No. 07-

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An Alaska federal jury awarded $5 billion in punitive damages against Exxon under federal maritime law for the accidental grounding of the tanker EXXON VALDEZ and the resulting oil spill. The award did not punish for harm to the environment, which other proceedings had fully redressed, but only for lost income and similar economic harm to commercial fishermen and other private parties. Applying the Due Process Clause, the Ninth Circuit reduced the award to $2.5 billion—still 123 times the compensatory damages awarded and five times what the court found was the total, fully compensated loss to all private economic interests.

The questions presented are:

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

3. Is this $2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal appellate courts in our history, within the limits allowed by (1) federal maritime law or (2) if maritime law could permit such an award, constitutional due process?

PARTIES TO THE PROCEEDING

Petitioners are Exxon Shipping Company (now known as SeaRiver Maritime, Inc.) and Exxon Mobil Corporation, defendants-appellants below. Joseph Hazelwood (the master of the EXXON VALDEZ) was also a defendant-appellant below and is therefore a respondent under Rule 12.6.

Plaintiffs-appellees below, who are respondents under Rule 12.6, are Grant Baker, Louie E. Alber, Ahmet Artuner, Jeffrey Bailey, William Bennett, Michael Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, Larry L. Dooley, Mark Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompkoff, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghan, Elenore E. McMullen, Leslie R. Meredith, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A. Tisdall, Darrell Wood, the Alaska Sport Fishing Ass'n, Debra Lee, Inc., Dew Drop, Inc., and the Native Village of Tatitlek. They are representatives of a punitive damages class certified by the district court and defined as "all persons who possess or assert a claim for punitive damages" arising out of the grounding of the EXXON VALDEZ and the resulting oil spill, except for certain governmental entities. App. 126a.[1]

RULE 29.6 DISCLOSURE

All of the stock of Exxon Shipping Company is owned directly or indirectly by Exxon Mobil Corporation. Exxon Mobil Corporation has no parent corporation and no person or entity owns 10% or more of its stock.

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[1] Citations to "App." indicate the Appendix to this Petition. Citations to "ER" and "RER" indicate materials available in Appellants' Joint Excerpts of Record and Appellants' Joint Rebuttal Excerpts of Record filed in the first Ninth Circuit appeal (No. 97-35191). Citations to "DX" indicate exhibits admitted at trial. Emphasis is supplied throughout, except where otherwise stated, and internal quotations and citations are omitted.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively, "Exxon") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The two opinions of the Ninth Circuit and the opinions of Judges Kozinski and Bea dissenting from denial of rehearing *en banc* are reported at 270 F.3d 1215 and 490 F.3d 1066 and reprinted at App. 1a-117a and 287a-293a. The district court's initial opinions on all issues are unreported and reprinted at App. 224a-284a. Its two later opinions on the size of the punitive award are reported at 236 F. Supp. 2d 1043 and 296 F. Supp. 2d 1071 and reprinted at App. 118a-223a.

JURISDICTION

The Ninth Circuit issued its opinions in this matter on November 7, 2001, and December 22, 2006, and amended the latter opinion on May 23, 2007, upon denial of Exxon's timely petition for rehearing. App. 285a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "No person shall be deprived of life, liberty, or property, without due process of law." Pertinent provisions of the Clean Water Act (CWA), 33 U.S.C. § 1311 *et seq*., are given at App. 293a-299a.

INTRODUCTION

This petition seeks review of what is by far the largest punitive damage award ever affirmed by a federal appellate court. Unlike all the other punitive awards this Court has reviewed, which arose under state law, this award is purely the product of judge-made federal law and raises important federal questions *not* limited to whether the amount exceeds the boundaries of due process. Because the oil spill was a maritime tort, the award was made under maritime law, a species

of federal common law which federal judges have responsibility to declare and shape in the same manner that state courts declare and shape the common law of their states, and of which this Court is the ultimate arbiter. The questions presented, of importance to the entire maritime community, must therefore start with whether the award was proper under maritime law. It was not.

First. The trial court instructed the jurors that if they found the ship's master had acted recklessly, they were *required* as a matter of law to impute his recklessness to the shipowner, even if the master's acts were contrary to the owner's properly enforced policies. As explained in Judge Kozinski's dissent, App. 287a-291a, in upholding these instructions the Ninth Circuit departed from 200 years of maritime law, and put itself squarely in conflict with decisions of the First, Fifth, Sixth, and Seventh Circuits.

Second. Congress established a detailed scheme of penalties and remedies for oil spills in the CWA, but did not authorize punitive damages. In holding that punitive damages were available, the Ninth Circuit departed from decisions of this Court and other circuits holding that judge-made maritime law cannot add remedies to those Congress has provided in an applicable statute, including the CWA. The decision also conflicts with multiple maritime-law decisions of other circuits barring judge-made punitive damages where pertinent federal statutes do not authorize them.

Third. The Ninth Circuit refused to recognize that substantive maritime law limits the size of the award independently of due process. Indeed, the court said that absent a due process limit, the jury might permissibly have awarded the full $5 billion on the theory that Exxon "ought to have a year without profit" as punishment for the spill. App. 91a. In so holding, the Ninth Circuit ignored maritime law's core objectives of uniformity, predictability, and avoidance of undue burdens on maritime commerce. It also contradicted decisions of other circuits that punitive awards made under federal law must comply not only with outer limits imposed by

due process, but also with non-constitutional limits imposed by underlying federal law. The $2.5 billion award in this case vastly exceeds any amount supportable under maritime law. And for reasons including those discussed in Judge Bea's dissent, App. 292a-293a, the award also vastly exceeds the maximum permitted by due process.

STATEMENT OF THE CASE

A. Factual Background

1. On March 24, 1989, the EXXON VALDEZ, a modern, well-equipped tanker fully loaded with crude oil, ran aground on Bligh Reef in Prince William Sound, Alaska. The immediate cause of the grounding was the failure of Third Mate Cousins to turn the vessel away from the reef, the last step in a routine maneuver to avoid ice in the shipping lanes. The vessel's master, Captain Hazelwood, instructed Cousins when and where to make the turn, but then left the bridge—a violation of Exxon's explicit policy requiring two officers to be present. For reasons never explained, Cousins failed to make the turn as instructed, and the ship went aground, spilling 258,000 barrels of oil. App. 61a-64a.

Upon learning of the grounding, Exxon dispatched an emergency response team which successfully prevented the discharge of the remaining 80 per cent of the vessel's cargo. RER 287-91. Exxon acknowledged responsibility for the spill and initiated a massive cleanup, ultimately spending $2.1 billion on that effort—almost double Exxon's annual profit at that time from all petroleum operations in the United States. App. 64a; RER 312; DX-6347. Exxon also established a claims program which paid, without litigation and mostly without requiring releases, over $300 million to compensate commercial fishermen, seafood processors, and other persons claiming that the spill had disrupted their businesses. App. 64a. And Exxon undertook comprehensive remedial measures to reduce the risk of future shipping accidents and spills. ER 108-09.

2. The State of Alaska sued Exxon for compensatory and punitive damages as *parens patriae*, and the United States indicted Exxon for violating the CWA, 33 U.S.C. § 1311(a), and other statutes. ER 1, 88. Both governments also sued Exxon for natural resource damages under CWA § 1321(f). App. 70a. Exxon resolved all these claims in a federal consent decree and plea agreement entered in October 1991. Exxon paid the governments $900 million for natural resource damages, and they dismissed or released all pending or potential claims asserted on behalf of the general public, including Alaska's *parens patriae* claim for punitive damages. App. 65a; ER 242A. Exxon also pled guilty to certain misdemeanors, including negligent discharge of oil in violation of CWA § 1319(c)(1)(A), and was sentenced under 18 U.S.C. § 3571(d) to pay a fine of $150 million and restitution to the United States and Alaska of $100 million. App. 103a. The fine was remitted to $25 million in recognition of Exxon's exemplary post-spill conduct, including its extensive remedial measures and payment of $2.1 billion for cleanup and $300 million to compensate private losses. App. 103a; ER 101-13. The net sentence of $125 million exceeded the total of all fines previously imposed by the United States in environmental cases. ER 124. Exxon's pretrial payments, settlements, and fines exceeded $3.4 billion. App. 100a.

At the 1991 sentencing hearing, the Attorney General's representative affirmed that the criminal sentence by itself "clearly" achieved "adequate deterrence." ER 155-56. The Attorney General of Alaska concurred, stating that a $150 million fine was "a number which the State can hold up to other polluters … and that certainly should be sufficient … to give pause to those who do not show the proper regard for the Alaska environment." ER 169. The district court agreed, noting that it "says to others in the industry … that you can expect fines that are off the chart in response to oil spills that are off the chart[,] … [b]ut it also says … [that] if you live up to your legal responsibilities [after such a spill] … you will get credit for it." The court found that "Exxon has …

been a good corporate citizen[,] … sensitive to its environmental obligations[,] … [who] immediately after the spill … stepped forward with both its people and its pocketbook and did what had to be done in difficult circumstances, … [and] will do its utmost to prevent another [spill]." ER 194-97. The court approved the sentence as containing both "an appropriate amount of punishment" and "an appropriate element of encouragement of respect for the law." App. 103a; ER 197.

B. Proceedings Below

1. The punitive damage claims were tried in 1994 together with claims by commercial fishermen who alleged that the spill had caused greater economic losses than Exxon compensated in the claims program. (The claims were mostly for business interruption—the State closed the fisheries to protect the market reputation of Alaska salmon.) To allow resolution of all punitive damage claims in a single trial, the district court certified a class of all persons who "possess[ed] or assert[ed]" a punitive damage claim arising from the spill. App. 126a. The class asserted punitive damage claims under federal maritime law against Captain Hazelwood individually and also against Exxon, Hazelwood's employer and the owner of the vessel and cargo. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1333, 1441, and 1442.

For purposes of the trial, Exxon stipulated that the two Exxon entities could be treated as one. Exxon also stipulated that Hazelwood had been negligent in leaving the bridge in violation of Exxon's two-officer policy. Plaintiffs contended that Hazelwood had been *reckless*—the required predicate for punitive damages—both by leaving the bridge and by allowing alcohol to impair his judgment before that. Exxon disputed these contentions, but if Hazelwood was impaired on duty, that too violated Exxon's explicit policy. App. 89a.[2]

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[2] In separate criminal proceedings, an Alaska jury convicted Hazelwood of negligently spilling oil, but *acquitted* him of the more serious charge of operating the vessel while impaired by alcohol. ER 43-45.

As the master of a tanker, Hazelwood was a "managerial officer or employee" of Exxon as the jury instructions defined that term. App. 300a. Over Exxon's objection, the district court instructed the jury that "the reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." App. 300a. The district court further instructed the jury, again over Exxon's objection, that this was so "whether or not those acts are contrary to the employer's [established and adequately enforced] policies or instructions." App. 301a.

Plaintiffs also argued to the jury that Hazelwood was an alcoholic, Exxon knew it, and Exxon had been independently reckless for allowing Hazelwood to serve as master and not supervising him sufficiently. The evidence on all these points was highly disputed. The Ninth Circuit acknowledged that based on the record the jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk." App. 88a-89a. But the district court's instructions made it unnecessary for the jury to reach these questions.

2. In the first phase of the trial, the jury returned a verdict that Hazelwood had been reckless. Having been instructed that any reckless conduct of Hazelwood was "held in law" to be reckless conduct of Exxon whether or not contrary to Exxon's policies or instructions, the jury also duly returned a verdict that Exxon had been reckless. App. 300a. In the next phase, the jury substantially rejected the fishermen's claims for $800 million in damages based on low fish prices, finding that the spill did not cause prices to decline after 1989. ER 460-62. (Exxon's proof showed that a worldwide salmon glut drove down prices.) After offsetting prior claims payments, the district court entered judgment for $19.6 million in compensatory damages. App. 67a. A state court judgment added $700,000 more, for a total of $20.3 million. App. 32a.

In the final phase of the trial, made necessary by the verdicts on recklessness, the jury was asked to determine what amount of punitive damages should be awarded against Hazelwood and Exxon. The district court instructed the jury that in determining these amounts, it should not consider harm to the environment because "[a]ny liability for punitive damages relating to those harms was resolved" in the government proceedings, App. 96a-97a, a result in any case required by res judicata. App. 73a. After hearing evidence about Exxon's net worth and income, the jury awarded punitive damages of $5000 against Hazelwood and $5 *billion* against Exxon. The district court denied Exxon's post-trial motions, App. 224a-280a, and entered judgment for the full $5 billion punitive award. ER 781. Exxon appealed.

3. The Ninth Circuit issued its first opinion in November 2001. App. 57a. The court rejected Exxon's arguments that no punitive damages were authorized, but with significant caveats. On the propriety of the jury instructions authorizing vicarious punitive damages liability, the court pronounced itself bound by its own earlier decision in *Protectus Alpha Nav. Co.* v. *North Pac. Grain Growers*, 767 F.2d 1379 (9th Cir. 1979), but acknowledged that *Protectus* conflicted with the historic maritime-law rule as well as with modern maritime decisions of three other circuits. App. 85a-86a & n.84. Addressing whether judge-made maritime remedies could be added to those contained in the Clean Water Act, the court acknowledged that the question was "serious," "not without doubt," and "close." App. 75a, 77a. And while the court would not accept Exxon's argument that maritime law and due process bar punitive damages when prior sanctions and liabilities have fully vindicated any reasonable public interest in punishment and deterrence, it acknowledged that the argument had "force as logic and policy." App. 68a.

The Ninth Circuit did, however, hold that a $5 billion award could not stand. Applying the due process guideposts announced in *BMW of North America* v. *Gore*, 517 U.S. 559 (1996), the court held that Exxon's conduct was not suffi-

ciently reprehensible to justify so high an award because the spill was not intentional, punishment was for economic injuries only, "fuel for the United States at moderate expense has great social value," and the company had spent billions to mitigate harm in the aftermath of the accident. The court further held that pretrial claims payments and settlements generally should not be included in the harm used to analyze the ratio between punitive and compensatory damages, and that a high ratio was unnecessary for deterrence because the $3.4 billion Exxon had already paid constituted a "massive deterrent" independent of any punitive damages. Finally, the court noted that the case was "unusually rich" in comparable penalties—including the $125 million criminal sanction deemed sufficient punishment and deterrence by the Attorneys General of the United States and Alaska—none of which supported a punitive award of $5 billion. App. 95a-104a.[3]

4. The Ninth Circuit remanded the case for the district court to determine the size of an appropriate remittitur. The district court, however, declined to follow the Ninth Circuit's reasoning. It reduced the award to $4 billion, but asserted at the same time that it saw no "principled" basis for any reduction at all. App. 222a-223a. Exxon again appealed, but before any briefs were filed, the Ninth Circuit *sua sponte* remanded the case for reconsideration in light of this Court's decision in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). This time the district court *increased* the award to $4.5 billion, asserting that *State Farm* presumptively validated punitive damages of up to nine times the total harm (which the district court calculated to be $500 million). App. 179a-180a. Exxon appealed for the third time.

5. The Ninth Circuit issued its second opinion in December 2006. App. 1a. The court again reviewed the award under

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[3] The court implicitly assumed that the Fifth Amendment due process analysis applicable to this federal-law judgment would be at least as rigorous as the Fourteenth Amendment due process analysis applicable to the state-court judgment in *Gore*. Exxon agrees.

the *Gore* guideposts, but this time with a different emphasis seemingly aimed at rationalizing a multibillion dollar award. On reprehensibility, for example, the court emphasized that the spill had physically endangered the crew and rescuers of the vessel, even though no one was injured and none of the crew or rescuers was a plaintiff in the lawsuit. App. 26a-28a. On ratio, the court repudiated its earlier statement that pretrial payments and settlements should not be included in the harm, stating incorrectly that the facts of *State Farm* mandated this change of view. App. 32a-35a, 287a. Accepting the district court's calculation of $500 million in total losses—and declining to follow *State Farm*'s admonition that when "compensatory damages are substantial," even a 1:1 ratio of punitive to compensatory damages may "reach the outermost limit of the due process guarantee," 538 U.S. at 425—the court held that due process would permit a 5:1 ratio because the tort fell within the "mid range" of reprehensibility. App. 31a-40a. By this reasoning, the court upheld an unprecedented punitive award of $2.5 billion. Although this award was billions more than the applicable (and substantial) legislatively enacted civil penalties for oil spills of this magnitude—the third *Gore* guidepost—the court opined that *State Farm* had reduced this guidepost to a mere check on whether legislatures dealt with similar misconduct "seriously." App. 40a-41a. Finding that legislative penalties for oil spills were serious, the court held this guidepost satisfied. Judge Browning dissented, and would have affirmed the full award. App. 42a-56a.

6. Exxon filed a timely petition for panel rehearing and rehearing *en banc*. The court denied it on May 23, 2007, amending its decision to remove its incorrect statement about the facts of *State Farm*, but not otherwise changing its result or attempting to justify the repudiation of its prior decision. App. 285a-286a. Two judges filed dissents from the denial of *en banc* review. Judge Kozinski dissented on the ground that the court had unjustifiably departed from 200 years of maritime precedent prohibiting vicarious punitive damages, in

conflict with every other circuit that had considered the issue. App. 287a-292a. Judge Bea agreed with Judge Kozinski that punitive damages should not have been awarded against Exxon and dissented on the additional ground that a $2.5 billion award was excessive under *State Farm.* App. 292a-293a.

REASONS FOR GRANTING THE PETITION

This record punitive award[4] unquestionably raises important issues of constitutional dimension. The Ninth Circuit's emphasis on concededly unrealized dangers to non-parties, its disregard of *State Farm*'s admonition against high punitive multipliers in cases with substantial compensatory damages, and its trivialization of the third *Gore* guidepost all raise important and recurring due process questions on which this Court's guidance is urgently needed. *See* Part III.B *infra*.

But the award raises equally important issues under maritime law. Federal courts have a "unique role in admiralty cases," since the "need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998). In maritime cases, federal courts have the opportunity and duty to determine the rules of maritime law, consistent with the policies that underlie the grant of admiralty jurisdiction, in the same way that state courts determine the common law of their states. *Norfolk Southern Ry. Co.* v. *Kirby*, 543 U.S. 14, 22-25 (2004); *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 207-08 (1994); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

Parts I, II, and III.A of this petition, therefore, do not invoke this Court's authority as the final judge of constitutional questions but rather its "traditional responsibility to

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[4] The largest award previously affirmed by a federal appellate court under U.S. law, state or federal, is $58.5 million—a fortieth of this one. *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207 (10th Cir. 2000). The largest for an unintentional tort is $12.5 million, for wrongful death. *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991).

vindicate the policies of maritime law." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 396-97 (1970). This Court has the duty to clarify, shape, and ultimately declare, like a common-law court, the uniform general maritime law applicable in the United States to the issue of punitive damages. The decision below creates clear circuit conflicts on maritime-law questions—the permissibility of vicarious punishment, the availability of punitive damages when Congress has not authorized them in applicable maritime statutes, and the substantive maritime-law limits on the size of punitive awards—that are of immense importance to the maritime community, and have significance extending far beyond this case or even oil spills generally.

I. The Court Should Grant Certiorari to Resolve the Conflict in the Circuits on Whether Maritime Law Permits Vicarious Punitive Damages.

As acknowledged by the panel and detailed in Judge Kozinski's dissent, the Ninth Circuit's decision to uphold vicarious punitive liability based on the misconduct of a vessel's master, contrary to the shipowner's policy and hostile to its vital interests, departs from the maritime-law rule to which every other circuit confronting this issue adheres. In *The Amiable Nancy*, 16 U.S. 546 (1818), the Court, speaking through Justice Story, its leading maritime-law scholar, held that punitive damages may not be imposed against the owner of a vessel for tortious acts of the master and crew unless the owner "directed," "countenanced," or "participated in" the wrong. *Id.* at 559. The Court reiterated that principle in *Lake Shore & M.S. Ry. Co.* v. *Prentice*, 147 U.S. 101 (1893), a non-maritime case, and declared the *Amiable Nancy* rule to be in accord with "the preponderance of well-considered precedents." *Id.* at 107-17. For 150 years, federal courts faithfully applied the rule, and refused vicarious punitive damages in maritime cases. *E.g.*, *The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896); *Pacific Packing & Nav. Co.* v. *Fielding*, 136 F. 577, 579-80 (9th Cir. 1905).

Outside the Ninth Circuit, that rule remains. In *United States Steel Corp.* v. *Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), the Sixth Circuit, emphasizing the maritime reality that a ship's master must have full authority to direct operations at sea, held that "punitive damages are not recoverable against the owner of a vessel for the acts of the master unless it can be shown that the owner authorized or ratified the acts," or that "the acts … were those of an unfit master and the owner was reckless in employing him." *Id.* at 1148. In *In re P&E Boat Rentals*, 872 F.2d 642 (5th Cir. 1989) (*en banc*), the Fifth Circuit held 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." *Id.* at 652. And in *CEH, Inc.* v. *F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), the First Circuit confirmed that maritime law bars imposition of punitive damages against an employer for the misconduct of a vessel's master absent "some level of culpability" on the part of the employer. *Id.* at 705.

The Ninth Circuit, by contrast, abandoned the maritime rule against vicarious punitive damages in *Protectus*, *supra*, a 1985 case in which that court chose to apply instead the new rule of vicarious liability for acts of "managerial" employees proposed by the authors of the Restatement (Second) of Torts § 909. 767 F.2d at 1386. No other circuit has followed *Protectus*, and the Fifth and First Circuit decisions in *P&E Boat Rentals* and *CEH* expressly rejected it. In the decision below, however, the panel declared itself "bound by *Protectus*," App. 86a, and confirmed the Ninth Circuit's conflict with the First, Fifth, Sixth, and Seventh Circuits on this important point of maritime law. App. 85a n.84.

The panel below suggested that Exxon was not in the same position as the owners of THE AMIABLE NANCY because the jury might have found that Exxon was independently reckless for not relieving Captain Hazelwood of his command. App. 83a. But as the court tacitly acknowledged by not ending its discussion there, that point is legally irrele-

vant in light of the instructions to the jury. The court conceded that a jury verdict as to Exxon's independent recklessness could have gone either way, on the basis of highly disputed evidence. App. 88a-89a. The instructions, however (quoted *supra* at 6), *required* the jurors to find Exxon reckless if they found Captain Hazelwood reckless, whether or not they reached any conclusion about Exxon's independent recklessness.[5] As this Court's decisions make clear, when it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed." *Greenbelt Co-op Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 11 (1970); *see Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459-60 (1993). The conflict with the other circuits is thus squarely presented.

The Ninth Circuit's other stated reasons for abandoning the traditional maritime rule do nothing to explain away or lessen the decisional conflict. The panel relied heavily on this Court's holding in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991), that vicarious punitive damages are not unconstitutional, but the question is not whether the *Constitution* permits such liability. It is whether *maritime law* does so. The answer turns on the maritime-law precedents, not on cases interpreting the outer limits of due process.

Protectus rested on the idea that "no reasonable distinction can be made between the guilt of the employee … and the guilt of the corporation." 767 F.2d at 1386. But as the other circuits have recognized, whatever the merits of that idea when an employee's acts implement company policy, it is self-evidently untrue when, as here, the employee's act is forbidden by his employer and hostile to its vital interests. *Fuhrman*, 407 F.2d at 1148; *P&E Boat Rentals*, 872 F.2d at 651-52. The *Protectus* panel also asserted that the Restate-

[5] In fact, jurors told the press they could not determine if Hazelwood was impaired by alcohol, they found him reckless for leaving the bridge, and they followed their instructions by imputing his conduct to Exxon. ER 638-39, 652-54.

ment's provision for purely vicarious punitive damages "better reflects the reality of modern corporate America." 767 F.2d at 1386. Since no evidence was taken about the "reality of modern corporate America," this appears to mean simply that the *Protectus* panel thought changing maritime law to adopt the Restatement was a progressive thing to do. But as Judge Kozinski pointed out, "nothing has changed in the relationship between ship owner and captain that would justify importing this innovation into maritime law." App. 288a n.1.

Moreover, courts take very different positions as to whether vicarious punitive liability is permissible even in land-based cases. Indeed, since the decision in *Protectus*, *this Court itself* has expressly rejected the Restatement position as a matter of federal civil rights policy, *see Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 539-46 (1999), just as federal appellate courts other than the Ninth Circuit have rejected it as a matter of federal maritime policy. In *Kolstad*, the Court held that implementation and enforcement of good faith policies to prevent misconduct is a defense to vicarious punitive damages for acts of managerial employees. The instructions in this case stated the opposite.

The conflict among the circuits is not only stark, it is of great importance to maritime commerce both nationally and internationally. As Judge Kozinski observed, App. 290a-291a:

> The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction—a staggeringly huge area—to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves … through careful hiring practices. Accidents at sea happen—ships sink, collide and run aground—often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they

> won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong ….
>
> … Moreover, the effects of this opinion are not limited to shippers and docks based in the Ninth Circuit: The shipping business knows no circuit, or even national, boundaries. Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

II. The Court Should Grant Certiorari to Resolve the Conflict in the Circuits on Whether Maritime Law Permits Judge-Made Remedies When Congress Has Not Authorized Them in Applicable Statutes.

The decision below further contravenes decisions of this Court and other circuits on the important maritime-law question of whether judges may create punitive damages remedies for conduct already governed by a statutory remedial scheme that does not include punitive damages. In the Clean Water Act (CWA), Congress specifically addressed the punishment and deterrence of maritime oil spills by enacting both criminal and civil penalties. 33 U.S.C. § 1319(c)-(d) (criminal and civil penalties for negligent or intentional discharge of oil in violation of § 1311(a)); *id.* § 1321(b)(6)(B) (alternative civil penalties for unauthorized discharge of oil). Supplemented by 18 U.S.C. § 3571(d) (authorizing criminal fines of up to double third-party pecuniary losses), the penalties are substantial. Indeed, the enforcement of these provisions by the federal government led to the record fine imposed on Exxon in this case. The CWA also creates limited liability to the federal government for cleanup costs and natural resource damages, but eliminates the liability limitation in cases of "willful misconduct within the privity and knowledge of the shipowner." 33 U.S.C. § 1321(f). But the

CWA does not authorize private punitive damages, even for willful misconduct.[6]

The CWA thus embodies a legislative judgment that cleanup costs, natural resource damages, and potential criminal and civil penalties provide sufficient punishment and deterrence for oil spills. As such, it implicates the rule—established in an unbroken line of cases beginning with *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618 (1978), and *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), and continuing with *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), and *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116 (1998)—that when Congress has spoken to an issue of federal tort law, the statute (not judge-made federal common law) determines the scope of the available remedies.

In *Mobil*, this Court held that the Death on the High Seas Act (DOHSA) precluded loss of society damages under maritime law for a death on the high seas because Congress had "limited survivors to recovery of their pecuniary losses." 436 U.S. at 623. The Court rejected the contention that judge-made maritime law could supplement the statutory remedy provided in DOHSA, holding that "Congress has struck the balance for us." *Id.* "In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.* at 625.

In *Milwaukee*, this Court held that the CWA's "comprehensive regulatory program" for water pollution, which prohibits the unauthorized discharge of any pollutant, displaced

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[6] The CWA provisions applicable to this oil spill are reproduced at App. 294a. After the spill, Congress increased the statutory civil penalties for such spills—subject to reduction on account of mitigation efforts, prior penalties, etc., *see* § 1321(b)(7)-(8), enacted as part of the Oil Pollution Act of 1990—but still did not authorize private punitive damages.

a non-maritime federal common-law nuisance remedy for interstate water pollution. 451 U.S. at 317-26. Citing *Mobil*, the Court held that when Congress has "spoke[n] directly to a question," judge-made federal law may not supplement the remedies Congress has chosen. *Id.* at 315. It further held that "when the question is whether federal statutory or federal common law governs," there is no presumption against pre-emption, *contrary* to the rule for state law. Rather, "we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 316-17; *see also id.* at 315 ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem.").

In *Sea Clammers*, this Court held that *Milwaukee* precluded a common-law nuisance claim for damage to the fishing, clamming, and lobster industries allegedly caused by ocean pollution in violation of CWA permits. 453 U.S. at 21-22. And in *Miles*, the Court held that a survival action by the heirs of Jones Act seamen under general maritime law could give no remedies not provided by the Jones Act. 498 U.S. at 32 ("It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action"). The unanimous decision in *Miles* emphasized not only the subordinate role of judge-made federal law in matters addressed by Congress, but also the strong maritime policy of uniformity:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will …. Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created.

498 U.S. at 36-37. This Court most recently reaffirmed these principles in *Dooley*, declining, again unanimously, to approve a general maritime law survivorship remedy for pre-

death pain and suffering damages not recoverable under DOHSA. 524 U.S. at 121-24.

Federal circuit courts outside the Ninth Circuit have faithfully applied these principles. *E.g.*, *Conner* v. *Aerovox, Inc.*, 730 F.2d 835, 838-42 (1st Cir. 1984) (*Milwaukee* and *Sea Clammers* equally foreclose judge-made *maritime*-law nuisance claims for pollution damage to fishing grounds); *In re Oswego Barge Corp.*, 664 F.2d 327, 339-44 (2d Cir. 1981) (CWA forecloses maritime-law negligence claims for government cleanup costs exceeding government's maximum recovery under the CWA). And multiple circuits have held that these principles bar recovery of *punitive* damages under judge-made maritime law when federal statutes do not authorize them. *E.g.*, *Miller* v. *American President Lines*, 989 F.2d 1450, 1454-59 (6th Cir. 1993) (no punitive damages for survivors of Jones Act seamen in maritime wrongful death claim); *Wahlstrom* v. *Kawasaki Heavy Indus.*, 4 F.3d 1084, 1091-94 (2d Cir. 1993) (no punitive damages for survivors of non-seamen killed in territorial waters); *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (no punitive damages for injured Jones Act seamen in maritime unseaworthiness claim); *Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1500-13 (5th Cir. 1995) (*en banc*) (no punitive damages for seamen for shipowner's failure to pay maintenance and cure). As Judge Kozinski accurately noted, the modern cases reaffirm maritime law's historic reluctance to impose punitive damages at all. App. 290a; *see* note 8 *infra*.

By contrast, the Ninth Circuit here refused to apply these principles despite its acknowledgement that the CWA provides a "carefully calibrated set of civil penalties for oil spills, generally with ceilings on penalties, even if the spills were grossly negligent or willful." App. 74a. But the panel's efforts to distinguish decisions of this Court and the other federal circuits do not withstand scrutiny. The opinion below brushed aside *Miles* as pertinent only to the "specialized and traditionally limited" tort of wrongful death. App. 75a. In doing so, the opinion not only ignored that this Court, in

Milwaukee and *Sea Clammers*, applied the same rule of deference—originally drawn from *Mobil*—to federal pollution statutes, but put the Ninth Circuit in conflict with other circuits (cited above) that have applied *Miles* to bar judge-made punitive damages for non-death maritime-law claims.

The Ninth Circuit also purported to distinguish *Sea Clammers* (and *Conner*) on the ground that the judge-made claims in those cases would have interfered with administrative determinations of the permissible amount of pollution. App. 77a. But the operative principle is not merely that judge-made federal law may not interfere with federal administrative determinations. The operative principle—in all the cases cited above—is that when Congress has spoken to an issue, federal courts applying judge-made federal law are not free to expand the remedies provided by Congress so as to disrupt the balance Congress has struck. In the CWA, Congress plainly spoke to the issue of punishment and deterrence of oil spills by enacting both criminal and civil penalties and various special liability provisions. A judge-made punitive damages remedy literally billions of dollars higher than the penalties Congress has provided not only disrupts the balance Congress has struck but *obliterates* it.

Nor is there any merit to the Ninth Circuit's novel suggestion that Congress should be deemed to have intended the CWA to punish only "public" as distinguished from "private" harm from oil spills. App. 77a. Nothing in the CWA suggests or supports such a distinction, and indeed, the provisions of 18 U.S.C. § 3571(d) used to authorize the record criminal fine in this case gauged the amount of the fine by reference to the losses incurred by private parties. Moreover, if the court meant that private punitive damages are intended to serve anything other than *public* interests, its opinion fundamentally misconceived both the nature and purpose of punitive damages. As Justice Kennedy has written:

> [Punitive damages plaintiffs] act as private attorneys general to effect the deterrence and retribution functions of [punitive damages]. So far is this from being

> a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest.

In re Paris Air Crash, 622 F.2d 1315, 1319-20 (9th Cir. 1980) (Kennedy, J.); *see State Farm*, 538 U.S. at 417 (punitive damages "serve the same purpose as criminal penalties"). Under the cases cited above, because Congress addressed the public interest in punishing and deterring oil spills in a duly enacted statute, federal courts are not free to expand on the remedies Congress has provided by awarding punitive damages under judge-made maritime law.[7]

The Ninth Circuit acknowledged that this question was "serious," "not without doubt," and "close." App. 75a-77a. Its resolution of the issue, however, departs from the principles established in the decisions of this Court and other circuits. For the same reasons expressed in Judge Kozinski's dissent on vicarious punishment, the issue has immense significance for the maritime community, not only in pollution cases but in every other area in which the issue of statutory

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[7] The Ninth Circuit noted that some CWA provisions expressly state that they are not intended to affect other remedies. App. 76a (citing CWA §§ 1321(o)(1) and 1365(e)). Section 1321(o)(1), however, provides only that that "[n]othing in this section"—*i.e.*, § 1321, which establishes civil penalties for oil spills and potentially limits liability to the government for cleanup costs and natural resource damages—"shall affect or modify in any way the obligations of any owner or operator of any vessel … for damages to any publicly owned or privately owned property resulting from a discharge of … oil." On its face, this provision states only that the section does not affect liability for "damages to … property" from spilled oil. It says nothing about *punitive* damages. Section 1365(e) is part of the CWA's "citizen suit" provision. It provides that "[n]othing in this section"—*i.e.*, the citizen suit provision—"shall restrict any right which any person … may have … to seek any other relief." In *Milwaukee*, this Court confirmed that § 1365(e) means only that the citizen suit provision (*i.e.*, "this section") does not in and of itself revoke other remedies. 451 U.S. at 328-29. "It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions." *Id.* Neither section suggests that Congress intended to authorize federal courts to create punitive damages remedies dwarfing the CWA's careful scheme of criminal penalties, civil penalties, and liability limits.

displacement of judge-made punitive damage claims arises. This Court should grant certiorari to confirm that judge-made punitive damages remedies are not available when Congress has already addressed the problem.

III. The Court Should Grant Certiorari to Remedy Confusion in the Lower Courts and Make Clear the Permissible Size of Punitive Damage Awards under Maritime Law and under the Due Process Clause.

A. Maritime Law. In this maritime case, the Ninth Circuit gave no consideration to how the substantive maritime law should affect the permissible size of any punitive damage award. Despite Exxon's express request, the Ninth Circuit affirmatively declined to perform its duty as a maritime court to effectuate the policies of maritime law, to articulate based on those policies the maritime-law rules that should govern punitive damages, and to reduce the award accordingly. It held that the only applicable limit on the size of the award was the constitutional one. App. 68a-70a, 90a-91a. The petition should be granted so that this Court, as the ultimate arbiter of maritime law, can articulate and clarify the appropriate standards for maritime punitive damage awards.

The Ninth Circuit's conclusion that only the Constitution limits the size of punitive damage awards was contrary to decisions of this Court and of other circuits. In *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), the Court held that common-law judicial review of the size of punitive damage awards is a vital part of the traditional justification for allowing juries to make such awards, and that it cannot be omitted consistent with procedural due process. *See also Gore*, 517 U.S. at 598 (Scalia, J.). As the Second Circuit has said:

> [E]ven where the punitive award is not beyond the outer constitutional limit marked out … by the three *Gore* guideposts, we retain an appellate responsibility to review punitive awards for excessiveness in applying federal statutes …. [T]he appellate function must be exercised, and review of punitive awards for exces-

> siveness is an especially appropriate context in which the reflective role of a court of appeals follows the often dramatic arena of a trial court.

Mathie v. *Fries*, 121 F.3d 808, 816-17 (2d Cir. 1997); *see Lee* v. *Edwards*, 101 F.3d 805, 809 (2d Cir. 1996); *Gaffney* v. *Riverboat Services of Indiana, Inc.*, 451 F.3d 424, 464 & n.39 (7th Cir. 2006); *see also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 458 n.24 (1993) (non-constitutional state law reasonableness requirements).

Individual Justices have also emphasized the power and duty of common-law courts to make rules governing punitive damages. *E.g.*, *Haslip*, 499 U.S. at 42 (Kennedy, J.) ("We do not have the authority, *as do judges in some of the states*, to alter the rules of the common law …. *Were we sitting as state court judges*, the size and recurring unpredictability of punitive damage awards might be a convincing argument to reconsider those rules."); *TXO*, 509 U.S. at 472 (1993) (Scalia, J.) ("State … courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime."); *State Farm*, 538 U.S. at 438 (Ginsburg, J.) ("state high courts" could "cap punitive damages"). In maritime cases, however, this Court performs the same function as state high courts do when ruling on state common law. This case thus offers the Court an ideal opportunity to lead by example and show how standards for punitive damages awards should operate in practice.

The appropriate standards for the award of punitive damages under maritime law of course depend on the policies underlying the grant to this Court of admiralty and maritime jurisdiction, U.S. Const. Art III, § 2, cl.1, and the ensuing responsibility to shape maritime law. This Court has reiterated that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Kirby*, 543 U.S. at 25; *accord Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990); *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674 (1982). Maritime commerce entails risks not found on land. Accidents can never be avoided entirely, and mariners must

often make difficult decisions. Therefore "[t]hrough long experience, the law of the sea … is concerned with … limitation of liability." *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249, 270 (1972). This Court has also reiterated that maritime law demands the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. 558, 575 (1874); *American Dredging Co.* v. *Miller*, 510 U.S. 443, 451 (1994). And this Court has referred from time to time to admiralty's policies of fair compensation for injury, promotion of settlement, and judicial economy. *Moragne*, 398 U.S. at 387; *McDermott*, 511 U.S. at 211.

None of these policies supports enormous punitive damages.[8] Such awards penalize maritime commerce rather than protecting it; they expand rather than limit liability; they are unpredictable and inconsistent; they have nothing to do with compensation for actual injury; and they impede rather than promote settlement and judicial economy. Because of the unique role of federal courts in shaping maritime law, federal courts are the "proper institutions of our society to undertake th[e] task," *TXO*, 509 U.S. at 472 (Scalia, J.), of specifying, based on maritime policies, the permissible size of maritime punitive damages. The Ninth Circuit's inability to discern or even acknowledge any substantive maritime-law principles limiting the size of this extraordinary punitive award demonstrates the urgency of the need for this Court to articulate such limits.

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[8] Indeed, maritime law has traditionally restricted or disallowed punitive damages. *Guevara*, 59 F.3d at 1508 n.11; *CEH*, 70 F.3d at 699-702 Prior to this case, punitive damages were never awarded for an oil spill, while the largest maritime punitive damages award affirmed by a federal appellate court, in *Protectus*, was $500,000, or 1/14 of the $7 million in compensatories, 767 F.2d at 1381, for a deliberate act that resulted in a death, in stark contrast to the award here, for lost commercial income from an unintentional spill that caused no personal injury. App. 98a.

Here the answer is clear. The decision below to uphold a $2.5 billion punitive award is contrary to every maritime policy that this Court or other federal courts have ever recognized. Yet the Ninth Circuit did not even consider whether the award was consistent with those policies or with maritime law. This case accordingly provides a particularly suitable vehicle for this Court to hold that federal courts considering maritime punitive damage awards must determine whether such awards are consistent with the policies of maritime law. Exxon submits that a $2.5 billion punitive damages award *cannot* be a proper exercise of the federal courts' authority to make maritime law when, as here, all the following conditions obtain.

• *Prior criminal and civil sanctions and other payments have already vindicated any reasonable public interest in punishment or deterrence*. In *Haslip*, this Court recognized that the only proper purpose of punitive damages was to vindicate the public interest in retribution and deterrence. 499 U.S. at 19; *accord Gore*, 517 U.S. at 568. In *State Farm*, the Court recognized that punitive damages should be awarded only when compensatory damages are not sufficient "to achieve punishment or deterrence." 538 U.S. at 419; *see Gore*, 517 U.S. at 584-85 (requiring consideration of whether "less drastic remedies could be expected" to achieve punishment and deterrence). The Ninth Circuit itself acknowledged the "force and logic" of Exxon's argument that punitive damages should be limited to what is necessary to achieve deterrence and punishment, and that such damages should be precluded when $3.4 billion in prior payments, liabilities, and fines achieved "massive deterren[ce]," and when the Attorneys General of both the United States and Alaska, the authorized representatives of the *public* interest in punishment, agreed that the record fine imposed was sufficient to achieve appropriate punishment. App. 68a. In such circumstances, punitive damages achieve nothing but overkill; they pile liability upon liability to give a windfall to plaintiffs already fully compensated. The strong maritime

policies of uniformity, predictability, and avoiding undue burdens on maritime commerce compel the conclusion that, as a matter of maritime law, no additional punitive damages are reasonable in these circumstances.

• *Compensatory damages are substantial.* Many state courts and state legislatures have now imposed caps on punitive damages awards, generally by requiring that they not exceed a fixed multiple of compensatory damages. *See Gore*, 517 U.S. at 615-16 (Ginsburg, J.). In *State Farm*, this Court stated that when compensatory damages are substantial, "then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *See* Part III.B.1 *infra*. Because the Court was interpreting the Constitution in *State Farm*, it did not make this principle into a rule applicable in every situation. But if a 1:1 ratio when damages are substantial can reach the "outer limit" of what the *Constitution* permits, surely that ratio represents the most the Court should permit when it is not marking the outer boundary permissible to a sovereign state in the pursuit of its own policies, but determining for itself, as the ultimate arbiter of maritime law, the correct rule based on federal maritime law and policy. Accordingly the same considerations of "size and recurring unpredictability" that have led state courts and legislatures to impose caps should lead the Court to set a limit here. *See Haslip*, 499 U.S. at 42 (Kennedy, J.). Enforcing such a limit would of course serve the maritime policies of uniformity and predictability. It would also promote the maritime policies of settlement and judicial economy by creating an incentive for prompt payment of compensation, since compensation paid by way of settlements could no longer be the predicate "harm" for a punitive damages award.

• *The award is greater than the civil penalties Congress has prescribed for the same conduct.* Maritime conduct has long been heavily regulated by Congress, and the statutes in question typically provide an array of substantial civil penalties and other punishments for infractions of what Congress

has ordained. Even if these enactments were not sufficient to preclude punitive damages altogether, *but see* Part II *supra*, respect for the pre-eminent role of Congress in the maritime area means that federal courts should not impose, through punitive damages, civil punishment that results in a total penalty greater than what Congress has prescribed. When Congress has specified by statute the available civil penalties, federal courts are "not free" to impose additional civil punishment, and thereby "to rewrite rules that Congress has affirmatively and specifically enacted," *Dooley*, 524 U.S. at 122. Aligning punitive awards with statutory civil penalties would also serve the maritime-law policies of predictability and uniformity by ensuring that civil punishment for particular conduct does not vary depending on whether it is imposed by public authorities or by juries in private lawsuits.

• *The jury was allowed to consider the net worth of the corporate defendant.* Plaintiffs' evidence in Phase III of the trial was entirely devoted to Exxon's income and net worth, and the jury was instructed it could consider that evidence in determining the proper size of the award. ER 517-19. Punishment on such a theory is clearly contrary to the maritime policies of predictability and uniformity, since it implies that the punishment of different actors for the same conduct may be different. It rests on an economically irrational foundation, a false analogy between the wealth of individuals and corporate net worth, as Judge Easterbrook has explained clearly, *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992), and its effect is to punish companies disproportionately based on size, which is directly contrary to the fundamental maritime-law policy of encouraging adequate capitalization for risky activities. Finally, allowing juries to base punishment on corporate net worth invites them to vent "raw redistributionist impulses," *TXO*, 509 U.S. at 468 (Kennedy, J.), lets them "use their verdicts to express biases," *Honda*, 512 U.S. at 432, and "provides an open-ended basis for inflating awards." *Gore*, 517 U.S. at 591 (Breyer, J.). None of this serves the policies of maritime law.

No case illustrates better than this one the need for simple, reasonable, and easily administered *standards* to constrain unfettered discretion in the award of punitive damages. *See Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007); *Gore*, 517 U.S. at 587 (Breyer, J.). Punishment and deterrence, to the satisfaction of the public representatives of the United States and Alaska, were achieved in 1991. Compensation for natural resource damages and nearly all private damages was accomplished by 1991 or a few years after. Given those facts, no maritime policy and no principle of maritime law supports a punitive damage award. Even if punitive damages may be awarded in maritime cases where Congress has not provided them by statute, *but see* Part II *supra*, it is for the federal courts, under this Court's leadership, to make sure that such awards correspond to what maritime law and policy permit. Because the courts below failed to provide such standards, for the past 15 years the parties have been litigating almost exclusively the propriety of an additional multibillion dollar windfall to private plaintiffs who were fully compensated long ago. The Court should grant the petition and provide the guidance to the lower federal courts that will prevent another such case.

B. Due Process. 1. "[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. And "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. Here Exxon paid $3.4 billion in cleanup costs, natural resource damages, claims payments, fines, and penalties—more than enough to deter and punish anyone for anything. Under the *State Farm* test, no "further sanctions" are necessary "to achieve punishment or deterrence." The compensatory damages awarded came to $20.3 million—a figure that is "substantial" by any standard, especially given that $1 mil-

lion was held "substantial" in *State Farm*, *id.* at 412, 426. The Ninth Circuit calculated "harm" at $500 million and used that as the predicate for punitive damages, yet still thought it appropriate to use a 5:1 "ratio" and approve an award of $2.5 billion. As Judge Bea recognized in his dissent, App. 293a, this is entirely inconsistent with this Court's teaching that in such circumstances a 1:1 ratio "can reach the outermost limit of the due process guarantee." 538 U.S. at 425.[9]

Indeed, the Ninth Circuit's reasoning was exactly backwards. The ratio prong of *Gore* and *State Farm* is not an excuse to multiply large compensatory damages to manufacture an even larger punitive award. Rather, the overriding principle is that an award should be no greater than what is reasonably necessary to punish and deter, and a large compensatory award, like large cleanup costs, fines, and penalties, itself provides punishment and deterrence and thereby *reduces* the need for an award of punitive damages. Taking *Haslip*, *Gore*, and *State Farm* together, the point is clear. Yet many lower courts have ignored this Court's message. They continue to resist the concept that they should give meaningful consideration to what is necessary overall to punish and deter, not simply find a "ratio" based on reprehensibility and

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[9] Some courts have followed *State Farm* faithfully, limiting punitive damages to a 1:1 ratio when compensatory damages are substantial, even in cases of intentional and egregious wrongdoing. *E.g.*, *Estate of Moreland* v. *Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005) (beating and death); *Stamathis* v. *Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004) (defamation and malicious prosecution). Others, like the Ninth Circuit here, have permitted much higher ratios, effectively ignoring *State Farm*. *E.g.*, *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-72 (Fed. Cir. 2003) (3.33:1 ratio based on $15 million in compensatories); *Bogle* v. *McClure*, 332 F.3d 1347, 1359, 1362 (11th Cir. 2003) (4:1 ratio based on $3.5 million in compensatories for emotional distress); *Bullock* v. *Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 176 (Cal. Ct. App. 2006) (33:1 ratio based on $850,000 in compensatories); *Superior Federal Bank* v. *Jones & Mackey Const. Co.*, 219 S.W.3d 643, 653 (Ark. Ct. App. 2005) (17.6:1 ratio based on $175,000 in compensatories).

multiply that by whatever "harm" the plaintiff can persuade them occurred. The cases are in disarray, and there is a clear need for further guidance from the Court. *See* note 9 *supra*.

2. The Ninth Circuit's use of a 5:1 ratio depended on its conclusion that Exxon's conduct was in the "mid range" of reprehensibility. App. 31a. Of course this entire analysis was flawed, since the court assumed that the jury found that Exxon's own conduct, as opposed to Hazelwood's, was reckless. *See* Part I *supra.* There was thus a complete disconnect between the conduct the Ninth Circuit considered reprehensible and the facts the jury's instructions required it to find. For all anyone knows, jurors agreed on *none* of the "facts" the Ninth Circuit recited.

Even leaving that critical defect in reasoning aside, the Ninth Circuit's reprehensibility discussion had few points of contact with this Court's analysis in *Gore*, 517 U.S. at 576-77, or *State Farm*, 538 U.S. at 419. The panel did acknowledge that the spill was not intentional, that there was no fraud or trickery, and that plaintiffs were not financially vulnerable "targets." App. 29a. It conceded that injury to the plaintiffs was solely economic, but invented a "non-economic injury" of "loss of livelihood"—even though no "livelihood" was lost since Exxon voluntarily paid compensation quickly and, as the jury verdict showed, fairly. It conceded that plaintiffs' health and safety were never at risk, but pointed to the theoretical danger to the crew of the EXXON VALDEZ, none of whom was injured, and none of whom was a member of the plaintiff class. App. 26a. This was an improper attempt to "adjudicate the merits of other parties' hypothetical claims" in the guise of reprehensibility analysis, *State Farm*, 538 U.S. at 423, and to punish Exxon for harms, not even real ones, to persons not before the court, *see Philip Morris*, 127 S. Ct 1057. (Remarkably, the Ninth Circuit increased punitive damages against Exxon based on *hypothetical* injury to the VALDEZ crew, whereas if any seamen had *actually* been injured, *Miles*, *Miller*, and *Horsley* would have barred punitive damages based on those injuries, *see* Part II

supra.) The panel pretended that Exxon was guilty of repeated misconduct, App. 29a, although there was clearly only one spill and only one decision to let Hazelwood resume command. Correctly analyzed, reprehensibility here was in a very low range, and did not come close to justifying a multiple of five times $500 million.

3. Finally, the Ninth Circuit's decision conflicts with *State Farm* and *Gore*, and with decisions of other circuits, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 607 (6th Cir. 2006), because it failed to give any weight at all to the third guidepost this Court has identified for assessing the constitutionality of a punitive damages award—comparable civil penalties. According to that guidepost, a reviewing court must give "substantial deference to legislative judgments concerning the appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583. In *State Farm*, the Court made plain that only civil penalties should be considered, not criminal ones. 538 U.S. at 428. Combined federal and state civil penalties for this oil spill could not have exceeded about $80 million, and therefore an award of $2.5 *billion* could not conceivably be justified under this guidepost. Even though it recognized that this case was "unusually rich in comparables," App. 101a, the Ninth Circuit ignored all of them, holding that the third guidepost imposes *no* quantitative constraint on punitive damage awards. According to the Ninth Circuit, this guidepost addresses "only … whether or not the misconduct was dealt with seriously under state civil or criminal laws." App 41a. Having concluded that the state and federal governments take oil spills "seriously," the Ninth Circuit refused to accord any deference whatever to the "legislative judgments concerning appropriate sanctions for the conduct at issue," let alone the "substantial deference" that *Gore* requires. 577 U.S. at 583. In other words, the Ninth Circuit wrote the third guidepost out of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: August 20, 2007