

In The
Supreme Court of the United States

—◆—
EXXON SHIPPING CO. and
EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF FOR THE PACIFIC COAST FEDERATION
OF FISHERMEN'S ASSOCIATIONS AND THE
INSTITUTE FOR FISHERIES RESOURCES, AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

—◆—
GLEN H. SPAIN
Northwest Regional Director
PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS
AND THE INSTITUTE FOR
FISHERIES RESOURCES
PO Box 11170
Eugene, OR 97440-3370
(541) 689-2000

AMY J. WILDERMUTH
Counsel of Record
UNIVERSITY OF UTAH
S. J. QUINNEY COLLEGE OF LAW
332 South 1400 East,
Room 101
Salt Lake City, UT 84112-0730
(801) 581-6833

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTRODUCTION AND INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT.....	3
SUMMARY OF ARGUMENT	10
ARGUMENT.....	11
I. Just as With Land-Based Torts, Punitive Damages May Be Imposed Under Mari- time Law When a Managerial Agent Acts Recklessly.....	11
A. Modern Maritime Communications and Contact with Shore.....	14
B. Modern Maritime Cargo.....	19
C. The Rule Applied in This Case Is Fair to All Maritime Businesses	23
D. Punitive Damages Under Maritime Law for Reckless Acts of a Managerial Agent Will Not Threaten Maritime Business.....	25
II. This Particular Punitive Damage Award Is Permissible Under Maritime Law.....	29
III. The Clean Water Act Poses No Bar To Impos- ing Punitive Damages In This Case.....	32
A. The District Court Did Not Err In Denying Exxon’s Belated Attempt to Claim Clean Water Act Preemption As Untimely	32

TABLE OF CONTENTS – Continued

	Page
B. There Is No Merit to Exxon’s Clean Water Act Preemption Defense.....	37
CONCLUSION	39
APPENDIX	App. 1

TABLE OF AUTHORITIES

	Page
CASES	
<i>A.D.E. Inc. v. Louis Joliet Bank and Trust Co.</i> , 742 F.2d 395 (7th Cir. 1984)	34
<i>American Federal Group, Ltd. v. Rothenberg</i> , 136 F.3d 897 (2d Cir. 1998)	33
<i>American Soc’y of Mech. Eng’rs v. Hydro Level Corp.</i> , 456 U.S. 556 (1982)	13
<i>Askew v. American Waterways Operators</i> , 411 U.S. 325 (1973)	3, 22
<i>Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.</i> , 402 U.S. 313 (1971)	35
<i>Clinton v. Jones</i> , 520 U.S. 681 (1997)	33
<i>Commercial Molasses Corp. v. New York Tank Barge Corp.</i> , 314 U.S. 104 (1941)	28
<i>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001)	30, 32
<i>Coryell v. Phipps</i> , 317 U.S. 406 (1943)	28
<i>Dukes v. Wal-Mart Stores, Inc.</i> , 222 F.R.D. 137 (N.D. Cal. 2004), <i>aff’d</i> , 509 F.3d 1168 (9th Cir. 2007)	15
<i>Exxon Co. U.S.A. v. Sofec, Inc.</i> , 517 U.S. 830 (1996)	11
<i>Exxon Shipping Co. v. Airport Depot Diner</i> , 120 F.3d 166 (9th Cir. 1997)	32
<i>GMAC v. Froelich</i> , 273 F.2d 92 (D.C. Cir. 1959)	24

TABLE OF AUTHORITIES – Continued

	Page
<i>Hartford Accident & Indemnity Co. of Hartford v. Southern Pacific</i> , 273 U.S. 207 (1927).....	28
<i>In re Fine Paper Antitrust Litigation</i> , 685 F.2d 810 (3d Cir. 1982).....	33
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987).....	37
<i>Kimble v. Hoso</i> , 439 F.3d 331 (6th Cir. 2006)	33
<i>Laboratory Corp. of America Holdings v. Chiron Corp.</i> , 384 F.3d 1326 (Fed. Cir. 2004)	33
<i>Lewis v. Lewis & Clark Marine, Inc.</i> , 531 U.S. 438 (2001).....	28
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991).....	30
<i>Robins Dry Dock & Repair Co. v. Flint</i> , 275 U.S. 303 (1927).....	31
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984).....	37
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003).....	30
<i>The Amiable Nancy</i> , 16 U.S. 546 (1818).....	11, 13, 14
<i>Union Oil Co. v. Oppen</i> , 501 F.2d 558 (9th Cir. 1974)	3
<i>United States v. Locke</i> , 529 U.S. 89 (2000).....	5

TABLE OF AUTHORITIES – Continued

	Page
STATUTES, REGULATIONS, AND RULES	
33 U.S.C. § 1321(o)(1) (2002).....	38
33 U.S.C. § 2718 (2002).....	27
46 U.S.C. §§ 30501-35012 (2002)	28
49 C.F.R. § 173.1 (2007).....	20
FED. R. CIV. P. 8	34, 35
FED. R. CIV. P. 16	36
FED. R. CIV. P. 50	36
LEGISLATIVE MATERIALS	
S. REP. NO. 101-94 (1989), <i>reprinted at</i> 1990 U.S.C.C.A.N. 722.....	5
<i>Hearing on H.R. 1465 – To Establish Limita- tions on Liability for Damages Resulting from Oil Pollution, To Establish a Fund for the Payment of Compensation for such Dam- ages, and for Other Purposes Before Sub- comm. on Coast Guard and Navigation, House Comm. on Merch. Marine & Fisheries, 101st Cong. 187 (May 11, 1989)</i>	<i>26</i>
<i>Pending Oil Spill Legislation, Hearing on S. 686, S. 1066, and S. 1223 Before Subcomm. on Envtl. Prot., Senate Comm. on Env't and Pub. Works, 101st Cong. 128 (July 21, 1989).....</i>	<i>26</i>
135 Cong. Rec. H8133 (Nov. 8, 1989).....	27

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
ROBERT GREENHALGH ALBION, THE RISE OF NEW YORK PORT (1939)	19
EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE (2007)	21, 22
EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, HERRING RESTORATION STEERING COMMITTEE BACKGROUND AND STATUS REPORT (2007), <i>available at</i> http://www.evostc.state.ak.us/Universal/Documents/Publications/HerringCommittee-ExecSummary.pdf	8, 9
EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, UPDATE ON INJURED RESOURCES AND SERVICES (2006), <i>available at</i> http://www.evostc.state.ak.us/Universal/Documents/Publications/2006IRSUpdate.pdf	8, 31
EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, EXXON VALDEZ OIL SPILL RESTORATION PLAN (1994), <i>available at</i> http://www.evostc.state.ak.us/Policies/restplan.cfm	7
IRVING E. FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS (1997)	14

TABLE OF AUTHORITIES – Continued

	Page
STEPHEN E. FLYNN ET AL., NAVIGATING THE UNCERTAIN WATERS OF THE 21ST CENTURY: THE ROLE OF NEW TECHNOLOGIES IN BUILDING A COMPETITIVE AND SECURE MARITIME INFRASTRUCTURE (1998), <i>available at</i> http://www.ion.org/ionsite/search/view_abstract.cfm?jp=p&idno=1231	16
L.S. HOWETH, HISTORY OF COMMUNICATIONS: ELECTRONICS IN THE UNITED STATES NAVY (1963), <i>available at</i> http://earlyradiohistory.us/1963hw.htm	14
JOHN J. KIRCHER AND CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE (2d ed. 2000)	12
WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (rev. vol. 2001)	23
INTERNATIONAL MARINE ORGANIZATION, IMO AND DANGEROUS GOODS AT SEA (1996).....	19, 20, 21
JONATHAN L. RAMSEUR, CONGRESSIONAL RESEARCH SERVICE, OIL SPILLS IN U.S. COASTAL WATERS (2007)	5, 22, 30
CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FED. PRAC. & PROC. CIV. 3D (2007)	34, 35
UNITED STATES GENERAL ACCOUNTING OFFICE, ADEQUACY OF PREPARATION AND RESPONSE TO THE EXXON VALDEZ OIL SPILL (1989)	5, 6
RESTATEMENT (THIRD) OF AGENCY (2006)	12
RESTATEMENT (SECOND) OF TORTS (1979)	12, 29

TABLE OF AUTHORITIES – Continued

	Page
Danielle Droitsch, <i>Muddy Waters: Clarifying the Line Between Public and Private Recovery of Natural Resource Damages</i> , VT. J. ENTVL. LAW (1998), http://www.vjel.org/essays/roscoe98a.html	21
Edgar Gold, <i>Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom</i> , 14 J. MAR. L. & COM. 1 (1983)	18
Richard E. Thorne and Gary L. Thomas, <i>Herring and the “Exxon Valdez” oil spill: an investigation into historical data conflicts</i> , 65 ICES J. OF MARINE SCIENCE 44 (2007).....	9
Jeffrey W. Short et al., <i>Slightly Weathered Exxon Valdez Oil Persists in Gulf of Alaska Beach Sediments After 16 Years</i> , 41 ENVIRON. SCI. TECHNOL. 1245 (2007)	7
Peter MacKay, <i>The Song Remains the Same</i> , THE HAZARDOUS CARGO BULL., Jan. 1, 2005	20
Colin Nickerson, <i>For Ships, End of the Dotted (and Dashed) Line</i> , BOSTON GLOBE, Jan. 31, 1999, at A1.....	15
European Space Agency, <i>Low Cost Internet Access at Sea</i> , Apr. 19, 2006, http://www.esa.int/esaTE/SEMMAWNFGLE_index_0.html	15
Exxon Valdez Oil Spill Trustee Council, <i>History</i> , http://www.evostc.state.ak.us/History/PWSmap.cfm	5

TABLE OF AUTHORITIES – Continued

	Page
Exxon Valdez Oil Spill Trustee Council, <i>History</i> , http://www.evostc.state.ak.us/History/excerpt.cfm	6
Exxon Valdez Oil Spill Trustee Council, <i>History FAQ</i> , http://www.evostc.state.ak.us/history/faq.cfm	5, 30
Exxon Valdez Oil Spill Trustee Council, <i>Injured Resources and Services</i> , http://www.evostc.state.ak.us/Publications/injuredresources.cfm	6, 7, 31
Exxon Valdez Oil Spill Trustee Council, <i>Lingering Oil</i> , http://www.evostc.state.ak.us/Habitat/lingering.cfm	6, 30
United States Coast Guard, <i>Vessel Traffic Services</i> , http://www.navcen.uscg.gov/mwv/vts/vts_home.htm	16
http://maritimematters.com/shipcams.html	17

**INTRODUCTION AND INTEREST
OF THE *AMICI CURIAE***

The parties' consent to the filing of this brief was lodged with the Clerk of this Court in accordance with Supreme Court Rule 37.¹

Founded in 1976, the Pacific Coast Federation of Fishermen's Associations ("PCFFA") is the largest trade association of working commercial family fishermen and women on the west coast of the United States. PCFFA is a nonprofit federation and trade association dedicated to protecting the rights of individual fishermen and fighting for the long-term survival of commercial fishing as a productive livelihood and way of life. It consists of seventeen different port associations, fishermen's marketing associations, and commercial fishing vessel owner's associations spanning the Pacific coast from San Diego to Alaska, with a combined membership of about 2,000 commercial fishing vessels.²

PCFFA's members include small- and medium-sized family businesses whose operations range from commercial fishing vessels in distant grounds to small, trailerable boats that work nearshore waters. They

¹ In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief.

² A complete list of PCFFA member organizations is included in the Appendix.

harvest a wide variety of ocean seafood, including fresh wild salmon, Dungeness and rock crab, squid, herring, swordfish, shark, blackcod, rockfish, albacore, sea cucumber, California halibut and flounder, urchin and abalone.

PCFFA commercial fishing members are professionals who derive their incomes largely from harvesting the sea. They may operate small or large vessels; they may be full or part-time. But all share a common commitment to preserving their businesses, which all depend on ensuring the future of sustainable fisheries resources.

In order to better preserve and protect their members' livelihoods, PCFFA established the Institute for Fisheries Resources ("IFR") in 1992. IFR is a separate nonprofit organization dedicated to the protection and restoration of marine and anadromous fish resources throughout the west coast. In particular, IFR manages PCFFA's sustainable fishery conservation and restoration programs. Many PCFFA commercial fishing industry members are also members of IFR.

These organizations have a clear interest in this case. "This is a case about commercial fishing," Pet. App. 59a, and, in particular, the economic harm to commercial fishing and other businesses resulting from the EXXON VALDEZ spill. As commercial fishing families, *amici* will be uniquely impacted by the decision in this case. Just like other maritime businesses, "the fishing industry is clearly a part of traditional maritime

activity.” *Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9th Cir. 1974). One goal of maritime law is to protect and promote the interests of fishermen and women and the owners of fishing vessels. *See id.*; *cf. Askew v. American Waterways Operators*, 411 U.S. 325, 333 n.5 (1973) (“[T]he importance of the fishing industry within the world’s economy is not in doubt and is steadily increasing”).

The livelihoods of commercial fishermen and women depend on healthy fisheries. As a result, they support federal maritime rules that will punish those who engage in egregious conduct similar to that of Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively “Exxon”) in this case, and that will provide adequate deterrence to prevent in the future the extraordinary and long-lasting harms of the sort that resulted from the EXXON VALDEZ spill. In so doing, the members of PCFFA and IFR are particularly interested in rules (1) that reflect the reality of modern maritime business with respect to both modern technology and modern cargo and (2) that are consistently applied to all maritime businesses and therefore give no advantage to large corporations like Exxon.

◆

STATEMENT

1. For many years, Exxon knew that its employee, Joseph Hazelwood, had a drinking problem that interfered with his work on Exxon supertankers.

Pet. App. 63a-64a; 121a. In 1985, after Exxon received reports of Hazelwood's drinking problem, Hazelwood went to an alcohol treatment program that lasted 28 days, after which Hazelwood was reinstated to command supertankers. Pet. App. 63a; *see* Pet. App. 121a. Shortly after his reinstatement, however, his superiors at Exxon received reports that Hazelwood had returned to drinking. Pet. App. 64a; 121a. Despite many such reports, Exxon left Hazelwood in command of the EXXON VALDEZ. Pet. App. 64a; 121a.

On March 24, 1989, the terrible but all-too-predictable consequence of Exxon's behavior happened. Although the supertanker was freshly loaded with 53 million gallons of crude oil, Exxon's known-alcoholic captain – the only officer aboard licensed to navigate through the difficult parts of Prince William Sound – was drunk and left his post. *See* Pet. App. 61a-64a; 120a-122a. The fatigued Third Mate, who was not licensed to steer the ship in those waters, was left in charge and eventually the ship ran into Bligh Reef. Pet. App. 63a-64a; 120a-121a. As Exxon acknowledged and stipulated to in the district court, Hazelwood “was negligent in leaving the bridge of the vessel on the night of the grounding, [his] negligence was a legal cause of the oil spill, and . . . the Exxon defendants are responsible for this act of negligence.” JA212.

The grounding of the EXXON VALDEZ spilled nearly 11 million gallons of oil into Prince William Sound. Pet. App. 64a; 122a. The oil eventually spread

across several hundred linear miles and impacted over 10,000 square miles of the surrounding coastal saltwater ecosystem, including well over 1,000 miles of coastline. See Exxon Valdez Oil Spill Trustee Council, *History*, <http://www.evostc.state.ak.us/History/PWSmap.cfm>. This astounding spill is one of the largest spills to date in American waters, *United States v. Locke*, 529 U.S. 89, 94 (2000); JONATHAN L. RAMSEUR, CONGRESSIONAL RESEARCH SERVICE, OIL SPILLS IN U.S. COASTAL WATERS at CRS-1 (2007), and “it is widely considered the number one spill worldwide in terms of damage to the environment.” See Exxon Valdez Oil Spill Trustee Council, *History FAQ*, <http://www.evostc.state.ak.us/history/faq.cfm>.

The oil companies’ contingency plan for Prince William Sound had long recognized that even a properly conducted response would not be able to contain a spill of this size. SJA62sa. Making matters worse, however, Exxon’s and the government’s response to the spill was “unreasonably slow [and] confused,” see S. REP. NO. 101-94, at 2 (1989), *reprinted at* 1990 U.S.C.C.A.N. 722, 723-24, and “was clearly inadequate to contain and recover the spilled oil.” UNITED STATES GENERAL ACCOUNTING OFFICE, ADEQUACY OF PREPARATION AND RESPONSE TO THE EXXON VALDEZ OIL SPILL 1 (1989). The problems identified with the inadequate response “ranged from a shortage of equipment and skilled personnel to inadequate communications and organizational structures.” *Id.* at 14. One key problem was the lack of preparedness

for this type of spill. *Id.* at 1 (“Major problems were encountered because no one had realistically prepared to deal with a spill of that magnitude in Prince William Sound.”). Another significant problem was the ineffectiveness of the recovery techniques that were used: “[R]ecoverly efforts were . . . hampered by breakdowns in equipment and by techniques rendered ineffective by such factors as weather and water conditions.” *Id.* at 2.

The harms that resulted from the spill have been well-documented. *See, e.g.*, Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, <http://www.evostc.state.ak.us/Publications/injuredresources.cfm>. Although no human lives were lost as a direct result of the spill, four deaths are associated with the cleanup. Exxon Valdez Oil Spill Trustee Council, *History*, <http://www.evostc.state.ak.us/History/excerpt.cfm>. Beaches were heavily oiled by the spill and, to this day, “visually identifiable surface and subsurface oil persists at many locations.” Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, <http://www.evostc.state.ak.us/Habitat/lingering.cfm>. One recent study’s

results indicate that the remaining subsurface oil may persist with little change for decades, even in sediments that are not anoxic. Such persistence can pose a contact hazard to intertidally foraging sea otters, sea ducks, and shorebirds, create a chronic source of low-level contamination, discourage subsistence in a region where use is heavy,

and degrade the wilderness character of protected lands.

Jeffrey W. Short et al., *Slightly Weathered Exxon Valdez Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 ENVIRON. SCI. TECHNOL. 1245, 1249 (2007). These losses to the natural environment of Prince William Sound and to those whose livelihoods depended on it have been devastating: “[T]he human and natural losses were immense – to fisheries, subsistence livelihoods, tourism, wildlife.” Exxon Valdez Oil Spill Trustee Council, *History*, <http://www.evostc.state.ak.us/History/excerpt.cfm>.

The spill occurred at “just before the most biologically active season of the year,” which placed “seaward migration of salmon fry, major migrations of birds, and the primary breeding season of most species of birds, mammals, fish, and marine invertebrates in the spill’s path.” Exxon Valdez Oil Spill Trustee Council, EXXON VALDEZ OIL SPILL RESTORATION PLAN 30 (1994), *available at* <http://www.evostc.state.ak.us/Policies/restplan.cfm>. In other words, a spill of this nature would always be devastating but this particular spill was made even worse because it occurred at nearly the worst time of year in terms of harm to species and those who depended on those species.

Thousands of marine animals were killed by direct oiling; thousands more have been impacted in the long-term by the lingering effects of the spill on future generations of the species as well as on their

habitat: “Almost two decades after the *Exxon Valdez* oil spill, it is clear that some resident species injured by the spill have not fully recovered.” See Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, <http://www.evostc.state.ak.us/Publications/injuredresources.cfm>. The most recent report of the Exxon Valdez Oil Spill Trustee Council indicates that Pacific herring are not recovering. EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, UPDATE ON INJURED RESOURCES AND SERVICES 6 (2006), available at <http://www.evostc.state.ak.us/Universal/Documents/Publications/2006IRSUpdate.pdf>. The lack of recovery of the herring population is particularly troubling to those in the fishing industry.

“Pacific herring are ecologically and commercially important species in the Sound ecosystem. They are central to the marine food web; providing food to marine mammals, birds, invertebrates and other fish. Herring are also commercially fished for food, bait, [and roe].” *Id.* at 25. Prior to the spill, the herring population was increasing in Prince William Sound, with record harvests recorded in the late 1980s. *Id.* The 1989 year class, however, “was one of the smallest cohorts” of spawning adults recorded, and by 1993, the fishery had collapsed with only 25% of the expected adults returning to spawn. *Id.* As a result of these losses, the herring fishery in the Sound has been closed for 11 of the last 17 years. *Id.* Although the precise “[r]easons for the population collapse and failure to recovery remain unknown,” EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, HERRING RESTORATION STEERING

COMMITTEE BACKGROUND AND STATUS REPORT 1 (2007), *available at* <http://www.evostc.state.ak.us/Universal/Documents/Publications/HerringCommitteeExecSummary.pdf>, at least one study has concluded that “that the start of the herring decline was coincident with the oil spill, and that the decline took place over a 5-year period, rather than the single-year collapse previously reported.” Richard E. Thorne and Gary L. Thomas, *Herring and the “Exxon Valdez” oil spill: an investigation into historical data conflicts*, 65 ICES J. OF MARINE SCIENCE 44, 44 (2007). Studies continue to examine the impact of the spill on the herring population and how the herring might, if ever, recover. *See* HERRING COMMITTEE, *supra*, at 2.

2. After the spill, Exxon faced numerous lawsuits. Exxon was indicted by the United States on criminal charges and was sued civilly by both the United States and the State of Alaska. It resolved these claims in 1991 by pleading guilty to three environmental crimes. It also agreed to pay \$900 million in natural resource damages as well as \$25 million in fines.

Faced with the prospect of thousands of additional individual claims, Exxon set up a program under which it agreed to pay claims resulting from the spill. These settlements, however, did not fully compensate the plaintiffs for their losses. In particular, Exxon’s payments to commercial fishermen and women under these agreements compensated them for losses due to cancelled fisheries in 1989 but did not compensate them (1) for the diminished prices of

fish in 1989, (2) for the losses associated with the post-1989 harvests, or (3) for the decline in the value of fishing permits and vessels. This litigation – which involves the economic harms to 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, municipalities, and others – brought recovery for some, but not all, of the additional economic harm suffered by the plaintiffs. These plaintiffs, however, never recovered for their significant non-economic harm such as the “severe depression, post-traumatic stress disorder, [and] generalized anxiety disorder” that they suffered. Pet. App. 123a.

In the end, the compensable economic harm was calculated by the court of appeals to be over \$500 million. Pet. App. 38a. After a reduction by that court, the total punitive damage award amounts to \$2.5 billion. Pet. App. 42a.



SUMMARY OF ARGUMENT

After almost two decades of litigation, Exxon has asked this Court to review the punitive damages awarded as a result of Exxon’s reckless conduct that led to the grounding of the EXXON VALDEZ. Although Exxon has presented this as a complicated case, the issues are straightforward.

This Court should affirm the award because the rule applied by the courts below comports with the

realities of the modern maritime industry, it is consistent with how other industries are treated in similar circumstances, and its results are fair to all maritime businesses. Moreover, this particular award, which amounts to average punitive damages of about \$75,000 per plaintiff, is reasonable and consistent with the purposes for punitive damages. Finally, even if Exxon had not waived its Clean Water Act argument, that Act poses no bar to recovery of punitive damages for harms to the private economic interests of the more than 30,000 plaintiffs resulting from the EXXON VALDEZ oil spill.



ARGUMENT

I. Just as With Land-Based Torts, Punitive Damages May Be Imposed Under Maritime Law When a Managerial Agent Acts Recklessly.

Federal maritime law presumptively follows the common law applicable to land-based torts. *Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 835, 842 (1996) (affirming an admiralty judgment that “imput[ed]” the “extraordinary negligence” of an Exxon captain to Exxon, the shipowner). Just as tort law must conform to current conditions and norms, maritime law reflects the realities and conditions of the times in which it is determined. *See, e.g., The Amiable Nancy*, 16 U.S. 546 (1818).

Contrary to Exxon's contentions, the rules set forth in the RESTATEMENT (SECOND) OF TORTS § 909(c) are simply an example of the adaptive nature of the common law. That section provides that employers are liable for punitive damages for the reckless acts of managerial agents because businesses should hire their managerial agents carefully. *See* RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1979) ("Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.").

Today, most jurisdictions have accepted the logic of the Restatement approach: "[I]n most jurisdictions that have considered the issue of vicarious liability, punitive damages will be imposed upon a principal when a managerial employee commits an act within the scope of employment that, of itself, would justify imposition of punitive damages upon that agent" and that "rule has been applied without considering any fault of the principal in hiring or retaining the managerial agent." JOHN J. KIRCHER AND CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE, § 24:05, at 24-19 (2d ed. 2000). In fact, a slight majority of states allow corporations to be liable for punitive damages for reckless acts of **any** employee. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e (2006) ("A slight majority of states hold that punitive damages

may be awarded against a principal that is vicariously liable on the basis that an employee-agent acted within the scope of employment when committing a tort, without requiring any additional showing of culpability on the part of the employer.”); *cf. American Soc’y of Mech. Eng’rs v. Hydro Level Corp.*, 456 U.S. 556, 575 n.14 (1982) (“A majority of courts, however, have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification.”).

Given this legal landscape, if Captain Hazelwood had caused an accident and subsequent spill of this sort from a land-based operation under identical circumstances, Exxon would be liable for punitive damages in almost any jurisdiction under identical circumstances. Exxon, however, argues that this case is different, largely relying on anecdotes about the maritime industry from a time gone by. But Exxon has yet to offer any sound explanation as to why modern maritime businesses should be treated differently than modern land-based operations.

Indeed, instead of acknowledging and contemplating the dynamic nature of maritime business and tort law, Exxon relies on nineteenth-century and early twentieth-century cases to argue that punitive damages are never appropriate in the maritime context no matter what the circumstances. It centers its argument on dicta in *The Amiable Nancy*, 16 U.S. 546 (1818), a case involving a privateer. Privateer is a term most Americans are unfamiliar with because privateers – private warships authorized by a national

government – went out of existence in the mid-1800s. Unlike Exxon’s modern day transport of oil, privateers were permitted to attack the vessels of a declared national enemy for profit and not be held liable for what otherwise would have been maritime torts. Accordingly, the maritime landscape that that case envisions was peculiar to the particular setting of the case and does not exist today.

A. Modern Maritime Communications and Contact with Shore

Early maritime law developed under the premise that once a ship set sail, the captain was out of touch with the shore. When the United States Supreme Court decided *The Amiable Nancy*, naval ships could only communicate with a rudimentary flag signaling system requiring visual contact. See L.S. HOWETH, HISTORY OF COMMUNICATIONS: ELECTRONICS IN THE UNITED STATES NAVY (1963), *available at* <http://earlyradiohistory.us/1963hw.htm>. Without wireless communication – which was not available until late in the nineteenth century and was not in general use until World War I – vessels operated in complete isolation from developments on the shore. See IRVING E. FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 90-93 (1997).

As a result, in the 1800s and early 1900s, the lack of communication between the owner and the ship captain usually meant that a ship was operated

under the sole authority of the captain. Communications and contact between a ship's crew and those ashore today is much different. It simply is no longer true that ships sail for months with no contact with those left behind. Just as Wal-Mart "has a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis," *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168, (9th Cir. 2007), a ship's captain now has the ability to be in contact with the shore at anytime. A shipowner can simply lift a telephone and talk to the ship captain, and she can send the captain a fax or email to which the captain can instantly reply. See Colin Nickerson, *For Ships, End of the Dotted (and Dashed) Line*, BOSTON GLOBE, Jan. 31, 1999, at A1 ("[A]dvances in communications technology . . . have made e-mail, faxes and crystal-clear phone calls as commonplace on the bridge of a ship in the most remote sea as in a business office."). In fact, the lowered cost and increased reliability of these technologies means that they are now part and parcel of operations on vessels large and small. See European Space Agency, *Low Cost Internet Access at Sea*, Apr. 19, 2006, http://www.esa.int/esaTE/SEMMAWNFGLE_index_0.html. Most PCFFA members have access to or use these technologies in operating their businesses.

At the time of the spill, Exxon had many of these technologies at its disposal. In its written response to

Congress's question about the communications available on the EXXON VALDEZ, Exxon replied:

[T]he EXXON VALDEZ is equipped with a number of ship-to-shore communications to enable the vessel to communicate with any shore location. These systems include Marsat voice and telex systems, single sizeband radio, VHF Marine radio, HF Radio, cellular telephone, SITOR telex, and facsimile.

SJA249sa. In fact, when the EXXON VALDEZ ran aground, Hazelwood's supervisor in San Francisco called Hazelwood shortly after the grounding. JA 223-24, 354-55, 872-75. Among other things, they discussed Hazelwood's plan to try to rock the supertanker off the reef. *Id.*

In addition to the ability to communicate on a regular basis in real-time, shipowners and ship captains now have access to a variety of technologies to monitor and carefully guide a vessel. The United State Coast Guard operates vessel traffic centers, scattered along United States coastal waterways, in order to provide active monitoring and navigational advice for ships in near-shore or territorial waters, such as Prince William Sound. United States Coast Guard, *Vessel Traffic Services*, http://www.navcen.uscg.gov/mwv/vts/vts_home.htm. In addition to the Coast Guard's system, ships use a variety of their own global positioning system devices and technologies, all of which have led to "an unparalleled capacity to remotely track activities at sea." STEPHEN E. FLYNN ET AL., NAVIGATING THE UNCERTAIN WATERS OF

THE 21ST CENTURY: THE ROLE OF NEW TECHNOLOGIES IN BUILDING A COMPETITIVE AND SECURE MARITIME INFRASTRUCTURE 87, 91 (1998), *available at* http://www.ion.org/ionsite/search/view_abstract.cfm?jp=p&idno=1231. But a shipowner can do more than just track its ship. With the advent of affordable video cameras and reliable wireless transmission of those images, a shipowner can now see what is happening on the ship as well as see what those on the ship see in real time.

For example, cameras can be installed at various places around a ship for monitoring on-ship conduct just as parents have been able to monitor their children's activities on nanny cams. In addition, cameras can be mounted at various places on the ship to view the ship's surroundings and any potential dangers. Images of this sort from a variety of vessels are available to the public at <http://maritimematters.com/shipcams.html>.

In short, these communication and navigational technologies have changed the role of a ship captain. As one maritime scholar wrote six years before the EXXON VALDEZ oil spill:

There is no doubt that the traditional decision-making autonomy of masters no longer exists today. Like it or not, masters today are "ship managers" who have relatively few "command decisions" to make. Modern communication methods ensure that masters today are in constant contact with the owners/

managers, and it is simply unrealistic to expect masters to disregard proper instructions. Whether such instructions are termed “advice” or “orders” are quite irrelevant. The master is expected to be a key member of a total “management team” and would disregard instructions at his own professional risk.

Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1, 13 (1983). Exxon, in fact, had recognized this changing role when it began a program to provide its fleet officers with management skills training in 1981 and implemented other measures to transform its captains into managers on board. See JA 896-98; SJA 285sa-290sa (Exxon Shipping President Iarossi’s *Surrendering the Memories* speech).

Like land-based businesses such as Wal-Mart, ship captains and owners can and do stay in contact in real time, even over very long distances. Shipowners can monitor the travels of a ship through global positioning systems and other tracking technology; shipowners and captains can communicate by phone (as on that fateful night on the EXXON VALDEZ), fax, and email; and, when necessary, shipowners can observe the ship captain and others on the ship as well as see what those on the ship see through real-time cameras aboard the ship. Because direct contact and communication is as available between shipowner and captain as it is between owner and manager of a land-based operation, there is no justification for

treating the maritime industry differently than land-based ones.

B. Modern Maritime Cargo

Not only does Exxon fail to acknowledge the very different communications and navigational technologies available to maritime businesses today, it also never acknowledges the very different nature of the cargo that is transported by modern ships. Just as maritime communications are unlike those in the 1800s, the cargo transported by ships, both in size and character, has drastically changed, particularly in the last fifty years.

In the mid-1800s, cotton was the principal American export, followed by gold bullion, tobacco, and flour. ROBERT GREENHALGH ALBION, *THE RISE OF NEW YORK PORT* 400 (1939). Woolen goods, silken goods, cotton goods, and sugar were the principal American imports, followed by coffee and iron. *Id.* at 401. Spills of these cargos would have been largely environmentally innocuous. Indeed, ships carried so few dangerous cargos during most of the nineteenth century that no special regulations were considered necessary. INTERNATIONAL MARINE ORGANIZATION, *IMO AND DANGEROUS GOODS AT SEA 1* (1996).

Dangerous cargo was not even mentioned in maritime law until 1894, when the transport of explosive cargo on emigrant ships was prohibited in order to protect ship passengers. *Id.* International laws that governed for the next several decades were

likewise directed at preventing the carriage of goods likely to endanger ship passengers. *Id.* at 3. Until 1948, the types and amounts of dangerous cargo transported by ships were too insignificant to justify more comprehensive regulation. *See id.*

Today more than half of all packaged goods and bulk cargo transported by sea are dangerous, hazardous, or harmful to the environment. *Id.* at 1. The transportation of dangerous cargo is extensively regulated at both the national and international level. *See* 49 C.F.R. § 173.1 (2007) (discussing the scope of national regulations for the transport of hazardous substances by sea and commenting that they are generally consistent with the International Maritime Dangerous Goods Code). The International Maritime Dangerous Goods Code recognizes nine classes of dangerous goods, which include explosives, gases, flammable liquids, flammable solids or substances, toxic and infectious substances, radioactive materials, corrosives, aerosols, fertilizers, asbestos, and other substances harmful to the marine environment. IMO, DANGEROUS GOODS, at 9-17.

In addition, with the advent of containerization, a single ship can carry a wide variety of dangerous goods at the same time. *See, e.g.,* Peter MacKay, *The Song Remains the Same*, THE HAZARDOUS CARGO BULL., Jan. 1, 2005 (discussing sinking of a ship with cargo including insecticides, matches, lead acetate, ammonia, paint and paint thinner, liquid chlorine, and butane propellant aerosols). As the world has industrialized, the transport by sea of a wide variety

of dangerous cargo has grown exponentially. IMO, DANGEROUS GOODS, at 1.

Spills of dangerous cargo may still be harmful to a ship's crew and passengers. The real danger, however, is the potentially disastrous consequences to the surrounding environment as evidenced by the spill in this case. See Pet. App. 155a ("This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound. Rather, this is an employer deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil."). The acute effects of spills can be enormous, such as the "[a]pproximately 3,500-5,300 sea otters and between 260,000-580,000 birds" that died following the EXXON VALDEZ spill. Danielle Droitsch, *Muddy Waters: Clarifying the Line Between Public and Private Recovery of Natural Resource Damages*, VT. J. ENTVL. LAW (1998), <http://www.vjel.org/essays/roscoe98a.html> (citing *Summary of Injuries to Natural Resources as a Result of the Exxon Valdez Oil Spill*, 56 Fed. Reg. 14,687, 14,690-91 (Apr. 11, 1991)). Spills of dangerous cargo can also inflict long-term damage on marine ecosystems by causing critical changes in the environment. See EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE 44 (2007). Such changes include variation in salinity and pH, and de-oxygenation when materials are broken down in the marine environment. *Id.* Even biologically inert material can impact the marine environment by

smothering or by changing the physical nature of an area. *Id.* Releases of some dangerous substances, particularly metals and organic chemical compounds, can result in incorporation of the substances into biological pathways. *Id.* at 45.

With respect to oil in particular, it is estimated that “[o]il spills can cause impacts over a range of time scales, from days to years, or even decades.” RAMSEUR, CRS, OIL SPILLS IN U.S. COASTAL WATERS at CRS-3 (2007), *available at* http://assets.opencrs.com/rpts/RL33705_20070823.pdf; *see also id.* at CRS-3 to -6 (detailing the myriad potential impacts of an oil spill). In addition to the environmental harms of an oil spill, many businesses, such as the fishermen in this case, are uniquely harmed by oils spills. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 333 n.5 (1973) (“The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world’s economy is not in doubt and is steadily increasing.” (quoting Louis Henkin, *Issues in Offshore Oil Production*, 10 HARV. INT’L L.J. 316, 321-323 (1969))). For example, in November 2004, the Salem Nuclear Plant was forced to halt operations when an oil spill in the Delaware River polluted the cooling water used by the plant. The plant claimed lost profits of \$57 million as a result of the shutdown. RAMSEUR, *supra*, at CRS-6.

The days when ships were primarily loaded with simple cargo of cotton and flour are gone. The modern

shipping industry regularly transports large quantities of dangerous cargo that have the capacity to cause enormous environmental disasters. The increased hazard posed by these ships and the ability of shipowners to monitor a ship's goings-on in real time make clear that the rule applied by the lower courts is the correct one. That rule encourages shipowners to use the utmost care in choosing captains of their ships, especially those ships that, like the *EXXON VALDEZ*, carry dangerous cargo.

C. The Rule Applied in This Case Is Fair to All Maritime Businesses

Any maritime rule regarding punitive damages should treat all maritime operators, large and small, fairly. Exxon, however, advocates a rule that would allow its policies – even though unenforced – and additional management layers to insulate it from liability for punitive damages. Petr. Br. at 26. Requiring plaintiffs to demonstrate that Exxon ratified or condoned Captain Hazelwood's actions is both inconsistent with the law, *WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 4942, at 640-641 (rev. vol. 2001) (“[m]erely stating or publishing instructions and policies is not sufficient to insulate a corporation from liability, and a corporation may be held responsible for acts of its agents even when they violate such policies”), and would serve to advantage large corporate maritime businesses over small ones. The rule applied in this case does not allow Exxon to benefit unfairly from its

corporate form because the rule treats all maritime businesses the same.

As the United States Court of Appeals for the D.C. Circuit has pointed out:

A corporation . . . , with offices in a number of cities and engaged in widespread activities, necessarily delegates authority to its agents to be used on its behalf. If these agents in the exercise of their delegated authority, acting through regular corporate channels, engage in conduct which, except for the corporate nature of their principal, makes out a case for punitive damages, the corporation is not shielded therefrom simply by the absence of explicit authorization or ratification of the particular conduct. A contrary rule would permit punitive damages against smaller concerns . . . but not against a large corporation whose size and ramifications make express authorization by the top executives of tortious acts of its working-level agents highly unlikely. The question is whether the wanton, reckless or malicious action of the agents or employees can fairly be said to be truly that of the principal.

GMAC v. Froelich, 273 F.2d 92, 94 (D.C. Cir. 1959).

Unlike Exxon, small commercial fishing enterprises like those run by *amici* are unlikely to have the resources needed to generate policies or to generate corporate layers between the ship captain and the shipowner. Instead, most family-run commercial fishing businesses consist of only a few members of

the family who must spend the majority of their time fishing and selling their fish. They rarely have the time to produce comprehensive written policies on conduct – or anything else for that matter. The absence of any written policies combined with the close nature of the family relationship would make it quite difficult to show that a ship captain who is the daughter of a shipowner was not acting at her father's direction, or at the very least acting in a manner that was expected by her father.

The rule followed in this case requires all maritime businesses, big and small, to select ship captains with care because the reckless acts of **any** ship captain, when that captain is a managerial agent acting within the scope of his or her employment, can subject the shipowner to both compensatory and punitive damages. Because this rule is fair to all maritime businesses, the Court should reject Exxon's arguments to treat it, and other large corporate entities, in a fashion that allows them an unfair advantage.

D. Punitive Damages Under Maritime Law for Reckless Acts of a Managerial Agent Will Not Threaten Maritime Business

Some *amici* in support of Exxon at various stages before this Court have claimed that the imposition of vicarious punitive damages might harm the maritime industry, which would in turn damage the American economy. *See, e.g.*, Br. of *Amici Curiae* Transportation Inst., Int'l Ass'n of Indep. Tanker Owners, Int'l Ass'n

of Dry Cargo Shipowners, and Overseas Ship-holding Group, Inc. in Supp. of Petrs. at 11-25 (merits stage); Br. of Am. Waterways Operators et al. as *Amicus Curiae* in Supp. of Pet. at 3-4, 9 (certiorari stage). Many of these same *amici*, however, made these same claims when they lobbied Congress to include language in the Oil Pollution Act of 1990 that would preempt state laws, including state laws that allow for unlimited liability for oil spills.

For example, the American Waterways Operators tried to convince Congress that unlimited liability would “destroy an industry which is so beneficial to American consumers.” *Pending Oil Spill Legislation, Hearing on S. 686, S. 1066, and S. 1223 Before Subcomm. on Envtl. Prot., Senate Comm. on Env’t and Pub. Works*, 101st Cong. 128 (July 21, 1989) (statement of Joseph Farrell, President American Waterways Operators). That group further claimed that “any prudent businessman is not going to stay in business facing unlimited liability.” *Id.* at 58. The American Petroleum Institute complained that unlimited liability would make insurance very expensive or impossible to obtain. *Id.* at 58 (oral statement of Charles J. DiBona, President, Am. Petroleum Inst.) The American Institute of Marine Underwriters claimed then – as it does now – that the health of the maritime industry depends upon the application of one uniform and comprehensive system of laws. *See Hearing on H.R. 1465 – To Establish Limitations on Liability for Damages Resulting from Oil Pollution, To Establish a Fund for the Payment of Compensation*

for Such Damages, and for Other Purposes Before Subcomm. on Coast Guard and Navigation, House Comm. on Merch. Marine & Fisheries, 101st Cong. 187 (May 11, 1989) (written statement of Am. Inst. of Marine Underwriters); Br. of Am. Inst. of Marine Underwriters as Amicus Curiae in Supp. of Pet. at 7-8. Even claims of harm to national security made it into the Congressional debate on the Oil Pollution Act. See 135 Cong. Rec. H8133 (Nov. 8, 1989) (statement of Rep. Lent, R-NY).

Congress rejected these unfounded claims and included a provision – typically referred to as the “non-preemption provision” – in the Oil Pollution Act that explicitly preserved the rights of states to impose additional requirements and liabilities. 33 U.S.C. § 2718 (2002). As such, shippers have been exposed to unlimited liability through a non-uniform patchwork of state and federal laws since 1990. Contrary to their claims during the hearings, however, the maritime industry continues to flourish in American waters. There is no reason to think that the same claims from the same groups are any more accurate today than they were in 1989. Accordingly, this Court ought to reject them.

Finally, many shipping *amici* that supported Exxon at the certiorari stage indicated that – unlike Exxon in this case – they use the utmost care in selecting ship masters. Br. of American Waterways Operators et al. at 7; Br. of Keystone Shipping Co. at 4. So long as they continue to do so, the prospect of any punitive damages is remote at best under the

rule applied in this case. Moreover, the Limitation Act, 46 U.S.C. §§ 30501-35012, will likely protect most innocent shipowners from large punitive damage awards because, unlike Exxon's knowledge of Captain Hazelwood's drinking problem, the Act limits an owner's liability to the value of its interest in its vessel and cargo where the damage caused by the vessel is "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001); *see also Coryell v. Phipps*, 317 U.S. 406, 412 (1943) ("One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless 'privity' or 'knowledge' are to become empty words."); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 106-07 (1941) ("If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could limit liability."); *Hartford Accident & Indemnity Co. of Hartford v. Southern Pacific*, 273 U.S. 207, 214 (1927) ("[T]he great object of [the Limitation Act] was to encourage shipbuilding and to induce the investment of money in this branch of industry by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending, in cases of damage or wrong happening, without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board."); *cf.* BIO App. 43a (acknowledging Exxon's privity and knowledge of Hazelwood's drinking).

II. This Particular Punitive Damage Award Is Permissible Under Maritime Law.

Not only is the rule that allowed for the award of punitive damages in this case the correct one under maritime law, but there is also nothing impermissible about the specific punitive damages awarded in this case.

To be clear, the punitive damages award at issue is \$2.5 billion. When divided between all class members, this amounts to an average of roughly \$75,000 per plaintiff. This is slightly less than five times the compensatory award to each plaintiff, which amounts on average to roughly \$15,500 per plaintiff. This means that, in total, the average award to each plaintiff in the class is less than \$100,000.

Nevertheless, Exxon contends that the punitive damages award here is excessive and urges this Court to reduce it because it “contravenes *all* maritime law policies.” Petr. Br. at 51. It then proposes several “standards” for the Court to adopt as guides for maritime punitive damages awards. *Id.* at 51-55. These purported standards, however, largely disregard this Court’s prior punitive damage jurisprudence. Most troubling of all, Exxon’s proposal (and largely its briefing before this Court) ignores entirely the egregious nature of Exxon’s actions with respect to the spill.

“Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like.” RESTATEMENT OF TORTS (SECOND) § 908 cmt.b (1979). Instead, they are only awarded where the

conduct is outrageous, *id.*, and they are “aimed at deterrence and retribution.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). “[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant’s misconduct was especially reprehensible.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O’Connor, J., dissenting). They “embody [the] social outrage at the action of serious wrongdoers.” *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 n.5 (2001) (quoting Cass Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998)). The EXXON VALDEZ spill certainly qualifies as “especially reprehensible” and “serious wrongdoing.”

As detailed at length in this litigation and several outside reports, books, and articles, the EXXON VALDEZ spill is one of “the largest and most expensive oil spill in U.S. waters to date.” RAMSEUR, CRS, OIL SPILLS IN U.S. COASTAL WATERS at CRS-1 (2007), *available at* http://assets.opencrs.com/rpts/RL33705_20070823.pdf. Because of its location, it is widely regarded as the **worst** spill of all time in terms of environmental and economic damage. See Exxon Valdez Oil Spill Trustee Council, *History FAQ*, <http://www.evostc.state.ak.us/history/faq.cfm>. Almost twenty years after the spill, thousands of gallons of oil remain. See Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, <http://www.evostc.state.ak.us/Habitat/lingering.cfm>. In simplest terms, the area affected by the spill has been devastated and,

even after nearly two decades of effort, it remains unclear whether it will ever fully recover. See Exxon Valdez Oil Spill Trustee Council, *Injured Resources and Services*, <http://www.evostc.state.ak.us/Publications/injuredresources.cfm> (“Almost two decades after the Exxon Valdez oil spill, it is clear that some resident species injured by the spill have not fully recovered. The Trustee Council recognizes 30 resources and services as injured.”); EXXON VALDEZ OIL SPILL TRUSTEE COUNCIL, UPDATE ON INJURED RESOURCES AND SERVICES 6 (2006), available at <http://www.evostc.state.ak.us/Universal/Documents/Publications/2006IRSUpdate.pdf> (as of 2006, the majority of species and human services provided by the area are either still recovering or not recovering at all).

Here, the punitive damages award is entirely reasonable because the spill leading to this devastation was entirely predictable. Exxon retained a known-alcoholic as a captain and on March 23, 1989, allowed that employee to captain its ship containing 53 million gallons of crude oil through an area that only he was licensed to navigate. Pet. App. 26a (“[P]utting the relapsed alcoholic in charge of the tanker is a deliberate act”). The only real surprise here is that such a spill did not occur earlier.

Punitive damages in this instance are particularly fitting because maritime law continues to follow a restrictive model of compensatory damages. In general, maritime law does not allow for emotional distress awards or consequential economic damages. See generally *Robins Dry Dock & Repair Co. v. Flint*,

275 U.S. 303 (1927). In this case, for example, plaintiffs were unable to recover for any damages resulting from price losses in unoled Alaskan fisheries that occurred due to the stigma attached to catch from the area as a result of the spill. *See Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); JA 1155-56. Nor were they able to recover for emotional damages resulting from the spill. *Exxon Shipping*, 120 F.3d at 167 n.3; Pet. App. 123a; JA 149, 1384-90. As a result, the award of punitive damages in maritime law takes on the more traditional role of compensating for “intangible injuries, compensation which was not otherwise available under . . . [a] narrow conception of compensatory damages.” *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001).

III. The Clean Water Act Poses No Bar To Imposing Punitive Damages In This Case.

A. The District Court Did Not Err In Denying Exxon’s Belated Attempt to Claim Clean Water Act Preemption As Untimely

Exxon’s final challenge to punitive damages is its claim that the Clean Water Act preempts those damages under federal maritime law. The district court denied Exxon’s very tardy attempt to raise this argument thirteen months **after** the jury verdict on punitive damages. *See* Pet. App. 73a (Exxon made motion on October 23, 1995); Pet. App. 7a (jury awarded punitive damages award on September 16,

1994). That decision was well within the district court's discretion.

District courts have broad power to manage the cases before them. *See, e.g., Kimble v. Hosco*, 439 F.3d 331, 336 (6th Cir. 2006) (“With good reason, district courts ordinarily enjoy broad discretion in matters of pretrial management, scheduling, and docket control.”); *Laboratory Corp. of America Holdings v. Chiron Corp.*, 384 F.3d 1326, 1333 (Fed. Cir. 2004) (“District courts are granted broad latitude in managing the cases before them. We decline to find an abuse of discretion when the district court made an informed determination as to how it would manage the litigation pending before it based on sound reasoning and identified facts.”); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 817 (3d Cir. 1982) (“[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court. We will not interfere with a trial court’s control of its docket except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.” (citation and internal quotation marks omitted)); *cf. Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936))); *American Federal Group, Ltd. v. Rothenberg*, 136 F.3d 897, 905 (2d Cir. 1998) (concluding that denial of untimely post-trial motion was within lower court’s discretion). In this case, Exxon had multiple opportunities to

raise its Clean Water Act argument but failed to do so at every turn. The district court was therefore within its discretion to deny Exxon leave to file its late motion.

Exxon's assertion in its motion was that the Clean Water Act "[d]isplaces," Petr. Br. at 31, any federal maritime law that might permit the imposition of punitive damages. That is, Exxon has claimed that any right to punitive damages under federal maritime law was extinguished by the passage of the Clean Water Act. This assertion sounds in preemption. See Petr. Br. at 29 (noting "'presumption *in favor of* preemption of federal common law whenever it can be said that Congress legislated on the subject.'" (quoting *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981))).

Rule 8(c) of the Federal Rules of Civil Procedure requires that the defendant plead an affirmative defense where the defendant seeks to "admit the allegations of the complaint but suggest some other reason why there is no right of recovery." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FED. PRAC. & PROC. CIV. 3D § 1271 (2007). Based on this logic, it is widely accepted that preemption is an affirmative defense. *Id.* Moreover, defenses need not extinguish plaintiff's entire claim but may simply bar some of the relief requested by plaintiff. See *A.D.E. Inc. v. Louis Joliet Bank and Trust Co.*, 742 F.2d 395, 397 (7th Cir. 1984) (Posner, J.) (holding that partial payment is an affirmative defense and noting that "there are partial as well as complete defenses (e.g.,

failure to mitigate damages, avoidable consequences, and, in states that have abandoned contributory negligence, comparative negligence) . . . [and therefore] there was no need for the rule's draftsmen to add 'in whole or part'). Accordingly, if Exxon's Clean Water Act argument amounts to "an avoidance or affirmative defense" under Rule 8(c), in keeping with the well-known general rule, Exxon waived the defense by never pleading it in its answer and never seeking to amend its answer to include it. WRIGHT & MILLER, 5 FED. PRAC. & PROC. CIV. 3D § 1278 ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case."); cf. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) ("The purpose of . . . pleading [an affirmative defense] is to give the opposing party notice of the [defense] and a chance to argue, if he can, why the imposition of [the defense] would be inappropriate.").

Even if Exxon was not required to plead this as an affirmative defense, Exxon had a duty to raise the issue before trial and had several opportunities to do so. Exxon could have made this claim when it moved for summary judgment on April 15, 1993, on the basis of the alleged displacement of maritime punitive damages by the Trans-Alaska Pipeline Authorization Act. See JA 4, 63-93. It did not. More critically, Exxon should have presented this issue during briefing for the revised trial plan, which determined the law to be

applied to the case at trial. *See* FED. R. CIV. P. 16(b). It never did so. Instead, Exxon essentially asked to revisit that order in its motion for leave to file its Clean Water Act argument presented to the court two years after the order was entered and more than a year after the Phase III trial concluded. *Cf.* BIO App. 33a.

Notwithstanding its failure to raise the issue pre-trial, during Phase III of the trial, Exxon might also have attempted to move for judgment as a matter of law under Rule 50(a) asserting that the Clean Water Act barred any punitive damages in the case. *See* FED. R. CIV. P. 50(a). Again, it did not. Moreover, because it did not, Exxon could not move for judgment as a matter of law after the jury verdict. *See* FED. R. CIV. P. 50(b). But even if Exxon could have made this argument post-trial under Rule 50 without raising it before – a dubious proposition – it missed the stipulated post-trial motion deadline by more than a year. *See* BIO App. 33a.

In sum, Exxon had ample opportunity to raise this argument over the more than five years it took from filing of the case to Phase III of the trial. Instead, it waited more than a year after the jury verdict to make its argument. In this complex and complicated case involving over 30,000 plaintiffs, the district court was required to intensively manage the case, including scheduling, in order for it to stay on track. Pet. App. 67a (noting that district court “did a masterful job of managing this very complex case.”). Given Exxon’s extraordinary and unexplained delay

in raising this argument, the district court was within its broad discretion to deny Exxon's motion as untimely.

B. There Is No Merit to Exxon's Clean Water Act Preemption Defense

Even if the district court had abused its discretion in denying Exxon's motion, the Clean Water Act poses no bar to the punitive damage award here. Exxon does not dispute that the Clean Water Act does not bar the tort claims asserted by the over 30,000 plaintiffs here. *See generally International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (detailing Clean Water Act savings provisions and describing their preservation of several common law actions). Accordingly, it must demonstrate that the Clean Water Act "spoke directly to," Petr. Br. at 30, punitive damages (but not compensatory damages) resulting from the otherwise permissible tort causes of action for which it was found liable. It has failed to make this difficult showing.

As this Court has noted on several occasions with respect to state common law, "unless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes," it is assumed that the entire cause of action is available. *Int'l Paper*, 479 U.S. at 499 n.19; *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law. . . . Congress assumed that traditional principles of state tort law

would apply with full force unless they were expressly supplanted.”). There is simply no express evidence in the Clean Water Act that Congress intended to supplant punitive damages under maritime law. In fact, even if Exxon must only show, as it claims, “a clear and manifest purpose to displace common-law rules,” Petr. Br. at 29 (citations and internal quotation marks omitted), Exxon has pointed to nothing in the Clean Water Act that can be said to embody an intention to displace punishment for *private economic* harm, the basis for the punitive damages here.

To the contrary, with respect to oil spills, the Clean Water Act specifically preserves much of the law that existed before it was enacted: “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.” 33 U.S.C. § 1321(o)(1) (2002). As such, the Clean Water Act poses no bar to the award of punitive damages in this case.



CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GLEN H. SPAIN
Northwest Regional Director
PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS
AND THE INSTITUTE FOR
FISHERIES RESOURCES
PO Box 11170
Eugene, OR 97440-3370
(541) 689-2000

AMY J. WILDERMUTH
Counsel of Record
UNIVERSITY OF UTAH
S. J. QUINNEY COLLEGE OF LAW
332 South 1400 East,
Room 101
Salt Lake City, UT 84112-0730
(801) 581-6833

Counsel for Amici Curiae

APPENDIX

PCFFA MEMBER ORGANIZATIONS

Commercial Fishermen's Organization of Morro Bay
Santa Cruz Fishermen's Marketing Association
Crab Boat Owners Association
Trinidad Bay Fishermen's Marketing Association
Washington Trollers Association
Moss Landing Commercial Fishermen's Association
Humboldt Fishermen's Marketing Association
Commercial Fishermen of Santa Barbara, Inc.
Half Moon Bay Fishermen's Marketing Association
Salmon Trollers Marketing Association
Monterey Fishermen's Marketing Association
Port San Luis Commercial Fishermen's Association
Small Boat Commercial Salmon Fishermen's Association
Federation of Independent Seafood Harvesters
Fishermen's Marketing Association of Bodega Bay
California Herring Association
Salmon for All
