No. 07-219

THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

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 THE RESPONDENTS

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QUESTIONS PRESENTED[1]

On March 24, 1989, the *Exxon Valdez* spilled eleven million gallons of toxic crude oil into the once pristine waters of Prince William Sound, Alaska. A jury awarded respondents $5 billion in punitive damages under general maritime law for petitioners' reckless interference with their commercial and subsistence fishing interests. On appeal, this award was reduced to $2.5 billion. Two questions are presented for this Court's consideration:

1) May a jury award punitive damages under maritime law against a shipowner whom it has found complicit in the reckless conduct of a ship's master at sea?

2) Do the Clean Water Act's criminal and civil penalty provisions displace the availability of punitive damages under general maritime law for the harms caused by an oil spill?

[1] The petitioners in this action are Exxon Mobile Corporation and Exxon Shipping Company. The respondents are 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.; and William Findlay Abbott, Jr.

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The opinion of the U.S. Court of Appeals for the Ninth Circuit affirming the district court's judgment in part, vacating in part, and remanding for further proceedings is reported at *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001) [hereinafter *Valdez I*]. The opinions of the U.S. District Court for the District of Alaska on remand are reported at *In re Exxon Valdez*, 236 F. Supp. 2d 1043 (D. Alaska 2002) [hereinafter *Valdez II*], and at *In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) [hereinafter *Valdez III*]. The Ninth Circuit panel opinion vacating and remanding the district court's judgment is reported at *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006) (per curiam) [hereinafter *Valdez IV*]. The Ninth Circuit's order amending its 2006 opinion, denying a petition for panel rehearing, and denying a petition for rehearing en banc are reported at *In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007) [hereinafter *Valdez V*].

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit panel was entered on December 22, 2006, and petitions for rehearing by the panel and en banc were denied on May 23, 2007. A petition for certiorari was filed on August 20, 2007, and this Court granted certiorari on October 29, 2007. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (2007) (mem.). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following is a list of the constitutional and statutory provisions involved in this case. For the full text of the constitutional and statutory provisions, please see the attached appendix.

U.S. Const. art. III, § 2
33 U.S.C. § 1311(a) (1990)
33 U.S.C. § 1319 (1990)
33 U.S.C. § 1321 (1990)
33 U.S.C. § 1342(a)(1) (1990)

STATEMENT OF FACTS

On March 24, 1989, the *Exxon Valdez* oil tanker ran aground on Bligh Reef, dumping eleven million gallons of oil into the once pristine waters of Prince William Sound, Alaska. The respondents in this action are a group of commercial fishermen, Alaskan natives, and landowners who have sought damages for Exxon's reckless interference with their private economic and quasi-economic interests.[2] The only questions before the Court are whether respondents' recovery of $2.5 billion in punitive damages was permissible under general maritime law, and if so, whether the common law of admiralty has been preempted by the Clean Water Act's criminal and civil penalty provisions.

I. The *Exxon Valdez* Oil Spill

On the night of March 23, 1989, the *Exxon Valdez* set sail for California from the Trans-Alaska Pipeline Terminal at Valdez, Alaska. Elizabeth R. Millard, Note, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 Seton Hall Legis. J. 331, 340 (1993). More than 900 feet long, the tanker carried fifty-three million gallons of crude oil in its gigantic hull. *Valdez II*, 236 F. Supp. 2d at 1046.

A woefully unfit crew manned the oil tanker. Joseph Hazelwood, the captain of the vessel, was a relapsed alcoholic who was not even licensed to drive in his home state of New York due to a drunk driving conviction. Millard, *supra*, at 342. Although Captain Hazelwood had been treated medically for his condition, he had recently dropped out of his rehabilitation programs and fallen off the wagon. *Valdez I*, 270 F.3d at 1223. Executives at Exxon Shipping knew about Hazelwood's alcoholism, knew that he had received treatment for it, and knew that

[2] In March 1989, the *Exxon Valdez* was owned by the Exxon Shipping Company, which is a wholly owned subsidiary of the Exxon Mobile Corporation. Stephen Raucher, Comment, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 Ecology L.Q. 147, 147-48 (1992). Throughout this brief, respondents use the name "Exxon" to refer collectively to the Exxon Shipping Company and the Exxon Mobile Corporation.

he had returned to drinking on board their ships and in waterfront bars. *Id.* Nevertheless, Exxon did not relieve Captain Hazelwood of his duties and left him in charge of an enormous tanker carrying millions of gallons of toxic crude oil.

There is little doubt that Captain Hazelwood was drunk when he took the helm of the *Exxon Valdez* on the evening of March 23. Before embarking, Hazelwood drank at least five doubles (about fifteen ounces of eighty-proof alcohol) in waterfront bars. *Id.* This amount of alcohol would have been sufficient to incapacitate a nonalcoholic. *Valdez II*, 236 F. Supp. 2d at 1045. In fact, Hazelwood was still legally intoxicated when his blood alcohol level was tested ten hours after the *Exxon Valdez* had run aground. Millard, *supra*, at 342.

Captain Hazelwood's extreme intoxication seriously impinged his ability to command the *Exxon Valdez* as it threaded its way through the hazardous waters of Prince William Sound. Although Captain Hazelwood prudently took the vessel east of the normal outgoing shipping lanes to avoid a heavy concentration of ice, this maneuver set the tanker on a collision course with the reef surrounding Bligh Island. *Valdez I*, 270 F.3d at 1222. To avoid this well-known hazard, Captain Hazelwood merely needed to order his wheelmen to bear west about the time the *Exxon Valdez* came abeam of the navigation light at Busby Island. *Id.* Although Captain Hazelwood, as the only crewmember licensed to navigate in Prince William Sound, was required to be in the bridge while the crew executed this simple yet critical maneuver, he inexplicably left the bridge minutes before the crucial turn was to be carried out. *Id.* at 1222-23.

Saying that he had "paperwork" to attend to in his cabin, Captain Hazelwood entrusted the command of the *Exxon Valdez* to Gregory Cousins, an overworked third mate who was in the habit of drinking sixteen cups of coffee per day to stay awake. *Id.* Although Cousins was not supposed to be on watch that evening, his relief had not shown up at the end of his shift, so he

was left to work overtime on little sleep. Cousins's only assistant was Able-Bodied Seaman Robert Kagan, a man whose personnel records detailed a history of "almost unmitigated ineptitude." *Id.* at 1223; Raucher, *supra*, at 176 (quoting the U.S. government's "bill of particulars" in its criminal prosecution of Exxon).

Probably due to fatigue, Cousins neglected to order the ship's wheelmen to begin turning the vessel once it came abeam of Busby Light. *Valdez I*, 270 F.3d at 1223. When Cousins realized his mistake, he ordered an emergency maneuver in a desperate attempt to steer the vessel away from Bligh Island. *Id.* Unfortunately, this maneuver was complicated by the fact that Captain Hazelwood had put the vessel on autopilot before he left the helm. *Id.* Autopilot is rarely used when a vessel is outside of its shipping lane, and the autopilot program increased the vessel's speed, reducing the amount of time available to remedy Cousins's failure to order a prompt turn. *Id.* Cousins's emergency orders were unavailing, and the tanker ran aground on Bligh Reef shortly after midnight on March 24, 1989. *Id.* The reef tore the hull open, releasing eleven million gallons of crude oil into Prince William Sound. *Id.*

By any measure, the damages inflicted by the *Exxon Valdez* spill are immense. Billions of dollars were spent to remove oil from the water and adjacent shorelines, and Exxon eventually reached an agreement to pay the United States and the State of Alaska at least $900 million to restore damaged natural resources. *Id.* In addition, Exxon pleaded guilty to various criminal offenses and was ordered to pay $125 million in fines and restitution. Raucher, *supra*, at 149. Aside from the harms to natural resources and wildlife, the district court in this case estimated that the *Exxon Valdez* spill inflicted more than $513 million in economic damages on the individuals and entities reliant on Prince William Sound. *Valdez III*, 296 F. Supp. 2d at 1101. Furthermore, the noneconomic harms caused by the spill are enormous. The social fabric of the

communities surrounding Prince William Sound has been torn apart. The pollution of the sound caused many individuals dependent on the fishing industry to lose their jobs, and as unemployment rose, rates of alcoholism, drug abuse, domestic violence, and severe depression also increased. These harms, which have been so painfully felt by thousands of claimants and their families, are unquantifiable. *See Valdez I*, 236 F. Supp. 2d at 1062.

II. Procedural History

In the wake of the *Exxon Valdez* spill, a number of civil cases were filed under federal maritime jurisdiction in the U.S. District Court for the District of Alaska, and most of these actions were consolidated and placed on a single docket. *Id.* at 1047-48. The district court certified a commercial fishing class, a native class, and a landowner class for purposes of awarding compensatory damages. *Valdez I*, 270 F.3d at 1225. The district court also certified a mandatory punitive damages class to ensure that its punitive damage award would not be duplicated in other litigation and would include all punitive damages the jury thought appropriate. *Id.* Before trial, Exxon stipulated that its negligence caused the oil spill. *Id.* The case was then tried in three phases. *Id.* In the first phase of the trial, which began on May 2, 1994, the jury determined that Hazelwood and Exxon had been reckless and were thus potentially liable for punitive damages under general maritime law. *Id.*; *Valdez II*, 236 F. Supp. 2d at 1048. In the second phase, the jury found that the commercial fishermen were entitled to $287 million in compensatory damages. During this phase of the trial, Exxon also reached a settlement with the members of the native class, agreeing to pay them $22.6 million in compensatory damages. *Valdez II*, 236 F. Supp. 2d at 1043. In the third phase, the jury awarded $5 billion in punitive damages against Exxon. *Id.* at 1050. A fourth phase, which was to include all outstanding compensatory damage claims that had not been resolved in the previous three

stages, became unnecessary when Exxon agreed to settle with the remaining litigants for $13.4 million. *Id.*

On appeal, a Ninth Circuit panel held that the $5 billion punitive damage award was excessive and remanded for reconsideration in light of this Court's holdings in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). On remand, the district court first reduced the punitive damage award to $4 billion, *Valdez II*, 236 F. Supp. 2d at 1043, but after an additional remand for reconsideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the district court set the award at $4.5 billion, *Valdez III*, 296 F. Supp. 2d at 1110. Concluding that the district court's award was still too high, the Ninth Circuit panel ordered a remittitur of $2 billion, resulting in total punitive damages of $2.5 billion. *Valdez IV*, 472 F.3d at 602. The Ninth Circuit denied a petition for rehearing en banc, *Valdez V*, 490 F.3d 1066, and this Court subsequently granted petitioners' writ of certiorari, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (2007) (mem.).

SUMMARY OF ARGUMENT

The federal judiciary has long recognized that punitive damages can be imposed as a remedy for general maritime claims. This Court's precedents in maritime and federal common law also permit punitive damages to be awarded against a shipowner for the wrongful acts of her employees at sea, if the owner can be shown to be complicit in those acts. *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893); *The Amiable Nancy*, 16 U.S. 546 (1818). Complicity is present when an owner's actions demonstrate a level of culpability separate from the wrongful acts of her employees. Complicity, however, need not rise to the level of individual fault or guilt. Complicity is also distinguishable from a pure vicarious liability standard, which holds an

employer liable for all the acts of an employee conducted within the scope of her duty. Notably, this Court's maritime jurisprudence shields shipowners against punitive damage awards that are based on pure vicarious liability without a finding of complicity.

In this case, the lower courts properly used the *Restatement (Second) of Torts* § 909 (1979) to determine that Exxon was complicit in the reckless actions of Captain Hazelwood and the resulting *Exxon Valdez* oil spill. The jury could have found complicity under either, or both, of two tests in Section 909:

1) Section 909(b)—the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him (reckless employment standard)
2) Section 909(c)—the agent was employed in a managerial capacity and was acting in the scope of employment (managerial capacity standard).

Federal courts sitting in maritime jurisdiction have repeatedly used a reckless employment standard in their evaluations of a shipowner's vicarious liability. Modern maritime practice reveals that two elements must be proven in reckless employment cases: 1) An agent must be shown to be unfit; 2) A principal must be shown to be reckless in employing or retaining the agent. In the case at bar, the jury separately found both Captain Hazelwood and Exxon, Hazelwood's employer, to have been reckless. *Valdez I*, 270 F.3d at 1233. The evidence clearly satisfied the reckless employment standard by establishing that "Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." *Id.* at 1234.

The jury may have also found Exxon complicit under the managerial capacity standard in Section 909(c). In allowing for this possibility, the district court took several precautions to require that the jury still find Exxon complicit before imposing punitive damages. First, the jury was required to find independent recklessness on Exxon's part to be the legal cause of the *Exxon*

Valdez oil spill before punitive damages could be considered. *Id.* at 1233. Second, the jury was instructed that despite the findings of recklessness, they were not required to enter punitive damages against either or both of the defendants. *Valdez II*, 236 F. Supp. 2d at 1050. Third, the district court instructed the jury that a corporation was not liable for employee acts that were contrary to corporate policies, provided that those policies were enforced and not mere statements. *Valdez I*, 270 F.3d at 1233. Fourth, the jury was also informed "that if 'corporate policymakers did not actually participate in or ratify the wrongful conduct' or if it 'was contrary to company policies' then the jury 'may consider' these facts 'in mitigation or reduction of any award of punitive damages.'" *Id*. Fifth, the jury was instructed to award punitive damages against Exxon only to the extent it found cause for punishment and deterrence. *Valdez II*, 236 F. Supp. 2d at 1050. In sum, the district court took sufficient precautions to ensure that the jury found Exxon complicit in the *Exxon Valdez* oil spill before awarding punitive damages. Exxon is therefore complicit under either *Restatement* test and liable for punitive damages under maritime law.

Despite petitioners' protestations to the contrary, the availability of punitive damages under general maritime law is not foreclosed by the Clean Water Act. This Court has historically played a leading role in crafting the substantive law of admiralty, and it has shown reluctance in holding that a congressional statute preempts judge-made maritime law. For a statute to displace existing principles of maritime law, the statute must speak directly to an issue previously governed by the common law of admiralty. The Clean Water Act, however, does not address the issue of an oil polluter's liability to private parties harmed by a spill. At the time the *Exxon Valdez* ran aground on Bligh Reef, 33 U.S.C. § 1321, the section of the Clean Water Act dealing with "oil and hazardous substance liability," focused narrowly on the federal government's

ability to recover a portion of the costs expended on cleaning up oil spills. Both the language and the legislative history of the Clean Water Act demonstrate that Congress disclaimed any intention of preempting otherwise available remedies when it passed the Act. In fact, the *Exxon Valdez* spill was the catalyst that finally prompted Congress to deal comprehensively with the problem of oil-spill liability in the Oil Pollution Act of 1990 (OPA). The OPA's legislative history is replete with statements criticizing the fragmented nature of the pre-OPA statutory regime. By passing the OPA, Congress rendered its verdict on the scope of the Clean Water Act, and it found that the Act did not address oil-spill liability in a comprehensive manner. This Court should not ignore Congress's considered judgment about the Clean Water Act's limited scope by now holding that the Act was sufficiently comprehensive at the time of the *Exxon Valdez* spill to displace the availability of punitive damages under general maritime law.

The Clean Water Act's criminal and civil penalty provisions do not preclude the imposition of punitive damages in this case. The prevailing rule in the United States is that "[t]he awarding of punitive damages is not prevented by a prior criminal conviction for the same act." Restatement (Second) of Torts § 908 cmt. a (1979). If a criminal conviction does not preclude the imposition of punitive damages, then *a fortiori* the potential availability of civil penalties does not prevent a jury from awarding punitive damages under general maritime law. Given the prevailing rule as articulated in the *Restatement (Second) of Torts*, Congress could not have anticipated that its provision of criminal and civil penalties in the Clean Water Act would later be interpreted as preempting the imposition of punitive damages under the common law of admiralty. This Court should not frustrate Congress's intent to preserve existing remedies by holding that the Act's criminal and civil penalty provisions preclude the awarding of punitive damages in this case.

Furthermore, the Clean Water Act's multiple saving provisions controvert any claim that the Act was intended to limit the exposure of oil companies and shippers to liability for the damages caused by oil spills. Under 33 U.S.C. § 1321(o)(2), for example, a state presumably could provide a punitive damage remedy under state law to private parties harmed by an unlawful discharge of oil into the state's territorial waters. Given Congress's unwillingness to preempt the availability of punitive damage remedies under state law, it would be highly incongruous for this Court to hold that Congress intended to preclude the imposition of punitive damages under the common law of admiralty. Section 1321 is a sword, not a shield. It was intended to facilitate the federal government's recovery of oil-spill cleanup costs. Its purpose was not to preempt extant remedies for the injuries caused by oil spills.

ARGUMENT

I. EXXON CAN BE HELD LIABLE FOR PUNITIVE DAMAGES DUE TO ITS COMPLICITY IN THE ACTS COMMITTED BY ITS SHIP'S MASTER AT SEA.

Federal courts have long recognized that punitive damages can be imposed as a remedy for federal maritime claims. Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5:17 (4th ed. 2008). As in other contexts, punitive damages in maritime cases are awarded as punishment for conduct that shows "a callous disregard for the rights of others." *Id.* In the case at bar, the lower courts correctly employed a complicity standard to determine that Exxon was liable for such culpable conduct by the *Exxon Valdez*'s crew. *Valdez I*, 270 F.3d at 1237. Under this complicity standard, punitive damages were appropriate as a matter of federal maritime law.

To determine Exxon's complicity, the court of appeals affirmed the district court's use of the widely applied *Restatement (Second) of Torts* standard for punitive damages against a principal:

> 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.

Restatement (Second) of Torts § 909 (1979) (emphasis added). Of the four bases of liability, only sections (b) and (c) are at issue in the case at bar. If this Court finds complicity under *either* (b) or (c), that finding is sufficient to support a decision in favor of the respondent. Indeed, if the Court finds petitioners liable under section (b) (reckless employment), it need not even reach the question of whether they could also be liable under section (c) (managerial capacity). Moreover, since modern maritime cases have construed the managerial capacity test to require a finding of employer culpability, the two tests substantially overlap in practice. Assigning vicarious liability for punitive damages under either test is consistent with maritime law, as both demonstrate an owner's complicity. Since Exxon was culpable under both the reckless employment and managerial capacity tests of complicity, the judgment of the Ninth Circuit upholding punitive damages should be affirmed.

A. This Court's maritime and common law precedents support a complicity standard for vicarious maritime liability.

The commonality across all four prongs of the *Restatement* is that "an employer may be liable for punitive damages *only when its own conduct is culpable*." Robert L. Conason et al., *Damages in Tort Actions* § 40.06 (2007); *see also* Restatement (Second) of Torts § 909 cmt. b (1979). This complicity standard can be readily distinguished from a pure vicarious liability standard, which imposes punitive damages liability on an employer whenever an employee's

wrongful conduct occurred within the scope of duty.[3] *See, e.g.*, *Stroud v. Denny's Rest., Inc.*, 532 P.2d 790 (Or. 1975). A complicity standard is also different from the rule, advanced by petitioners, of independent fault, which requires that an employer explicitly direct or participate in wrongful conduct to incur liability for punitive damages. *See, e.g.*, *Denver & R.G. Ry. v. Harris*, 122 U.S. 597, 610 (1887) (holding a railroad company liable for punitive damages on the grounds that its governing officers had participated in and directed an armed attack).

Awarding punitive damages on the basis of an employer's complicity, rather than independent fault or pure vicarious liability, is entirely consistent with this Court's maritime and common law precedents. In *The Amiable Nancy*, 16 U.S. 546 (1818), this Court was confronted with the question of whether to impose punitive damages against the owners of an American privateer, the *Scourge*, whose crew illegally boarded and ransacked a neutral vessel during the War of 1812. In holding that punitive damages against the owners were not appropriate, Justice Story noted that "[t]hey are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, *nor participated in it in the slight degree*." 16 U.S. at 559 (emphasis added). The *Amiable Nancy* Court created a shield against pure vicarious liability: a wholly innocent shipowner could not be held liable for punitive damages solely on the basis of a crew's misconduct. Nothing in *Amiable Nancy*, however, precludes the imposition of punitive damages on the basis of an owner's complicity in that misconduct. Rather, the absolutist language of the Court's holding suggests that any owner who participates "in the slightest degree" in a crew's misconduct could face liability for punitive damages. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 121 (1997) ("Under the 'complicity' interpretation, the employer's liability would not actually be fully vicarious but

[3] A minority of jurisdictions have adopted a "scope of employment" vicarious liability rule. Under this standard an employer may be held vicariously liable for the acts of any employee so long as the employee was acting within the scope of employment. Conason et al., *supra*, § 40.06 cmt. 1(b).

some blend of vicarious and personal-fault or direct-fault liability."). Contemporaneous practice followed this view. Sixteen years after the decision, a lower court found *Amiable Nancy* to be no bar to awarding exemplary damages[4] against shipowners who had not been sufficiently attentive to the manner in which the captain of their vessel was using the authority they had committed to him. *Ralston v. The State Rights*, 20 F. Cas. 201, 210 (E.D. Pa. 1836).

In the instant case, the jury explicitly found that Exxon was reckless in entrusting the *Exxon Valdez* to a captain and crew that it knew to be patently unfit and incompetent. *Valdez I*, 270 F.3d at 1234. As a result, petitioner cannot claim immunity under *Amiable Nancy*'s shield for pure vicarious liability. Moreover, the opinion in *Amiable Nancy* was sharply colored by the government's wartime exigency of employing privateers in a struggle for national survival. 16 U.S. at 560 ("[I]t cannot be the duty of the courts of justice to defeat the [wartime] policy of the government . . . ."). Given the Court's desire not to interfere with American wartime policy of supporting privateers, the opinion's language should not be read expansively to preclude Exxon's liability for punitive damages in this case.

This Court's opinion in *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), more fully considered the question of punitive damages for employer complicity. In deciding whether a railroad corporation could be assessed punitive damages for the malicious acts of its conductor, the *Lake Shore* Court, following *Amiable Nancy*, found that an owner could not be held vicariously liable "merely by reason of wanton, oppressive, or malicious intent on the part

[4] The court defined exemplary damages as an award of "something beyond the mere pecuniary loss or personal suffering." *Ralston v. The State Rights*, 20 F. Cas. 201, 209 (E.D. Pa. 1836).

of the agent." 147 U.S. at 108. This holding, however, simply restates the *Amiable Nancy* shield against pure vicarious liability.[5]

More saliently, the *Lake Shore* Court went to great lengths to articulate how liability for punitive damages could be imposed on the basis of an owner's complicity, beyond either direct ratification or participation in an agent's actions. In so doing, the decision provides support for both the reckless employment and managerial capacity tests of complicity under the *Restatement*.

First, the *Lake Shore* Court supported the imposition of punitive damages for the reckless employment of an unfit agent. Specifically, the Court approvingly cited a case decided by the New York Court of Appeals, *Cleghorn v. Railroad Co*., 56 N.Y. 44 (1874), which embraced the imposition of punitive damages when "the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied." 56 N.Y. at 47. The *Lake Shore* Court used this *Cleghorn* standard of reckless employment to absolve its defendant of liability. 147 U.S. at 108 ("[T]he plaintiff does not appear to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect . . . ."). In contrast, the *Lake Shore* Court also cited *Cleghorn* in explaining how punitive damages could be assessed upon a principal for reckless employment of an unfit agent:

> If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company . . . and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages.

Id. at 116 (quoting *Cleghorn*, 56 N.Y. at 47-48). The facts of the case currently before the Court bring it squarely within this reckless employment test of liability. Senior executives at Exxon

[5] The holding in *Lake Shore* was issued in response to a jury instruction that imposed pure vicarious liability on the railroad corporation solely on the basis of a conductor's "illegal, wanton and oppressive" conduct. *Lake Shore*, 147 U.S. at 112.

had given control of the *Exxon Valdez* to a captain who they knew to have an alcohol problem, to have failed treatment, and to have continued drinking. *Valdez I*, 270 F.3d at 1223. Far from barring the imposition of punitive damages for reckless employment, this Court's precedents suggest their necessity for Exxon's transgressions.

Second, the *Lake Shore* Court embraced the notion of imputing punitive damages to a corporation for the wrongful actions of its executives on the basis that their actions could be treated as those of the corporation itself. 147 U.S. at 114; *see also Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905). While the *Lake Shore* opinion, written in 1893, declined to extend this executive liability to lesser managerial roles, such as a railroad conductor, it did still explicitly bring the *Amiable Nancy* within federal common law. 147 U.S. at 180 ("The rule thus laid down is not peculiar to courts of admiralty; for . . . those courts proceed, in case of tort, upon the same principles of common law, in allowing exemplary damages . . . ."); *see also Valdez I*, 270 F.3d at 1236. By consequence, the widespread expansion of corporate liability, under the federal common law doctrine of *respondeat superior* and state tort law, in the intervening century provided ample ground for the district court in the instant case to adopt the *Restatement*'s extension of executive liability to acts performed in a managerial capacity within the scope of employment. *See, e.g.*, *Protectus Alpha Navigation Co., Ltd. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1386 (9th Cir. 1985); *CEH Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995).

In sum, *Amiable Nancy* and *Lake Shore* provide a sufficient basis in this Court's early maritime and common law precedents to use both the reckless employment and managerial

capacity test of complicity.[6] Both of these tests have been further supported by lower court decisions interpreting the scope of federal maritime and common law.

B. Lower courts have almost uniformly supported punitive damages for reckless employment of an unfit agent.

In the case at bar, the Section 909(b) reckless employment test, which provides for punitive damages if a principal or managerial agent was reckless in employing or retaining an unfit agent, was clearly met. The jury found Exxon to be independently reckless. *Valdez I*, 270 F.3d. at 1233. Moreover, the evidence established that "Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." *Id*. at 1234.

The *Restatement* standard of reckless employment is not only consistent with precedent in *Lake Shore*; it also parallels a general standard for punitive damages set out by this Court and applied in maritime cases. *See Smith v. Wade*, 461 U.S. 30, 51 (1983) ("The threshold standard for allowing punitive damages for reckless or callous indifference applies even in a case, such as here, where the underlying standard of liability for compensatory damages is also one of recklessness."); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (noting that

[6] This Court has only limited vicarious complicity liability on the basis of well-delineated exceptions. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court held that damages recoverable in a general maritime wrongful death action could not include an award for loss of society. The *Miles* Court, however, based its decision on a factor inapposite here: uniformity with a well-established legislative framework. *Id*. at 32; *see also Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir. 1995) ("If the situation is covered by a statute . . . and the statute informs and limits the available damages, the statute directs and delimits the recovery available under the general maritime law as well); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993) ("[A] number of district courts have 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."). Similarly, in *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995), the Ninth Circuit held that punitive damages are unavailable for maintenance and cure claims because of their pseudo-contractual nature. None of these holdings are applicable to the respondents' maritime torts claims, which are detached from any statutory restraints. *See infra* Part II (discussing the Clean Water Act).

punitive damages can be awarded for showings of "gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct").

Lower federal courts considering maritime cases have repeatedly adopted a similar recklessness standard in considering whether to hold an employer liable for the actions of an employee. This has been the case even where lower courts have declined to impose punitive damages on other grounds. In *U.S. Steel Corp. v. Fuhrman*, the Sixth Circuit, citing both *Amiable Nancy* and *Lakeshore,* adopted a recklessness standard into its holding. 407 F.2d 1143, 1148 (6th Cir. 1969) ("Punitive damages may also be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him."). In accordance with this principle, the *Fuhrman* court examined both whether the captain who had been involved in a collision was unfit and whether the owner, U.S. Steel, had been reckless for failing to overrule the captain's orders at critical moments of navigation during an emergency. *Id.* The court found that neither condition was present: the captain was fit and the company had acted reasonably when declining to countermand his instructions. *Id.* (observing that had company officials countermanded the captain it "conceivably could have resulted in an even worse disaster"). As a result, the *Fuhrman* court dutifully exonerated the defendant U.S. Steel from punitive damage liability.

Applying the *Fuhrman* analysis of recklessness to the case at bar, however, leads to liability for punitive damages. On the night of the *Exxon Valdez* oil spill, Captain Hazelwood, who had "consumed sufficient alcohol to incapacitate a non-alcoholic," could only be characterized as unfit. *Valdez II*, 236 F. Supp. 2d at 1045. Exxon itself understood the risk attendant to transporting crude oil, and it "knew that Captain Hazelwood was an alcoholic, it knew that he had resumed drinking, and it knew that Captain Hazelwood was drinking while on

duty." *Id*. at 1055. By consequence, Exxon is liable for punitive damages as an employer who recklessly, if not willfully, employed a clearly unfit captain.

Nearly every circuit court that has considered the issue has included the reckless employment standard in their holding. *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577 (9th Cir. 1905), is the one prominent lower court case that did not include the reckless employment standard in assessing vicarious liability for actions at sea, holding instead that corporate authorization or ratification is required. *Pacific*'s holding, however, was decisively overturned within its circuit. *See Protectus* 767 F.2d at 1386; *Churchill v. F/V Ford*, 892 F.2d 763, 772 (9th Cir. 1998).

In *Matter of P&E Boat Rentals, Inc*., 872 F.2d 642, 652 (5th Cir. 1989), the Fifth Circuit wholly ascribed to the *Fuhrman* standard, including the reckless employment test for punitive damage liability. The First Circuit followed suit by adopting the *Restatement (Second) of Torts*, which includes a reckless employment test in section 909(b).[7] The agreement among the circuits that have considered the issue should leave no doubt to this Court that punitive damages for reckless employment of an unfit captain is a ubiquitous standard.[8] Because that standard was clearly met in the case at bar, Exxon is liable for punitive damages.

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[7] The First Circuit qualified its adoption of the *Restatement* with respect to section 909(c), discussed further in section I(c)(ii) of this brief.

[8] A form of the reckless vicarious liability standard has been adopted internationally as well. The terms of the 1992 Protocol of the International Convention on Civil Liability for Oil Pollution Damage (CLC) state that shipowners cannot limit their liability if oil pollution damage resulted from an owner's reckless omission with the knowledge that damage would probably result. Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 art 6, *concluded* 27 November 1992, 1992 WL 602598 (Int.Env.L.), 1956 U.N.T.S. 287; Jaclyn A. Zimmerman, *The Inadequacies of the Oil Pollution Act of 1990: Why the United States Should Adopt the Convention on Civil Liability*, 23 Fordham Int'l L.J. 1499, 1539 n.117 (2000). One hundred twenty nations have ratified the protocol. International Maritime Organization, Summary of Status of Conventions, http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited Apr. 27, 2008). While this international standard is not binding upon the federal judiciary, this Court has recognized that international law is a component in its effort to craft uniform federal maritime laws. *See, e.g.*, *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (noting the "proper harmony and unity" of federal maritime law in "its international and interstate relations").

C. Imposing punitive damages liability for "a manager acting within the scope of employment" is consistent with the complicity standard.

This Court acknowledged in *Lake Shore* that the actions of senior corporate officials could give rise to vicarious liability for the corporation itself, even absent authorization or ratification. *See* 147 U.S. at 114; *Pacific Packing*, 136 F. at 580. The *Lake Shore* Court, sitting in the nineteenth century, declined to extend such liability to the acts of managerial employees. *Id*. Subsequent lower courts considering maritime cases, including the case at bar, have extended the *Lake Shore* rule to include liability for managerial employees with ample support from doctrinal shifts in modern federal and state common law.

i. The expansion of vicarious corporate liability in both federal and state common law supports a managerial capacity standard in maritime law.

In the century since the *Lake Shore* opinion was issued, this Court has recognized the realities of the modern corporation and sanctioned broad doctrines of vicarious corporate liability. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, the Court noted that "[a] majority of courts . . . have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification." 456 U.S. 556, 576 n.14 (1982). It also suggested that the *Lake Shore* vicarious liability rule may have been too restrictive, even when considered in its own historical era. *Id*. ("[T]he [*Lake Shore*] Court may have departed from the trend of late 19th century decisions . . . ."). In *Pacific Mutual Life Insurance Co. v. Haslip*, similarly, this Court found no fundamental unfairness in imposing punitive damages upon a faultless corporation for the actions of its agents. 499 U.S. 1, 15 (1991). Rather, the Court recognized that such liability was necessary to foster adequate oversight of corporate agents. *Id*. at 14. The modern practice of this Court suggests that strict

adherence to a *Lake Shore* rule against extending vicarious liability beyond corporate executives to managers is an antiquated notion.

The other traditional sources of general maritime law—state and federal common law—have both clearly shifted toward imposing greater vicarious liability upon corporations. Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 4:2, 5:1 (4th ed. 2008) (noting that general maritime law is drawn from state and federal sources and is "an amalgam of traditional common law rules, modifications of those rules, and newly created rules"). Contemporary federal common law has sanctioned broad corporate criminal liability through the doctrine of *respondeat superior*. The issue was first considered by this Court in *New York C. & H. R.R. Co. v. United States*, 212 U.S. 481 (1909), which established corporate criminal liability for the illegal conduct of any employee acting within the course of employment. Subsequent decisions have expanded this liability to the extent that corporations can be criminally liable for an employee's crime committed within the scope of employment even when done against corporate orders. *See, e.g.*, *United States v. Hilton Hotels Corp*., 467 F.2d 1000 (9th Cir. 1972). Punitive damages are the civil analogue to criminal sanctions. Their purpose within maritime law has been to punish and deter actions that show a "criminal indifference to civil obligations." *P&E Boat Rentals*, 872 F.2d at 652; *see also Lake Shore* 147 U.S. at 107. Were this Court to adopt petitioners' view in the instant case and bar punitive damages, it would eviscerate the rationale of punitive damages within maritime law and create a stark gap in liability between that body of law and its federal common law foundation. The expansion of corporate criminal liability illustrates how the federal common law has adapted to the pervasiveness of corporations in modern society. Federal maritime law, as a subset of federal common law, ought to evolve similarly and extend vicarious

liability beyond senior executives of a corporation to managers acting within the scope of their employment.

The clear trend of both state and federal common law in contemporary practice has been toward greater vicarious corporate liability, if not outright adoption of the managerial capacity test. This Court has repeatedly and specifically endorsed the *Restatement (Second) of Torts* § 909, including its managerial capacity prong for vicarious corporate liability, as "a useful starting point for defining th[e] general common law." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 542 (1999); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998). Moreover, a majority of states have adopted the "Restatement rule or some version of it." Robert L. Conason et al., *Damages in Tort Actions* § 40.06 n.9 (2007). Given this undeniable trend in state and federal common law, this Court should follow the lower courts in the case at bar and endorse a managerial capacity test.

ii. By including an element of corporate culpability, lower courts in this case correctly applied the managerial capacity test for punitive damages liability in accordance with the traditional maritime law standard of complicity.

The district court in the case at bar included an element of corporate culpability in its managerial capacity test for punitive damages liability. It did this through jury instructions and an independent finding of recklessness. As a result, the jury's verdict satisfied the traditional maritime law requirement of complicity for punitive damages and avoided imposing purely vicarious liability on Exxon for its employees' actions.

The First Circuit outlined the appropriate liability analysis for managerial capacity in *CEH, Inc. v. F/V Seafarer*, explaining:

> In our view, imposing vicarious liability on a principal for the act of an agent employed in a managerial capacity and acting in the scope of employment represents an appropriate evolution of the *Lake Shore* rule, at least when linked to requiring some level of culpability for misconduct. Our approach today falls short of wholesale adoption of the

> Restatement because section 909(c), read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal.

70 F.3d 694, 705. The *Seafarer* court thus properly extended the *Lake Shore* rule of punitive damages liability beyond corporate executives to managers who, in the context of a modern corporation, are equally able to act as an alter ego of the corporation in their employment capacity.[9] By additionally requiring "some level" of corporate culpability for misconduct, the *Seafarer* court also comported with the ban on pure vicarious liability, even for managers, articulated by this Court in *Amiable Nancy*, 16 U.S. 559, and *Lake Shore*, 147 U.S. 108.

The Fifth Circuit, in *P&E Boat Rentals*, set forth a method for determining whether a corporation was being punished for pure vicarious liability rather than complicity:

> We hold simply that punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct. In such a case, the corporation itself cannot be considered the wrongdoer. If the corporation has formulated policies and directed its employees properly, no purpose would be served by imposing punitive damages against it except to increase the amount of the judgment.

872 F.2d at 652. Thus, circuit court maritime opinions reveal two elements for a vicarious punitive damages liability: 1) A finding of "some level" of independent corporate culpability; 2) Consideration of corporate policies and practice in determining the existence of such culpability. This approach is consistent with both maritime precedent as well as this Court's interpretation of common law limitations on vicarious liability in *Kolstad v. American Dental Association*. 527 U.S. 526, 542 (1999) ("The Court therefore agrees that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of

[9] The capability to wield the executive power of a corporation is particularly evident when a ship captain acts in a crisis. *U.S. Steel Corp*. 407 F.2d at 1147 ("In order to avoid chaos aboard in such [emergency] situations it is imperative that the vessel remain under the control of a single individual with complete and undisputed authority."). Exxon realized it was placing exactly such power in the incapable hands of *Exxon Valdez* Captain Hazelwood; Hazelwood was the only person on board the *Exxon Valdez* legally licensed to navigate the oil tanker away from the "known and foreseen hazard" of Bligh Reef. *Valdez I*, 270 F.3d at 1222.

managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII.").

Applying this standard to the case at bar, Exxon is clearly subject to liability for punitive damages. At the very outset of litigation, Exxon admitted to a minimal level of culpability by stipulating that its negligence caused the oil spill. *Valdez I*, 270 F.3d at 1225. In the penalty phase of the trial, the jury then found that Exxon was "reckless" and that its recklessness was the "legal cause of the grounding of the Exxon Valdez." *Id*. at 1233. In determining this recklessness, the jury was specifically instructed against finding Exxon liable for punitive damages without any showing of culpability. As the court of appeals noted:

> Instruction 36 said that acts contrary to the corporation's policies "are not attributable to the employer" provided that "adequate measures were taken to establish and enforce the policies or directions" but that "merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reckless actions of the employee that are contrary to the employer's policy or instructions."

Id. In the damages phase, the jury was once again instructed in a way that would have shielded an innocent corporate defendant from purely vicarious liability. First, the district court reminded the jury that even though they had determined that the conduct of Captain Hazelwood and of the Exxon defendants was reckless, they were not required to make an award of punitive damages against either one or both of them. *Valdez II*, 236 F. Supp. 2d at 1050. The jury was also informed "that if 'corporate policymakers did not actually participate in or ratify the wrongful conduct' or if it 'was contrary to company policies' then the jury 'may consider' these facts 'in mitigation or reduction of any award of punitive damages.'" *Valdez I*, 270 F.3d at 1233. Finally, the jury was instructed on the necessity of punitive damages "having a rational basis in the evidence in the case" and not exceeding "what is reasonably necessary to achieve society's goals of punishment and deterrence." *Valdez II*, 236 F. Supp. 2d at 1050. These instructions make

plain that the jury could only award punitive damages against Exxon if it found corporate culpability providing cause for punishment and deterrence. The court of appeals further upheld the sufficiency of evidence for punitive damages on review, observing that the evidence established that "Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." *Valdez I*, 270 F.3d at 1234; *see also Valdez III*, 296 F. Supp. 2d at 1071 ("Exxon officials heard multiple reports of Hazelwood's relapse, and Hazelwood was being watched by other Exxon officers. Yet, Exxon continued to allow Hazelwood to command a supertanker carrying a hazardous cargo."). As a result, Exxon has no grounds to claim the traditional maritime legal protection against pure vicarious liability. Rather, the facts of the case at bar overwhelmingly indicate that Exxon was complicit in the *Exxon Valdez* oil spill and can be held liable for punitive damages. For all of these reasons, the decision of the Ninth Circuit should be affirmed.

II. THE CLEAN WATER ACT DOES NOT DISPLACE THE AVAILABILITY OF PUNITIVE DAMAGES UNDER GENERAL MARITIME LAW FOR THE HARMS INFLICTED BY THE *EXXON VALDEZ* OIL SPILL.

The federal judiciary has historically played a leading role in articulating the substantive law of admiralty. Although federal courts "have not been vested with open-ended lawmaking powers," a "narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty." *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981). Article III of the Constitution grants the federal judiciary jurisdiction over all admiralty and maritime cases, U.S. Const. art. III, § 2, and since this nation's founding, "Congress has largely left to [the Supreme Court] the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963). Exercising this responsibility, the federal

judiciary "has traditionally taken the lead in formulating" a "flexible and fair" law of remedies for maritime cases. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). Absent a controlling statute, this common law of remedies applies in any case where the federal courts' admiralty jurisdiction is invoked. *East River S.S. Corp. v. Transamerica Pelaval, Inc.*, 476 U.S. 858, 864 (1986).

Neither the language nor the legislative history of the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000),[10] supports petitioners' argument that the Act displaces the availability of punitive damages under general maritime law for the substantial harms inflicted by the *Exxon Valdez* oil spill. In fact, a close reading of the Act and its legislative history indicates that Congress intended to preserve existing remedies for the injuries caused by oil pollution. Since Congress did not intend to disturb respondents' right to a punitive damage remedy under general maritime law, the Ninth Circuit's decision upholding the imposition of punitive damages should be affirmed.

A. This Court has shown reluctance in holding that congressional statutes displace judge-made maritime law.

A federal statute does not displace a civil remedy recognized by general maritime law unless the statute "speaks directly" to the issue of remedies in a manner that suggests that Congress did not intend to allow for remedies beyond those provided in the statute. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 315 n.8 (1981) ("[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly

[10] Before 1977, the Clean Water Act was known as the Federal Water Pollution Control Act. *See* Clean Water Act of 1977, Pub. L. No. 95-217, sec. 2, § 518, 91 Stat. 1566, 1566 (1977). Throughout this brief, respondents use the titles "Clean Water Act" and "Federal Water Pollution Control Act" interchangeably.

governed by federal common law."). Although this Court has shown a willingness to find that federal common law has been displaced by statute, *see, e.g.*, *City of Milwaukee*, 451 U.S. at 316-17, it has "applied the presumption of statutory preemption somewhat less forcefully to judge-made maritime law than to non-maritime federal common law." *United States v. Oswego Barge Corp.*, 664 F.2d 327, 336 (2d Cir. 1981). As the Second Circuit has recognized, this Court has repeatedly "approved the creation of new rights pursuant to judge-made maritime law despite the presence of arguably preempting federal statutes." *Id.* In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393-403 (1970), for example, this Court recognized a maritime wrongful death action for deaths occurring in state territorial waters, even though the maritime wrongful death statute passed by Congress only provided a cause of action for deaths occurring on the high seas. *See* Death on the High Seas Act (DOHSA), 46 U.S.C. app. §§ 761-767 (2000). In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27-30 (1990), the Court further held that the Jones Act, which created a negligence cause of action for the wrongful death of a seaman, did not preclude a seaman's parents from bringing a general maritime wrongful death action based on unseaworthiness. *See* 46 U.S.C. app. § 688 (2000). In addition, Congress's energetic activity in the area of maritime personal injuries did not deter the Court from crafting a right of contribution between joint tortfeasors in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). *Cf. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952) ("Congress has already enacted much legislation in the area of maritime personal injuries."). The Court's unanimous decision to create a maritime right of contribution in *Cooper Stevedoring* stands in stark contrast to its refusal to grant such rights in the areas of antitrust, *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641-42 (1981), and employment discrimination, *Nw. Airlines*, 451 U.S. at 95-97. *Cooper Stevedoring* thus exemplifies how the federal judiciary plays

a more expansive role in developing maritime law than in developing non-maritime federal common law. *Oswego Barge*, 664 F.2d at 335-36.

In the field of admiralty law, this Court has shown a unique willingness to craft judge-made remedies for harms inflicted on private plaintiffs. *Reliable Transfer*, 421 U.S. at 409. Unless petitioners can demonstrate that the Clean Water Act "speaks directly" to the issue of punitive damages, the general maritime law on punitive damages must govern this case. *See Higginbotham*, 436 U.S. at 625.

B. The language of the Clean Water Act demonstrates that Congress did not intend to preclude the availability of punitive damages under general maritime law for harms inflicted by oil spills.

As in all cases of statutory construction, the Court must begin by construing the meaning and scope of the Clean Water Act's language. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001). The provisions of the Clean Water Act most relevant to the case currently before the Court are codified at 33 U.S.C. § 1321, which deals specifically with liability for unlawful discharges of oil and hazardous substances. At the time the *Exxon Valdez* ran aground on Bligh Reef, § 1321(b)(3) prohibited the discharge of harmful quantities of oil into U.S. waters, including the waters of Prince William Sound. *See* 33 U.S.C. § 1321(b)(3) (1990).[11] Section 1321(b)(2) charged the President with responsibility for crafting a National Contingency Plan for responding to oil spills, and § 1321(f)(1) allowed the federal government to recoup costs incurred in cleaning up such spills. The amount of money the government could recover, however, was subject to statutory limits unless the oil discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner," in which case the government could recover the full amount of its costs. *Id.* § 1321(f)(1). Under § 1321(b)(6)(A), the owner of a

[11] Unless otherwise noted, all citations to 33 U.S.C. § 1321 refer to the 1990 edition of the *United States Code*, which contains the version of § 1321 in effect at the time of the *Exxon Valdez* oil spill.

vessel that unlawfully discharged oil into U.S. waters could face an administratively assessed civil penalty of up to $5000 for each offense. Although § 1321(b)(6)(B) seemingly would have allowed the United States to seek more substantial civil penalties from oil polluters in a U.S. district court, the agencies charged with implementing § 1321 concluded that subparagraph (B) applied only to discharges of hazardous substances and not to discharges of oil. 44 Fed. Reg. 50,785, 50,785 (Aug. 29, 1979).

Section 1321 also contains a number of "saving provisions" that clearly indicate that Congress did not intend for § 1321 to provide the exclusive remedies for harms inflicted by oil spills. Section 1321(o)(1) states that nothing in § 1321 shall affect a vessel owner's obligations "under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of . . . oil." Section 1321(o)(2) disclaims any congressional intent to "preempt[] any State . . . from imposing any requirement or liability with respect to the discharge of oil . . . into any waters within such State." Finally, § 1321(o)(3) provides that nothing in § 1321 "shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

This review of § 1321's language and scope strongly suggests that Congress did not intend to displace the availability of punitive damages under general maritime law when it passed the Clean Water Act. On its face, § 1321 does not expressly preempt the imposition of punitive damages in maritime cases. In fact, § 1321 does not address private causes of action at all. Instead, the statute narrowly focuses on the government's right to recover costs incurred in cleaning up oil spills. Congress's minimalist approach to oil-spill liability in § 1321 hardly

qualifies as the type of "comprehensive" regulation necessary to displace otherwise available remedies under general maritime law. *Cf. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981); *City of Milwaukee*, 451 U.S. at 318.

Section 1321's saving provisions also suggest that Congress intended to preserve general maritime remedies, including punitive damages. In their treatise on the law of admiralty, Professors Grant Gilmore and Charles L. Black, Jr., interpret § 1321(o)(1) as explicitly preserving all private rights of action under general maritime law. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 829 (2d ed. 1975) (arguing that, in context, the meaning of the phrase "any provision of law" in § 1321(o)(1) "evidently includes the general maritime law"). Furthermore, § 1321(o)(2)'s explicit preservation of causes of action based on state law belies any claim that Congress intended for § 1321 to protect oil companies and shippers from the imposition of punitive damages. Section 1321(o)(2) presumably would allow a state to provide a punitive damage remedy to individuals harmed by an oil spill occurring in the state's territorial waters. Given that § 1321(o)(2) appears to permit states to impose punitive damages on oil polluters, it would be incongruous for this Court to hold that Congress intended for the Clean Water Act to displace the availability of punitive damages under general maritime law.

Section 1321 is a sword, not a shield. It creates liability for the costs expended to clean up oil spills; it does not preclude private parties from obtaining remedies not provided in the statute. Based on the language of § 1321 alone, it is clear that Congress did not intend to preempt existing remedies under the common law of admiralty.

C. The potential availability of civil and criminal penalties for unlawful oil discharges under the Clean Water Act does not preclude the imposition of punitive damages.

At the time of the *Exxon Valdez* spill, the Clean Water Act provided for civil—and potentially even criminal—penalties for unlawful discharges of oil into U.S. waters.[12] The potential availability of civil and criminal penalties under the Clean Water Act, however, does not preclude the imposition of punitive damages under general maritime law. The prevailing rule in the United States is that "[t]he awarding of punitive damages is not prevented by a prior criminal conviction for the same act." Restatement (Second) of Torts § 908 cmt. a (1979); *see also King v. Nixon*, 207 F.2d 41 (D.C. Cir. 1953) (per curiam) ("The District Court rightly ruled that recovery of exemplary or punitive damages, in a civil action for assault and battery, is not precluded by the fact that the defendant may be liable to criminal prosecution . . . ."); John J. Kircher & Christine M. Wiseman, *Punitive Damages: Law and Practice* § 5:16 (2d ed. 2008) ("In jurisdictions that have addressed this issue, the prevailing rule generally provides that the potential or actuality of criminal punishment for the same action that also resulted in a civil suit will not bar the imposition of punitive damages against the defendant in a civil action."). While criminal penalties punish an offender for the harm he has inflicted on the general public, punitive damages penalize tortfeasors for the injuries they impose on particular individuals. As the Iowa Supreme Court recognized in *Hendrickson v. Kingsbury*, 21 Iowa 379 (1866):

> [T]he damages allowed in a civil case by way of punishment . . . have no necessary relation to the *penalty* incurred for the *wrong done to the public:* but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the *wrong done to that individual*.

[12] Aside from the extremely limited civil penalties provided in § 1321, some lower federal courts had held by the time of the *Exxon Valdez* spill that oil was a "pollutant" within the definition of the Clean Water Act and thus discharges of oil were subject to the criminal provisions of 33 U.S.C. § 1319(c). *See, e.g.*, *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977); *see also* S. Rep. No. 101-94, at 9 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 722, 730. In 1990, Congress expressly extended § 1319(c)'s criminal penalties to unlawful discharges of oil, thus ratifying the Sixth Circuit's holding in *Hamel*. Oil Pollution Act of 1990, Pub. L. No. 101-380, § 4301(c), 104 Stat. 484, 537.

If a *criminal conviction* does not preclude the imposition of punitive damages, then *a fortiori* the potential availability of *civil penalties* under the Clean Water Act does not displace extant punitive damage remedies under general maritime law.

Although Exxon has already paid criminal and civil penalties for the environmental havoc it wreaked in Prince William Sound, *see* Stephen Raucher, Comment, *Raising the Stakes for Environmental Polluters: The Exxon Valdez Criminal Prosecution*, 19 Ecology L.Q. 147 (1992), this case is not about befouling the environment. Instead, petitioners have sought compensatory and punitive damages for Exxon's reckless interference with their commercial and subsistence fishing interests. *See Valdez I*, 270 F.3d at 1221, 1225. As the lower court held, Exxon's acquiescence to the payment of criminal and civil penalties has no bearing on petitioners' efforts to vindicate their "private economic and quasi-economic interests." *Id.* at 1231. As a result, the availability of civil and criminal penalties under the Clean Water Act does not preempt the imposition of punitive damages under general maritime law.

To hold otherwise would frustrate Congress's intent in § 1321 to preserve existing remedies for the harms inflicted by oil spills. Since this Court "assume[s] that Congress is aware of existing law when it passes legislation," *Miles*, 498 U.S. at 32, it must presume that when Congress drafted the Clean Water Act, it was aware of the prevailing rule that criminal and civil penalties do not preclude the imposition of punitive damages. Congress's failure to include explicit language in the Clean Water Act preempting punitive damage remedies must thus be read as indicating Congress's intention to preserve such remedies. *Cf. Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301-02 (1959) (holding that because Congress did not unambiguously limit the liability of negligent stevedores in the Carriage of Goods by Sea Act, the prevailing rule that "agents are liable for all damages caused by their negligence" applied and

the negligent stevedoring company could be held liable for the full damage caused by its negligence). Given the prevailing rule articulated in the *Restatement (Second) of Torts*, legislators who wished to preserve existing punitive damage remedies despite the availability of criminal and civil penalties under the Clean Water Act would have seen no need to speak directly to the issue of punitive damages in the Act. The legislators could simply have assumed that the prevailing rule would prevent the Clean Water Act from preempting the imposition of punitive damages. This Court should not now pull the rug out from under Congress by changing the rules of the game after Congress has acted.

D. Legislative history suggests that Congress intended to preserve remedies available under general maritime law.

This Court has regularly looked to legislative history to determine the scope of a statute alleged to displace general principles of maritime law. *See, e.g.*, *Robert C. Herd & Co.*, 359 U.S. at 301. The legislative history of 33 U.S.C. § 1321 is replete with statements disclaiming any congressional intent to preempt other statutory or common-law remedies for injuries inflicted by oil spills. When this legislative history is considered in conjunction with the limited scope of § 1321's language, it becomes apparent that Congress could not have intended for the Clean Water Act to displace the availability of punitive damages under general maritime law.

i. The legislative history of the Water Quality Improvement Act of 1970 demonstrates that Congress did not intend to preempt general maritime punitive damage remedies.

The legislative history of 33 U.S.C. § 1321 traces back to section 11 of the Water Quality Improvement Act of 1970 (WQIA), Pub. L. No. 91-224, sec. 102, § 11, 84 Stat. 91, 91-98, which was re-enacted with only slight changes in section 311 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), Pub. L. No. 92-500, sec. 2, § 311, 86 Stat. 816, 862-71. *See* S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3731-32. In the

House's floor debates on the WQIA, Representative William Cramer, a leading manager of the legislation, stated:

> [I]t should be borne in mind that [the Act's] limitation of liability is solely for cleanup costs by the United States and does not proport [sic] to limit liability that might be imposed by State law or that exists under common law. . . .
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> . . . .
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> . . . [The Act] limits liability only in the matter of cleanup costs to be returned to the U.S. Government . . . . [I]f there are charges or damages due to third parties under admiralty law or common law, these would be in addition and would not be subject to [the Act's] limitation of liability.

116 Cong. Rec. 9326-27 (1970); *see also United States v. M/V Big Sam*, 681 F.2d 432, 444 n.15 (1982). Representative Cramer's remarks, which do not appear to have been challenged by any member of the House, indicate Congress's intent to preserve existing remedies—including punitive damage remedies—for the harms caused to third parties by oil spills.

Although references to oil-spill liability in the legislative history of the FWPCAA are sparse, Congress appears to have retained Representative Cramer's understanding of the WQIA's limited scope. In the portion of the Senate Report discussing the FWPCAA's citizen-suit provisions, the Report states:

> It should be noted . . . that the [citizen-suit] section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.*

S. Rep. No. 92-414 (1971) (emphasis added), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3746-47. While this statement does not directly reference the Act's oil-spill liability provisions, it demonstrates Congress's intent to preserve existing judge-made remedies, including those recognized under the common law of admiralty.

ii. The legislative history of the Oil Pollution Act of 1990 indicates that Congress had not previously offered a comprehensive solution to the problem of oil pollution.

In the wake of the *Exxon Valdez* disaster, Congress passed the Oil Pollution Act of 1990 (OPA), Pub. L. No. 101-380, 104 Stat. 484, which finally provided a comprehensive framework for assessing liability for the harms inflicted by oil spills.[13] *See* S. Rep. No. 101-94 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 722; Joel M. Gross & Lynn Dodge, *Clean Water Act* 12 (2005) ("The Oil Pollution Act (OPA) was enacted in 1990 as a response to the Exxon Valdez oil spill in Alaska and as an acknowledgment that existing authority for preventing and responding to oil spills from vessels and onshore facilities was inadequate."); 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 215 (4th ed. 2004) ("Only in 1990 did the Congress take a comprehensive approach [to the problem of oil pollution] with the passage of the Oil Pollution Act . . . ."). The Senate Report on the OPA elucidates the shortcomings of the pre-OPA statutory regime. The Report notes that at the time of the *Exxon Valdez* spill, a "fragmented collection of Federal and State laws provid[ed] inadequate cleanup and damage remedies." S. Rep. No. 101-94, at 2. The Report's authors lament that "[a]t the present time, the costs of spilling [oil] and paying for its clean-up and damage [are] *not high enough* to encourage greater industry efforts to prevent spills and develop effective techniques to contain them." *Id.* at 3 (emphasis added). Furthermore, the report states that prior to the OPA's enactment, the Clean Water Act set "inappropriately low limits of liability for owners and operators of vessels with respect to Federal oil spill removal costs and natural damages, and provide[d] no coverage or compensation for other damages." *Id.*

Despite petitioners' protestations to the contrary, these statements demonstrate that the Clean Water Act did not comprehensively address oil-spill liability prior to the passage of the

[13] Since the Oil Pollution Act did not take effect until August 18, 1990, its provisions do not apply to the case currently before the Court. *See* Pub. L. No. 101-380, § 1020, 104 Stat. 484, 506 (1990).

OPA. The bare-bones provisions of 33 U.S.C. § 1321 focused narrowly on the federal government's ability to recoup a portion of its oil-spill cleanup costs; the statute did not speak to the question of what remedies might be available to private parties harmed by a spill. This Court has recognized that Congress's post-hoc views on the comprehensiveness of prior legislation can be relevant in determining whether the legislation displaced federal common law principles. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 318 n.10 (1981). In this case, Congress has rendered its verdict, and it found that the Clean Water Act did not adequately address the issue of oil-spill liability prior to the enactment of the OPA. This Court should not ignore Congress's pellucidly clear views on the Clean Water Act's shortcomings by now holding that the Act was sufficiently comprehensive at the time of the *Exxon Valdez* spill to preempt the availability of punitive damages under general maritime law. *Cf. City of Milwaukee*, 451 U.S. at 318 (relying on the comprehensiveness of the Clean Water Act's effluent permitting system in holding that the Act displaced common law public nuisance actions seeking abatement of sewage discharges).

Congress's frustrations about the WQIA's inadequacies are mirrored by the statements of several leading commentators on the Act. More than a decade before Captain Hazelwood set the *Exxon Valdez* on a collision course with Bligh Reef, Professors Gilmore and Black wrote that the WQIA "is as soft and spineless in its drafting as it is muddle-headed in its policy." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 827 (2d ed. 1975). Based on the WQIA's narrow focus on the federal government's ability to recoup its oil-spill cleanup costs, Professors Gilmore and Black concluded that there was "nothing" in the Act to suggest that it precluded any "claims for property loss, injury or death under the general maritime law." *Id.* at 829. Similarly, in their review of the WQIA's legislative history, Nicholas Healy and Gordon Paulsen explain that the Act's oil-spill liability provisions "cover[] only removal costs incurred

by the United States Government." Nicholas J. Healy & Gordon W. Paulsen, *Marine Oil Pollution and the Water Quality Act of 1970*, 1 J. Mar. L. & Com. 537, 563 (1970). According to Healy and Paulsen, the WQIA did not address the availability of other types of claims, including claims under general maritime law. *See id.* Furthermore, this Court has recognized that 33 U.S.C. § 1321 "is concerned only with actual cleanup costs incurred by the Federal Government" and thus does not displace or preempt other remedies for the damages caused by oil spills. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 335-36 (1973).

Scholars, Congress, and the members of this Court have all agreed that § 1321 focuses narrowly on the federal government's ability to recover costs expended to remove oil from U.S. waters. Given this unanimous analysis of § 1321's constricted scope, it would be anomalous for this Court now to hold that the Clean Water Act displaces the availability of punitive damages under general maritime law. By affirming the imposition of punitive damages in this case, the Court would not be "rewriting rules that Congress has affirmatively and specifically enacted"; instead, it would be "filling a gap left by Congress' silence." *Higginbotham*, 436 U.S. at 625. Since the Clean Water Act does not represent a "considered judgment" on the part of Congress that punitive damages should not be available for the harms caused by oil spills, *id.* at 624, this Court should affirm the lower courts' judgment that punitive damages are appropriate in this case.

E. *City of Milwaukee* and *National Sea Clammers* do not bar the imposition of punitive damages in this case.[14]

[14] Although petitioners' argument before the court of appeals also relied heavily on this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), *Miles*'s refusal to award damages for loss of society and lost future income in a maritime wrongful death action has no bearing on the availability of punitive damages in the case currently before the Court. While the Jones Act specifically created a cause of action for the wrongful death of the seaman in *Miles*, the Clean Water Act does not address the extent of an oil polluter's liability to private parties harmed by an oil spill. Instead, the Act focuses narrowly on the federal government's right to recover a portion of the costs expended on cleaning up spills. While it makes eminent sense to hold that a court may not expand the remedies provided by statute to a particular litigant, it makes no sense to hold that Congress's utter silence on the issue of remedies displaces established principles of maritime law. *Miles* merely held that a private plaintiff could not

This Court's decisions in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), do not bar the imposition of punitive damages in this case. In *City of Milwaukee*, Illinois filed a common law public nuisance action in federal district court seeking abatement of the City of Milwaukee's sewage discharges into Lake Michigan. 451 U.S. at 308-10. Five months after Illinois filed its action, Congress passed the FWPCAA. *Id.* at 310-11. The Act "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit" issued by the Environmental Protection Agency or a qualifying state agency. *Id.* Since the City of Milwaukee was not in compliance with the terms of its permits, the Wisconsin Department of Natural Resources, which was responsible for monitoring Milwaukee's effluent levels, brought an enforcement action in state court. *Id.* at 311. The state court then entered a judgment that included a detailed timetable of the steps the City was required to take to come into compliance with the effluent limitations set forth in its permits. *Id.* Notwithstanding the state-court order, the federal district court proceeded to enter judgment for Illinois and order the City of Milwaukee to take remedial actions that went "considerably beyond" the terms of the City's previously issued permits and the state court's enforcement order. *Id.* at 311-12. This Court reversed the district court's order, holding that "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering" the federal government's comprehensive effluent-permitting scheme. *Id.* at 320.

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sidestep the Jones Act's remedial limitations by seeking expanded remedies under general maritime law. *Miles*, 498 U.S. at 32-33 ("It would be inconsistent with our place in the constitutional scheme . . . to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence."). Since the Clean Water Act in no way limits the remedies available to individuals harmed by oil spills, *Miles* does not support petitioners' position that the Act precludes the imposition of punitive damages in this case.

In *National Sea Clammers*, this Court extended its holding in *City of Milwaukee* to bar private parties from bringing a public nuisance claim under federal common law for damages inflicted by sewage discharges into New York Harbor and the Hudson River. 453 U.S. at 4-11. Relying entirely on its decision in *City of Milwaukee*, the Court held that "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the . . . comprehensive scope of the [FWPCAA]." *Id.* at 21-22.

City of Milwaukee and *National Sea Clammers* prevent federal courts from awarding damages or injunctive remedies to plaintiffs challenging sewage discharges under the common law of nuisance. These cases, however, are distinguishable and have no bearing on the case currently before the Court. First, respondents' claims are not grounded on the federal common law of nuisance; instead, respondents have sought damages under general maritime law for Exxon's reckless interference with their commercial and subsistence fishing interests. Since respondents' causes of action are based on maritime law and sound in negligence, *City of Milwaukee* and *National Sea Clammers*'s bar on common law nuisance actions simply does not apply to this case. *See* Joseph J. Kalo, *Water Pollution and Commercial Fishermen: Applying General Maritime Law to Claims for Damages to Fisheries in Ocean and Coastal Waters*, 61 N.C. L. Rev. 313, 316-17, 348 (1983).

Furthermore, the nature of Exxon's arguments suggest that it recognizes that *City of Milwaukee* and *National Sea Clammers* do not control this case. While *City of Milwaukee* and *National Sea Clammers* preclude a plaintiff from challenging sewage discharges under the federal common law of nuisance, Exxon is not disputing before this Court the respondents' right to recover compensatory damages under general maritime law. Instead, Exxon argues only that the Clean Water Act displaces respondents' claim for *punitive* damages. If Exxon believed that

City of Milwaukee and *National Sea Clammers* applied to the case currently before the Court, it undoubtedly would have argued that the Clean Water Act preempts respondents' right to *compensatory* damages. *City of Milwaukee* and *National Sea Clammers* offer no support for the proposition that the Clean Water Act permits the awarding of compensatory damages under general maritime law but precludes the imposition of punitive damages. Since there is no evidence that Congress intended to preserve compensatory remedies but preempt general maritime principles permitting the imposition of punitive damages, Exxon's acceptance of respondents' right to compensatory damages torpedoes its argument that the Clean Water Act preempts their claim for punitive damages.

Finally, *City of Milwaukee* and *National Sea Clammers* are distinguishable from the case currently before the court because respondents' claim for punitive damages does not threaten to interfere with administrative regulations or the statutory regime created by the Clean Water Act. In *City of Milwaukee*, the Court emphasized the fact that the federal district court's order "went considerably beyond the terms of [the City's] previously issued permits and the enforcement order of the state court," 451 U.S. at 312, and the Court held that "[f]ederal courts lack authority to impose *more stringent effluent limitations* under federal common law than those imposed by the *agency charged by Congress* with administering" the Clean Water Act's effluent-permitting scheme, 451 U.S. at 320 (emphasis added). Exxon does not claim that it could have received a government permit to dump eleven million gallons of oil into Prince William Sound. In fact, the Clean Water Act appears to curtail oil discharges more strictly than other effluents. While 33 U.S.C. § 1342 sanctions the discharge of certain pollutants pursuant to a duly issued permit, § 1321(b)(3) specifically prohibits the discharge of "harmful" quantities of oil. The Environmental Protection Agency has determined that a discharge of oil is "harmful" for purposes of §

1321(b)(3) if it causes "a film or sheen upon or discoloration of the surface of the water." 40 C.F.R. § 110.3 (1990). There can be no dispute that the *Exxon Valdez* oil spill met this "sheen test" and thus fell within the prohibition of § 1321(b)(3). Because respondents' claim for punitive damages does not threaten to interfere with the administrative judgments of the EPA or the statutory scheme of the Clean Water Act, the district court's imposition of punitive damages should be affirmed.

CONCLUSION

Exxon entrusted a tanker filled with fifty-three million gallons of toxic crude oil to a drunken captain and an incompetent, overworked crew. Given Exxon's reckless conduct, a substantial punitive damage award was appropriate under general maritime law, and the Clean Water Act did not preempt the availability of a punitive damage remedy in this case. Therefore, respondents respectfully request that this Court affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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April 28, 2008

APPENDIX: CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III, § 2 provides in relevant part:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .

33 U.S.C. § 1311(a) (1990) provided:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1319 (1990) provided in relevant part:

> (c) Criminal penalties
>
> (1) Negligent violations. Any person who-- (A) negligently violates section 1311 . . . of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.
>
> (d) Civil penalties; factors considered in determining amount
>
> Any person who violates section 1311 . . . of this title . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1321 (1990) provided in relevant part:

> (a) Definitions
>
> For the purpose of this section, the term-- (1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil; (2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occurring within the scope of relevant operating or treatment systems; (3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel; . . . (6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore

facility, the person who owned or operated such facility immediately prior to such abandonment; (7) "person" includes an individual, firm, corporation, association, and a partnership; (8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches; (9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone; (10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land; (11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel; (12) "act of God" means an act occasioned by an unanticipated grave natural disaster; (13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit; (14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section; . . . (16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]).

. . . .

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges

into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

. . . .

(6)(A) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States at the time of the discharge, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary. (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 such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on 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 by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the

privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph. (C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government. (D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title. (E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

(c) Removal of discharged oil or hazardous substances; National Contingency Plan

(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to-- (A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities; (B) identification, procurement, maintenance, and storage of equipment and supplies; (C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan; (D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies; (E) establishment of a national center to provide coordination and direction for operations in

carrying out the Plan; (F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances; (G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and (H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal. The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

(d) Marine disaster discharges

Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act [33 U.S.C.A. § 1471 et seq.] (or the convention defined in section 2(3) thereof [33 U.S.C.A. § 1471(3)]) shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil or hazardous substance.

(e) Judicial relief

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

. . . .

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

. . . .

(j) Regulations; penalty

(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from

vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

. . . .

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility 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 any oil or hazardous substance or from the removal of any such 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.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

33 U.S.C. § 1342(a)(1) (1990) provided in relevant part:

[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant . . . notwithstanding section 1311(a) of this title . . . .