt the clear and convincing evidence standard for vicarious punitive liability in admiralty cases: 1) the hindsight analysis performed by courts would better serve the aims of justice if held to this standard; and 2) federal admiralty liability should be subject to a higher standard of proof than standard tort cases.

"Accidents at seas happen—ships sink, collide and run aground—often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless." *Exxon II*, 490 F.3d at 1070 (Kozinski, J., dissenting). In determining whether a principal was liable for employing a master that is unfit for command, the evidentiary standard used becomes even more important. A clever trial lawyer could make any accident appear to be a result of reckless decisionmaking, especially if he or she had to convince

a jury that it was only more likely than not that a captain was unfit for command rather than meeting a clear and convincing evidence standard.

While this jury was never instructed to make a finding that Hazelwood was unfit for command in this case, *see* Lebedoff at 234-5 (quoting the three interrogatories the jury answered), the jury did hear conflicting evidence over the alleged alcohol problems of Hazelwood and Exxon's culpability in allowing him to retain command of the *Valdez*. This lack of clarity has led the Ninth Circuit and others to provide their own interpretations on the what the jury found; the simple explanation, and the one that is most authenticated by the historical record is that the jury found Hazelwood reckless, and per the erroneous jury instructions, they *had* to find Exxon reckless. *Id*. at 241-3. *See also supra*, Part I.B.1 n.3. If punitive damages in federal maritime law were held to the standard of clear and convincing evidence, the appellate courts would have a better record from which to determine what the jury *actually* found.

Second, the federal maritime standard should be higher than a standard tort case. Twenty-nine states and D.C. now require clear and convincing evidence when assessing punitive damages. American Tort Reform Association, Punitive Damages Reforms *available at* http://www.atra.org/show/7343. While this Court should not adopt State court standards simply for the sake of uniformity, in a body of law that favors limitation of liability, *Executive Jet Aviation*, 409 U.S. at 270, this Court should raise the bar for those who bring punitive damage claims. Admiralty claims tend to inflict major monetary losses; inflicting additional punishment for an act without clear findings is not appropriate when the stakes are exceedingly high.

II. BECAUSE THE CLEAN WATER ACT PROVIDES A COMPREHENSIVE SCHEME FOR PUNISHING, DETERRING, AND PROVIDING COMPENSATION FOR OIL SPILLS, THIS COURT SHOULD NOT CREATE AN ADDITIONAL PUNITIVE DAMAGE REMEDY.

The Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988) [CWA], provides a comprehensive scheme for oil spill liability, and therefore displaces all federal sources of relief except those specifically authorized by statute. Because Congress has limited recovery for economic harm to compensatory damages, federal courts may not create an additional punitive damage remedy.

A. The Clean Water Act provides a comprehensive statutory scheme to address water pollution, including provisions carefully calibrated to deter, punish, and remediate oil spills.

The CWA provides a comprehensive scheme for oil spill liability, including liability to the government for cleanup costs, civil and criminal fines for oil spills, and liability limits calibrated to the conduct of the oil spiller. This comprehensive scheme preempts claims not specifically authorized by statute.

First, the owner or operator of a vessel must compensate the government for cleanup costs. 33 U.S.C. § 1321(f) (1988). This liability extends to the costs necessary to restore or replace the natural resources damaged or destroyed as a result of the spill. *Id.* § 1321(f)(4). Exxon spent approximately $2.1 billion on cleanup costs and an additional $900 million to restore damaged natural resources. *Exxon I*, 270 F.3d at 1223. Second, the owner or operator of a vessel that spills oil is subject to civil fines under the CWA. 33 U.S.C. § 1321(b)(6). Finally, that owner or operator may also be subject to criminal penalties. 33 U.S.C. §§ 1311(a), 1319(c)(1) (1988). Exxon was prosecuted criminally for, and pled guilty to violations of, the CWA. Exxon paid $125 million in fines and restitution as part of its plea bargain in the criminal case. *In re the Exxon Valdez*, 296 F. Supp. 2d at 1079.

Both the cleanup and civil fine provisions of the CWA are calibrated to the relative blameworthiness of the spiller. The statute instructs the government to take into account "gravity of the violation, and the nature, extent, and degree of success of any efforts . . . to minimize or mitigate the effects of such discharge" when determining what fine to impose. 33 U.S.C. § 1321(b)(6)(B) (1988). When the discharge was the result of "willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge" the maximum penalty quintuples, to $250,000. *Id.* Willful violations within the privity and knowledge of the owner also create unlimited liability for cleanup costs. *Id.* § 1321(f). As the Fifth Circuit noted in *United States v. Dixie Carriers*, 627 F.2d 736 (5th Cir. 1980), legislative history reflects "Congress' intent to achieve a balanced and comprehensive remedial scheme . . . ." *Id.* at 739. The statute represents a compromise "intended to deter oil spills and recover cleanup costs in a manner that would protect most vessel owners from potentially crushing liability." *Id*. The liability structure not only punishes and deters ordinary spills, but exacts heightened punishment for more blameworthy conduct.

Cleanup liability not only remedies the environmental damage caused by an oil spill, but serves an important deterrent purpose. Congress expressly intended this result. *See* Report of the House Committee on Public Works and Transportation, H. Rep. 101-242, pt. 1, at 28 (1989) (noting that liability for the "enormous economic and ecological damages which could occur because of an oil spill" is an adequate deterrent to prevent spills); *see also Exxon I*, 270 F.3d at 1244 ("The cleanup expenses paid by Exxon should be considered as part of the deterrent already imposed."). Congress also acknowledged this function by experimenting with cleanup liability for hazardous substances that cannot actually be cleaned up. Federal Water Pollution Control Act Amendments, § 311(b)(2)(B), 86 Stat. 863 (amended 1978); Report of the Senate

Committee on Public Works, *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1415 (1973) ("The Committee believes that the discharge of [hazardous materials] should be subject to penalty even though clean up is not practicable. In this way, each carrier or handler evaluates the risk of discharge and determines whether or not the potential[] penalty is worth the risk."). Congress intended the deterrent effect of cleanup liability to be an important and calibrated part of its regulatory scheme, designed not just to repair the damage from spills but to prevent them.

Several courts have recognized that the CWA provides a comprehensive scheme for addressing the issue of water pollution in general, and oil spills in particular. In *Milwaukee v. Illinois*, 451 U.S. 304 (1981), this Court held that Congress' intent in enacting the CWA "was clearly to establish an all-encompassing program of water pollution regulation" and that the "'major purpose' of the [Act] was 'to establish a *comprehensive* long-range policy for the elimination of water pollution." *Id.* at 318 (emphasis in original) (citing S. Rep. No. 92-414, at 95, *reprinted in* 2 Leg. Hist. at 1511). Similarly, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), this Court relied on the "comprehensive scope" of the CWA for pollution of coastal waters. *Id.* at 22. Lower courts have noted that the oil pollution provisions of the CWA are equally comprehensive. In *Matter of Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), the court described § 1321 as "a comprehensive remedial scheme providing for both strict liability up to specified limits and recovery of full costs upon proof of willful negligence or willful misconduct . . . ." *Id.* at 340; *see also Conner v. Aerovox*, 730 F.2d 835, 841-42 (1st Cir. 1984) (noting that the CWA comprehensively addressed "the entire question of water pollution"). Nowhere in this scheme does Congress mention punitive damages.

B. Because Congress has provided a comprehensive liability scheme, federal courts sitting in maritime jurisdiction may not create an additional punitive damage remedy.

Because Congress has provided a statutory scheme to address oil spills that does not include punitive damages, federal courts may not provide an additional punitive damage remedy. The CWA displaces all federal sources of relief except those specifically authorized by statute. While the Act does allow claims for compensation based on damage to property, it does not authorize punitive damages. Federal courts may not supplement the remedies provided by Congress with additional common law remedies.

1. The Clean Water Act preempts all claims for relief except those specifically authorized by the statute.

In the modern era, maritime law is guided by statutes enacted by Congress. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) ("In this era, an admiralty court should look primary to . . . legislative enactments for policy guidance."). The role of the federal common law is to harmonize the statutes passed by Congress, not to supplant them. *Id.*; *Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, 820 (2001) ("While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field."). The question is "whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively proscribed the use of federal common law." *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Unlike claims that a federal law has preempted a state law, there is no presumption against federal statutory law displacing federal common law. *Milwaukee v. Illinois*, 451 U.S. at 316-17. Federal courts "start with the assumption" that Congress sets the relevant standards rather than the courts. *Id.* at 317.

This Court has already held that the CWA preempts general federal common law nuisance claims, *Milwaukee v. Illinois,* 451 U.S. at 332, and maritime law nuisance claims, *Sea Clammers*, 453 U.S. at 11 ("the federal common law of nuisance has been fully pre-empted in the area of ocean pollution."). Both *Milwaukee* and *Sea Clammers* relied on the comprehensive nature of the CWA to hold that it had "occupied the field" of water pollution abatement. *Milwaukee*, 451 U.S. at 317; *Sea Clammers*, 453 U.S. at 22. The plaintiffs in *Sea Clammers*, like the plaintiffs here, were commercial fisherman and shellfisherman who alleged damage to fishing grounds. *Id.* at 4. Noting that "there is no reason to suppose that the pre-emptive effect of the FWPCA[4] is any less when pollution of coastal waters is at issue," the Court dismissed the plaintiff's federal common law and maritime law claims. *Id.* at 22. *Sea Clammers* unequivocally holds that the plaintiffs in this case cannot proceed on a nuisance theory. *See Exxon II*, 270 F.3d at 1231; *see also Conner v. Aerovox*, 730 F.2d at 842 (holding that *Sea Clammers* foreclosed a maritime tort claim for damages based on nuisance principles).

Applying *Milwaukee* and *Sea Clammers*, circuit courts have held that the CWA also preempts recovery for oil spills on a negligence theory. In *Matter of Oswego Barge Corp.*, the court held that the government could not recover for damages from an oil spill on a negligence theory, because the CWA preempted that remedy. *Id.* at 344; *see also United States v. Dixie Carriers*, 627 F.2d 736 (holding that an action by government to recover oil spill cleanup costs on a negligence theory was preempted by the CWA). While both *Oswego* and *Dixie Carriers* relied on the government's ability to recover cleanup damages under 33 U.S.C. § 1321(f), a comprehensive remedial scheme does not need to provide an alternate remedy to preempt federal common law. In *Sea Clammers*, for example, this Court held that the CWA preempted

[4] The official name of the Clean Water Act is the Federal Water Control Pollution Act Amendments of 1972, and it is therefore sometimes referred to as FWCPA.

commercial fishermen's claim for damage to their fishing grounds, despite the fact that it provided no alternate remedy. *Sea Clammers*, 453 U.S. at 21-23 (holding that fisherman had no implied or express cause of action under the CWA, and that the Act preempted their federal common law claims); *see also Conner v. Aerovox*, 730 F.2d at 842-43 (holding that fishermen's tort claims under federal maritime law had been displaced by the CWA even though it provided them with no other remedy); *Milwaukee v. Illinois*, 451 U.S. at 342 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner.").

Where courts have found that federal common law claims for water pollution survive the CWA, they have relied on specific savings clauses in the Act itself. For example, in *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982), the court allowed the government to pursue a maritime negligence claim against a towboat that collided with a vessel carrying oil on the Mississippi River. The CWA, however, explicitly provides that "[t]he liabilities established by this section shall in no way affect any rights which . . . The [sic] United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil . . . ." 33 U.S.C. § 1321(h) (1988). Because the CWA has occupied the field of water pollution regulation in general, and oil spill regulation in particular, only express language in the CWA itself can preserve a common law action.[5]

[5] Savings clauses, of course, are limited by their own terms. The Ninth Circuit erroneously applied the savings clause in the citizen-suit provision of the CWA to the act as a whole. *Exxon I*, 270 F.3d at 1230 ("[S]ection 1365 expressly provides that it does *not* preempt common law rights to other relief.") That reasoning squarely contradicts this Court's holding in *Milwaukee v. Illinois* that § 1365(e) "most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so." *Milwaukee v. Illinois*, 451 U.S. at 329. The text of § 1365(e) is clear: "Nothing *in this section* shall restrict any right . . . ." 33 U.S.C. § 1365(e) (1988). The citizen-suit section is not applicable here, and neither this Court or any lower court relied on the citizen suit provision to determine that the CWA preempts federal common law.

2. The oil spill section of the Clean Water Act authorizes only compensatory damage claims for economic loss.

The oil spill provisions of the CWA rely on federal maritime tort law to compensate those whose property is damaged by an oil spill. Section 1321(o)(1) provides: "Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel . . . to any person . . . for damages to any . . . property resulting from a discharge of oil . . . or from the removal of any such oil . . . ." 33 U.S.C. § 1321 (1988). This language preserves the maritime tort claims for damage to property,[6] but does not authorize punitive damages.

The restrictive language used in § 1321(o)(1) suggests that this provision limits recovery to those damages necessary to make property owners whole. The statute is limited to "*obligations* . . . for *damages* to any . . . *property*." 33 U.S.C. § 1321(o)(1) (1988) (emphasis added). Compensatory damages are an *obligation* of the discharger to those whose property is damaged; a person who negligently discharges oil must make whole those who are harmed by that discharge. Punitive damages, on the other hand, punish the conduct of the defendant, and the plaintiff receives a "windfall." *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (describing punitive damages as a "windfall recovery"). For this reason, some jurisdictions require prevailing plaintiffs to share portion of their punitive damage awards with a state fund. *See, e.g.*, *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565 (Georgia 1996)

[6] Fisherman and shellfisherman do not have a property interest in uncaught fish, but can nonetheless recover for damage to commercial fisheries because of a traditional exception for fisherman from the general maritime rule that economic loss can only be recovered when there is direct physical harm to property. *See, e.g.*, *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (holding that commercial fisherman could recover for pure economic loss stemming from maritime negligence); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973) (holding that commercial fisherman and clam diggers could bring maritime claim against oil spiller despite having no property interest in fish); s*ee also Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (holding that an injured person must have suffered direct physical harm to recover economic losses in a maritime tort claim); *In re Exxon Valdez*, No. A89-0095-CV, 1994 WL 182856, (D. Alaska March 23, 1994) (noting that *Oppen* recognized a narrow exception for commercial fisherman whose fisheries are closed or damaged).

(upholding state's split-recovery statute); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (same). Punitive damages, then, do not fit the plain meaning of the word "obligation."

The language used by Congress in § 1321(o)(1) is analogous to the language at issue in *O'Gilvie v. United States*, 519 U.S. 79 (1996). In *O'Gilvie*, this Court interpreted a provision of the Internal Revenue Code that excluded certain damage awards from taxation. That statute excluded from gross income the "amount of any damages received . . . on account of personal injuries or sickness." *Id.* at 81. Noting that "punitive damages are not compensation from injury [but] [i]nstead . . . are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence," the Court concluded that punitive damages were not awarded "on account of" the plaintiff's injuries. *Id.* at 83 (internal citations omitted.) Instead, punitive damages were awarded because of the defendant's conduct. *Id.* Here, the CWA only preserves claims based on "damages to . . . property." § 1321(o)(1) (1988). Like claims "on account of" personal injury, this language describes the scope of its coverage in terms of the injury to the plaintiff. The reasoning of *O'Gilvie* thus applies with equal force: because punitive damages are not awarded by reason of the plaintiff's injury, but the defendant's conduct, punitive damages are outside the scope of § 1321(o)(1).

Moreover, when Congress intended for the CWA to preserve liability beyond compensation, it chose broader language to embody that intent. For example, § 1321(o)(2), which protects state oil spill laws from preemption, states that the section does not "preempt[] any State . . . from imposing *any requirement or liability*." 33 U.S.C. § 1321(o)(2) (1988) (emphasis added). While punitive damages can only be characterized awkwardly, if at all, as "obligations . . . for damages to . . . property," they would easily fall within the broader "any requirement or liability." Because the different savings clauses appear in the same subsection of

the same statute, Congress was clearly aware of the different language and intended it to have different effects. Affording greater preemptive effect to § 1321 for federal common law claims than state law claims is also consistent with the policy goals of the CWA. Protecting the ability of states to impose additional requirements or liability serves important federalism concerns. *Cf. Milwaukee v. Illinois*, 451 U.S. at 319 n.14 ("While Congress recognized a role for the States, the comprehensive nature of its action suggests that it was the exclusive source of *federal* law").

Finally, interpreting § 1321(o)(1) to authorize punitive damages would be anomalous, because it would allow unlimited damages where property is affected, but restrict punitive damages for harm to the environment. Under the CWA, punitive damages are not available for the environmental harm caused by the discharge of oil. *See Sea Clammers*, 453 U.S. at 22 (holding that private claims for environmental damage from oil spill are preempted by the CWA); *Exxon I*, 270 F.3d at 1231 (noting that "what saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest in punishing harm to the environment"). Congress chose authorize a fine of up to $250,000 to punish environmental damage. 33 U.S.C. § 1321(b)(6)(B) (1988). Despite the avowed purpose of Congress to protect the environment, such as "fish, shellfish, wildlife, shorelines, and beaches," *id.* § 1321(b)(2)(A) (1988), damage to property would face much stronger deterrent than more egregious damage to the environment. The punitive damage award in this case is 10,000 times the maximum civil fine allowed by § 1321. Taking the criminal fines into account, the punitive damages award—which is aimed only at economic loss—is still roughly twenty times the total non-compensatory liability of Exxon for environmental damage. Protecting property with a deterrent so much stronger than the environmental deterrent turns the CWA on its head. While Congress sought to protect the right of property owners to be

compensated for the damage done to their property by an oil spill, it did not intend for courts to jettison its carefully calibrated set of remedies whenever damage is done to commercial interests.

3. Because Congress has specified the remedies available for oil spills, federal courts may not expand federal common law to encompass new remedies.

Because Congress has enacted a statutory scheme covering oil spills that does not authorize punitive damages, federal courts may not create a punitive damage remedy as a matter of maritime law. This Court has repeatedly held that federal courts sitting in maritime jurisdiction may not supplement the remedies provided by Congress when the factual context of the tort is covered by statutory law. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court held that the general maritime action for the wrongful death of a seaman does allow recovery for loss of society, because the Death on the High Seas Act (DOHSA) and the Jones Act limited recovery to pecuniary loss. *Id.* at 33. Even though the plaintiff's cause of action in *Miles* did not arise under the Jones Act or DOHSA, the Court looked to those statutes because the factual context—death of a seaman—was the same. *Id.* at 36 ("Maritime tort law is now dominated by federal statute . . . . Because this case involves the death of a seaman, we must look to the Jones Act."). Because Congress had limited the damages available in that factual context to pecuniary loss, those limits should also be applied to tort actions under the general maritime law.

As several circuits have held, the *Miles* uniformity principle extends to punitive damages. *See Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) ("*Miles* mandates the conclusion that punitive damages are not available in an unseaworthiness action under general maritime law."); *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993) (citing with approval several cases that "invoked the Supreme Court's ruling in *Miles* as a

basis to disallow punitive damages for claims under the general maritime law in order to further uniformity between that law and the analogous federal statutes); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1512 (5th Cir. 1995) ("[O]nce there is a statutory/general maritime law overlap in the factual circumstances that are covered, the *Miles* damages uniformity principle is invoked, and punitive damages would be precluded under the general maritime action . . . ."); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993) ("Looking primarily to the federal maritime wrongful death statutes for guidance, we hold that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman."). Just as the *Miles* Court looked to the statutory context and found that loss of society damages were not available, these courts looked for statutory authorization for punitive damages. When punitive damages are not available under the statutes enacted by Congress, then the logic of *Miles* forbids punitive damages.

Applying the *Miles* uniformity principle, the First Circuit has held that the Oil Pollution Act, 33 U.S.C. § 2702 *et seq.* (2006)—which amended the oil spill provisions of the CWA—preempts claims for punitive damages. *South Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58, 65 (1st Cir. 2000). A federal district court has reached the same result, *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127 (D. Or. 2001), and no court or commentator has suggested that punitive damages survived the Oil Pollution Act. *South Port*, 234 F.3d at 65. In *South Port*, the Court relied on the fact that the OPA enumerated the types of damages available for oil spills, but did not list punitive damages. *Id.* at 65; 33 U.S.C. § 2702(b) (2006). The Court also relied on the interplay between strict liability for polluters, an opportunity for the polluter to limit its liability, and a corresponding opportunity for an injured party to overcome that limitation with a showing of gross negligence. These factors indicated that "the OPA embodies Congress' attempt to

balance the various concerns at issue, and . . . that the resolution of these difficult policy questions is best suited to the political mechanisms of the legislature . . . ." *South Port*, 234 F.3d at 66. Echoing the *South Port* analysis, the district court in *New Carissa* reached the same result. 171 F. Supp. 2d at 1134 n.4 ("It is unreasonable to read the statute as authorizing punitive damages when Congress considered the additional 'gross negligence' standard as means for making the responsible party liable for all actual damages, and allowing a merely negligent responsible party to limit its liability . . . .").

Even though the Oil Pollution Act does not apply here, since it was passed after the accident, the reasoning of *Gulf Oil* is still persuasive. The Oil Pollution Act expands on the framework created by the CWA, but the basic structure is the same. The OPA combines strict liability for oil spills with liability limits that can be defeated by showing gross negligence. 33 U.S.C. § 2702(b) (2006). This mirrors the cleanup cost scheme of the CWA. 33 U.S.C. § 1321(f) (1988). Punitive damages interfere with the CWA's treatment of gross negligence in the same way they interfere with the OPA. Unlike the CWA, the OPA explicitly covers damage to property, lost profits and earning capacity. 33 U.S.C. § 2702(b)(2)(B), § 2702(b)(2)(E) (2006). The purpose of this section, however, was to expand the types of recovery that are available after an oil spill, not contract them. *See, e.g.*, 136 Cong. Rec. 6920 (statement of Rep. Bonior) (the OPA "dramatically increases the liability for oilspill [sic] costs and damages to make sure polluters pay"). Because punitive damages are not available under the more expansive OPA, it would be anomalous to hold that these damages are available under the CWA.

Rather than authorizing punitive damages, the CWA relies on criminal penalties, civil fines, and cleanup liability to punish and deter oil spills. Congress has shown that it will intervene to increase or alter liability when it believes changes to its policy are necessary. The

Ninth Circuit therefore erred by allowing courts to create a punitive damage remedy where Congress has refused to provide one.

III. AWARDING PLAINTIFFS A PUNITIVE DAMAGE WINDFALL CONFLICTS WITH THE LONGSTANDING PUBLIC POLICY OF ADDRESSING MARITIME INJURIES THROUGH MEANS OTHER THAN MASSIVE LIABILITY.

A. Protecting maritime commerce through liability limitations is an important purpose of admiralty law.

One of the traditional policies of maritime law is to limit liability to encourage the transport of goods by sea. Limiting liability has been "an important theme of admiralty law" because it is necessary for realistic insurance coverage and a reasonable apportionment of the costs of a maritime disaster. *See* 2 Schoenbaum § 15-1. This Court has noted that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). To that end, Congress has enacted several statutes that limit liability for shippers, such as the Limitation of Vessel Owner's Liability Act of 1851, 46 U.S.C. §§ 30505-30512 (2006), and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 30701-30706 (2006). The Limitation of Liability Act allows a ship owner to limit liability for losses whose fault occurred without "privity or knowledge" of the owner. 46 U.S.C. § 30505 (2006). Similarly, COGSA limits the liability of carriers for damage done to goods under certain circumstances. "COGSA's overarching purpose [is] to 'allocat[e] risk of loss and creat[e] predictable liability rules on which not only carriers but others can rely." *Senator Linie GMBH & Co. v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002). The CWA limits liability for cleanup costs, 33 U.S.C. § 1321(f) (2006), and the Oil Pollution Act now explicitly limits liability for all types of damage caused by an oil spill. 33 U.S.C. § 2704 (2006). Because predictability, uniformity, and limited liability are necessary to protect maritime commerce, this

Court should not recognize a punitive damages remedy that is at odds with both general maritime law and the CWA.

B. Punitive damages are unnecessary to punish Exxon or deter future oil spills.

1. Because the total cost to Exxon for cleanup, compensatory, and criminal liability has already exceeded the value of the *Exxon Valdez's* cargo roughly 144 times over, Exxon has been punished and deterred far in excess of what is necessary to avoid future oil spills.

Exxon has already paid damages far in excess of what is necessary to deter future oil spills. The cleanup efforts alone totaled roughly $2.1 billion. *In re the Exxon Valdez*, 296 F. Supp. 2d at 1078. Exxon voluntarily undertook a claims program, paying $303 million to the fisherman affected by the spill. *Id.* Exxon paid $125 million in criminal fines, and settled various government entities' claims against it for approximately $900 million. *Exxon I*, 270 F.3d at 1244. Salvage of the vessel and the loss of cargo cost Exxon approximately $46 million dollars. *Id.* The total expense of the oil spill to Exxon, then, was roughly $3.4 billion. The value of Exxon Valdez's cargo was only $25.7 million, *id*., which is approximately two-thirds of one percent of the total cost of the spill to Exxon. Such a massive ratio between cost and cargo value has a strong deterrent effect. As the Ninth Circuit noted, "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only' $10,005 and he was not otherwise punished." *Id*. These expenses, alone, are more than enough to ensure that oil shippers use the utmost caution with their cargo.

Several other factors also militate against the need to punish Exxon further. Exxon acted quickly "both to clean up the oil and to compensate the plaintiffs for economic losses." *Exxon II*, 490 F.3d at 1073. Exxon's conduct was not willful. *Id.* The harm at issue is economic, rather than physical. *Id.* at 1085. To the extent punitive damages are intended to punish Exxon for the potential harm to the health and safety of others, *id.* at 1086, the award goes beyond the theory

on which this case avoided preemption and res judicata. *See Exxon I*, 270 F.3d at 1228 ("The punitive damages in this case are for harming the economic interests of commercial fishermen, the availability of fish to native subsistence fishermen, and private land."); *Exxon II*, 490 F.3d at 1072 ("[P]laintiffs' punitive damage case was saved from preemption and res judicata because the award 'vindicates only private economic and quasi-economic interests' . . . ."). The massive damages already paid by Exxon more than vindicate plaintiffs' economic interests.

2. Congress and Exxon have already acted to prevent oil spills through means other than massive liability.

Both Congress and Exxon have already acted to prevent future oil spills through means other than massive liability. Awarding punitive damages would not decrease the risk of oil spills, but would impose a major new cost on maritime commerce.

The Oil Pollution Act created a number of regulations designed to prevent oil spills. First, it requires all new vessels built to carry oil to have double hulls, which help prevent against spills after a collision. 46 U.S.C. § 3703a (2006). Other preventative measures include sections permitting the government to check records of drug and alcohol offenses when licensing mariners, *id.* §§ 7107, 7302, changes in the manning standards for foreign tank vessels, *id.* § 9101, changes to required vessel communications equipment, 33 U.S.C. § 1203 (2006), and special provisions regarding navigation in Prince William Sound, *id.* §§ 2731-2737. These provisions are part of Congress' ongoing effort to strike a "proper and balanced response to our Nation's needs both to increase preventative measures against oil spills and to respond to a spill should it occur." H. Rep. 101-242, pt. 1, at 29. These regulations obviate the need for punitive liability beyond those authorized by Congress.

Moreover, Exxon has voluntarily taken several actions to reduce the risk of future spills. Exxon has modified tanker routes, instituted drug and alcohol testing programs for safety-

sensitive positions, restricted those positions to employees with no history of substance abuse, implemented extensive periodic testing of vessels and facilities, strengthened training programs for captains and pilots, and applied new technology to improve navigation and oil containment systems. Changes ExxonMobil has Made to Prevent Another Accident Like Valdez, http://www.exxonmobil.co.uk/Corporate/about_issues_valdez_prevention.aspx (last visited Apr. 27, 2008). Exxon has also acted to improve its response capability. Exxon is a founding member of every major oil spill response center worldwide, and has organized over 1,000 employees into oil spill response teams worldwide. Those employees conduct frequent, extensive oil spill drills at ExxonMobil locations around the world. Exxon has also created the world's most effective, environmentally safe chemical for dispersing oil spills, and developed and applied new spill-detecting technology. *Id.* Exxon and other companies are taking the action necessary to prevent future oil spills, making massive punitive damage liability unnecessary.

C. Allowing this punitive damage claim would extend far greater protection to commercial interests than the environment or human life.

Recognizing a punitive damage claim here would extend greater protection to property than to the environment or even human life. Under the CWA, punitive damages are not available for the environmental harm caused by the discharge of oil. *See discussion supra,* Part II.B.2. The punitive damages award here—for solely economic harms—is twenty times the punishment Exxon received for damage to the environment.

Punitive damages are also unavailable for the injuries or wrongful death of seamen. Seamen are the traditional "wards" of admiralty. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 354-55 (1995). Courts are particularly solicitous of their claims because once at sea, they are entirely dependent on their employer for their health, safety, and well-being. *Id.*; s*ee also* 1 Schoenbaum § 6-28 (describing longstanding rights of seamen to "maintenance"—food and lodging if he falls

ill or becomes injured while in the service of the ship—and "cure"—necessary medical service). Nonetheless, seamen cannot receive punitive damages for wrongful death, unseaworthiness, or willful denial of maintenance and cure. *See, e.g.*, *Guevara v. Maritime Overseas Corp.*, 59 F.3d at 1512 (punitive damages unavailable for even willful breach of maintenance and cure obligation); *Miller v. American President Lines, Ltd.*, 989 F.2d at 1459 (punitive damages unavailable in a general maritime law unseaworthiness action for the wrongful death of a seaman). As one commentator has noted, preferring punitive damages "for property damage plaintiffs over personal injury and death plaintiffs is perverse enough to demean the legal system." David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 160 (1997). Moreover, unlike the environmental protections in the CWA, seamen are not protected by a comprehensive scheme of civil and criminal liability for their mistreatment. There is no reason why damage to commercial interests should be vindicated with punitive damages when the death and injuries of seaman are not, particularly when Congress has addressed oil spills through a comprehensive scheme for punishment and deterrence.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Court of Appeals for the Ninth Circuit and vacate the punitive damages award.

Respectfully submitted,

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April 28, 2008

APPENDIX

ADDITIONAL STATUTORY PROVISIONS

33 U.S.C. § 1365 provides in relevant part:

> Citizen suits. . . .
>
> (e) Statutory or common law rights not restricted
>
> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. § 1365 (1988).

33 U.S.C. § 2702(b) provides in relevant part:

> (b) Covered removal costs and damages
>
> (1) Removal costs
>
> . . .
>
> (2) Damages
>
> . . .
>
> (A) Natural resources
>
> Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage . . . .
>
> (B) Real or personal property
>
> Damages for injury to, or economic losses resulting from destruction of, real or personal property . . . .
>
> (C) Subsistence use
>
> Damages for loss of subsistence use of natural resources . . . .
>
> (D) Revenues
>
> Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources . . . .
>
> (E) Profits and earning capacity
>
> Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources . . . .
>
> (F) Public services
>
> Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil . . . .
>
> . . .

33 U.S.C. § 2702(b) (2006).

33 U.S.C. § 2704 provides in relevant part:

> (a) General rule
>
> Except as otherwise provided in this section, the total of the liability of a responsible party . . . with respect to each incident shall not exceed--
>
> (1) for a tank vessel, the greater of--
>
> (A) with respect to a single-hull vessel, including a single-hull vessel fitted with double sides only or a double bottom only, $3,000 per gross ton;
>
> (B) with respect to a vessel other than a vessel referred to in subparagraph (A), $1,900 per gross ton; or
>
> (C)(i) with respect to a vessel greater than 3,000 gross tons that is--
>
> (I) a vessel described in subparagraph (A), $22,000,000; or
>
> (II) a vessel described in subparagraph (B), $16,000,000; or
>
> (ii) with respect to a vessel of 3,000 gross tons or less that is--
>
> (I) a vessel described in subparagraph (A), $6,000,000; or
>
> (II) a vessel described in subparagraph (B), $4,000,000;
>
> (2) for any other vessel, $950 per gross ton or $800,000,, [sic] whichever is greater;
>
> . . .
>
> (c) Exceptions
>
> (1) Acts of responsible party
>
> Subsection (a) of this section does not apply if the incident was proximately caused by--
>
> (A) gross negligence or willful misconduct of, or
>
> (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).
>
> . . .

33 U.S.C. § 2704 (2006).