

No. 07-219

In the Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL., PETITIONERS,

v.

GRANT BAKER, ET AL., RESPONDENTS.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR *AMICI CURIAE*
TRANSPORTATION INSTITUTE,
INTERNATIONAL ASSOCIATION OF
INDEPENDENT TANKER OWNERS,
INTERNATIONAL ASSOCIATION OF
DRY CARGO SHIPOWNERS, AND
OVERSEAS SHIPHOLDING GROUP, INC.
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*¹

The Transportation Institute was established in 1967 as a Washington-based, non-profit organization dedicated to maritime research and promotion. The Institute advocates and works for sound national maritime policy to help maintain America's political and economic strength and national security. The Institute is comprised of companies that participate in the nation's deep sea foreign and domestic shipping trades, and barge and tugboat operations on the Great Lakes and on the 25,000 mile network of America's inland waterways. All Transportation Institute companies operate U.S.-flagged vessels crewed by American citizens, and the Institute recognizes that an adequate and well-trained work force of seafarers and other maritime employees is essential to the maritime industry.

The Transportation Institute believes that a balanced, competitive, and efficient waterborne transportation system is indispensable to America's economy and security. A privately-owned, citizen-crewed, U.S.-flagged merchant fleet has been the foundation for the commercial and military success of this nation in times of peace and of war. Excessive punitive damages awarded against U.S.-flag vessel owners, especially if imposed vicariously, such as the

¹ Petitioners and respondents each have filed a blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

staggering \$2.5 billion punitive-damages award at issue in this case, threaten the continued viability of the U.S. fleet that the Transportation Institute promotes in the interests of U.S. commerce and national defense.

The International Association of Independent Tanker Owners (“Intertanko”) is an unincorporated, not-for-profit association of independent tanker owners and operators. Its independent members, which are neither owned nor controlled by cargo owners such as oil companies, operate more than 2,500 vessels representing 70% of the world’s independent tanker fleet.

The International Association of Dry Cargo Shipowners (“Intercargo”) is an unincorporated, not-for-profit association of owners, operators, and managers of dry bulk cargo vessels. These vessels carry bulk (non-containerized) commodities such as ores and other minerals, grains, steel, coal, and timber throughout the world.

Both Intertanko and Intercargo trade extensively at United States ports on the Atlantic, Pacific, and Gulf coasts and the Great Lakes. As such, they are deeply concerned about maritime liability rules. Moreover, many of their member companies are relatively small, privately held enterprises that cannot sustain large punitive-damages awards.

Overseas Shipholding Group, Inc. (“OSG”) is one of the world’s leading bulk shipping companies engaged primarily in the ocean transportation of crude oil and petroleum products. OSG owns and operates vessels in both domestic and international maritime commerce, and

is the only major global tanker company with a significant U.S. Flag fleet. The company participates, among other things, in the Alaska North Slope Crude Oil Transportation through its 37.5% equity interest in the joint venture, Alaska Tanker Company, LLC.

As the second largest publicly traded tanker company in the world, OSG is substantially concerned that excessive punitive damages, imposed vicariously for the reckless behavior of a vessel's master, would adversely affect the financial position of the company and the entire maritime industry and thus undermine the commercial and national-security interests of the United States.

SUMMARY OF ARGUMENT

From the time of this Court's decision nearly 200 years ago in *The Amiable Nancy*, 16 U.S. 546 (1818), federal maritime law has held that a shipowner is not vicariously liable in punitive damages for the acts of a captain at sea. No circuit has departed from this rule except for the Ninth Circuit in this case based on its prior opinion in *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985).

The rule of *The Amiable Nancy* comports with traditional maritime principles. It also reflects long-established congressional policies (1) to limit the liability of shipowners under legal principles that do not apply in other areas of the law, and (2) to promote the maritime industry in order to further the commercial and national-security interests of the United States. The rule against

vicarious punitive-damages liability is firmly grounded in these maritime principles and congressional policies.

The *Amiable Nancy* rule is further supported by the unique and critical role of a captain at sea. Of necessity, the captain must be the absolute master and have undivided authority over the ship under sail. The captain aboard ship must be able to make instantaneous decisions in an emergency that will be promptly and unquestionably obeyed. A captain has never been, and cannot be, expected to confer with the owner on land to have his orders reviewed or approved. The Ninth Circuit's ruling, by imposing liability and therefore responsibility on the owner for the acts of the captain at sea, is irreconcilable with the captain's settled and essential duty.

Finally, the Ninth Circuit erred in adopting as a matter of federal maritime law the vicarious-liability provision of the RESTATEMENT (SECOND) OF TORTS. The Restatement has no basis in maritime law and indeed by its terms does not apply where, as in admiralty, special legal rules exist. Furthermore, the Ninth Circuit, by resting its ruling on its own policy view that broad corporate liability for punitive damages is desirable, far exceeded the proper role of even a common-law court to determine the law, not to adopt judges' policy preferences in the guise of law.

ARGUMENT**UNDER FEDERAL MARITIME LAW, A SHIPOWNER IS NOT VICARIOUSLY LIABLE IN PUNITIVE DAMAGES FOR THE WRONGFUL CONDUCT OF THE SHIP'S CAPTAIN AT SEA.****I. FEDERAL MARITIME COMMON LAW SHOULD REFLECT ESTABLISHED MARITIME PRECEDENTS AND CONGRESSIONAL MARITIME POLICIES.**

Maritime law is a form of federal common law. Accordingly, it should reflect federal policies and be consonant with the laws of Congress. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496, 1513 (5th Cir. 1995) (en banc), cert. denied, 516 U.S. 1046 (1996). Maritime law therefore looks to Congress for “policy guidance.” *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994).

As Justice Harlan explained, courts in developing federal maritime common law take account of the “legislative establishment of policy,” and such policy becomes part of the “decisional law.” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390-91 (1970); *see also id.* at 392-93, 395 (referring to “the general policies of federal maritime law”). *See also, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (courts fashion federal common law “from the policy of our national . . . laws”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Thus, as this Court summarized:

Admiralty is not created in a vacuum;
legislation has always served as an important

source of both common law and admiralty principles.

* * *

[A]n admiralty court should look primarily to these legislative enactments for policy guidance.

Miles v. Apex Marine Corp., 498 U.S. 19, 24, 27 (1990).

Against this background, the Court usually has recognized the wisdom of entrusting to the legislature rather than to the judiciary fundamental changes in maritime law. *See, e.g., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272-73 (1979); *Halcyon Lines v. Haenn Ship, Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952); *see also Miles v. Apex Marine Corp.*, 498 U.S. at 36; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978); *Moragne*, 398 U.S. at 400-02. In this case, it is Congress that is in the better position to determine the applicable facts and weigh the policy and economic considerations in order to decide whether longstanding maritime law should be radically and abruptly upset in the manner done by the Ninth Circuit's decision. Indeed, as Judge Kozinski noted below, "[f]or centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages [on the basis of vicarious liability]." Pet. App. 291a (Kozinski, J., dissenting from the denial of rehearing en banc). If the maritime law of

punitive damages is to be fundamentally altered, Congress is the appropriate branch to do so.²

As next discussed, settled maritime law for almost two centuries – save for the singular exception of the Ninth Circuit in this case relying on its previous decision in *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) – has held that a shipowner is not vicariously liable for punitive damages based on the conduct of its captain at sea. See *The Amiable Nancy*, 16 U.S. 546 (1818); pages 8-11, *infra*. Furthermore, from the founding of the Republic to the present, congressional policy consistently has limited rather than expanded the liability of shipowners and has protected and promoted the shipping industry in order to further the commercial and national-security interests of the United States. See pages 11-25, *infra*. And, directly contrary to the Ninth Circuit’s position, this Court recognized 75 years ago that in an “emergency . . . there is no opportunity of . . . bringing the proposed action of the master to the owner’s knowledge. The latter must rely upon the master’s obeying rules and using reasonable judgment.” *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502, 511-12 (1932). See pages 25-31, *infra*. Only by overturning 200 years of precedent, and by ignoring congressional maritime policies, can this Court

² This is particularly true insofar as the sound resolution of the vicarious-liability issue turns on determinations of legislative fact about the maritime industry, including the role of a captain at sea and the captain’s relationship to the owner on land. See pages 25-31, *infra*. Congress is in a better position than the Court to ascertain and evaluate such factual questions. See, e.g., *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

uphold the Ninth Circuit's aberrational view of the maritime law of vicarious liability for punitive damages.

II. FEDERAL MARITIME LAW DOES NOT IMPOSE VICARIOUS LIABILITY FOR PUNITIVE DAMAGES ON A SHIPOWNER BASED UPON THE ACTS OF THE CAPTAIN AT SEA.

A. The Established Rule Of Maritime Law Prohibits Vicarious Liability For Punitive Damages.

For hundreds of years, ships have set to sea not under the command and control of their owners but of their captains. During that time, many ships have sunk or caused damage to others in the hazardous and unpredictable conditions encountered at sea. And, unfortunately, some of those accidents have been due to the wrongful conduct of the ship's captain. Yet, prior to the ruling below, *no* shipowner to our knowledge has ever been held vicariously liable for punitive damages based upon the acts of the captain at sea.

It literally is hornbook law that "admiralty cases deny punitive damages in cases of imputed fault." 1 Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW* § 5-17, at 246 (4th ed. 2004). Thus, although a shipowner may be subject to punitive damages for its own acts if it "participated in or ratified the wrongful conduct" (*id.*), it cannot be held liable in punitive damages for the wrongful acts or omissions of the ship's captain at sea. Accordingly, a shipowner is answerable in punitive

damages not vicariously but only if it was itself complicit in the wrongful conduct at issue.

This “complicity” rule was adopted by the Court as federal maritime law in 1818. In *The Amiable Nancy*, the Court held shipowners could be held vicariously liable for compensatory but not punitive damages for wrongful conduct at sea. Writing for a unanimous Court, Justice Story explained that punitive damages would not lie against the owners who were “innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree.” 16 U.S. at 559.³ See also *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893).

Following *The Amiable Nancy*, every circuit to consider the issue, with the sole exception of the Ninth Circuit, has recognized that maritime law does not hold a shipowner vicariously liable for the wrongful conduct of its captain at sea but rather requires some culpability on the part of the owner itself. See *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (“[u]ndoubtedly the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the master for the unauthorized tort of the servant”); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) (“punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can

³ Justice Story “has been considered the father of American admiralty law.” IV Albert J. Beveridge, *THE LIFE OF JOHN MARSHALL* 119 (1919). “Early American commercial and admiralty law were largely the creation of [Justice] Story’s decisions.” Bernard Schwartz, *A HISTORY OF THE SUPREME COURT* 60 (1993).

be shown that the owner authorized or ratified the acts of the master”), *cert. denied*, 398 U.S. 958 (1970); *In the Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642, 650 (5th Cir. 1989) (specifically rejecting the Ninth Circuit’s decision in *Protectus Alpha*; “the principal is liable in punitive damages only if it authorizes or ratifies wanton actions of an agent”); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995) (denying vicarious liability for punitive damages against vessel owner for acts of “managerial” employees absent “some level of culpability [of the owner] for the misconduct”). *See also Muratore v. M/S Scotia Prince*, 845 F.2d 347, 355 (1st Cir. 1988) (“[i]t would be unfair to punish the charterer when it was not aware actually or constructively of its staff’s misconduct and had not encouraged such misconduct”).

United States Steel Corp. v. Fuhrman is particularly instructive. There, the district court, without citation to any supporting maritime precedent, held a shipowner vicariously liable for punitive damages. *See Petition of Den Norske Amerikalinje A/S*, 276 F. Supp. 163 (N.D. Ohio 1969). Relying upon *The Amiable Nancy* and other decisions, the Sixth Circuit reversed, explaining that “punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master.” 407 F.2d at 1148.

What is more, the Ninth Circuit itself, more than 100 years ago, recognized the complicity rule under federal maritime law. *See Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577 (9th Cir. 1905) (maritime case holding that company was not liable in punitive damages for wrongful actions of captain at sea). And even before

that, lower courts in the Ninth Circuit had applied that rule in maritime. See *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815) (holding, in maritime case, that “damages may be inflamed to teach offenders their duty; but not when the proceedings are against the owners . . . who . . . did not commit or in any manner countenance the wrong”).

This longstanding and, but for the Ninth Circuit, otherwise unbroken principle is correct and has been soundly followed by numerous courts. Moreover, as demonstrated in subsections II-B and II-C, *infra*, it properly reflects both congressional maritime policy and the time-honored role and responsibilities of the captain at sea. Finally, as discussed in subsection II-D, *infra*, the Ninth Circuit erred in deviating from the *Amiable Nancy* line of maritime cases in its decisions in *Protectus Alpha* and the present case.

B. The Rule Against Vicarious Punitive-Damages Liability For Shipowners Reflects Congressional Maritime Policy Limiting The Liability Of Owners And Protecting The Maritime Industry In Order To Further The Commercial And National-Security Interests Of The United States.

As discussed above, federal maritime common law should be informed by and consistent with congressional maritime policies embodied in the United States Code. Congress has enacted two categories of legislation that support the established rule of *The Amiable Nancy*. First, it has adopted several acts that limit the liability of shipowners in ways that differ from traditional liability

principles applicable in other areas of law. Second, beyond the specific issue of liability, Congress also has passed a variety of statutes to foster broadly the U.S. maritime industry.

These congressional enactments recognize that the U.S. maritime industry is unique in this country and unlike any other economic sector that has been before the Court in previous punitive-damages cases. It is long-established federal policy to promote this industry in order to protect it from undue liability under federal maritime law (*see* section II-B-1, *infra*) and to further our nation's economic and national-security interests (*see* section II-B-2, *infra*). Maritime commerce was “the jugular vein of the Thirteen States” as was “recognized by every shade of opinion in the Constitutional Convention.” *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting Felix Frankfurter & James M. Landis, *THE BUSINESS OF THE SUPREME COURT* 7 (1927)). Thus, “the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.” *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (internal quotation and citation omitted). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004). “Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability.” *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 297 (1968) (Douglas, J., dissenting in part).

1. Congress has narrowly limited the maritime liability of shipowners.

A hallmark of federal maritime legislation is the limitation of a shipowner's liability for acts occurring on the vessel at sea. "Limitation of liability [of carriers] is an important theme of admiralty law" and "is accepted as necessary to serve the needs of commercial practicality as well as the shipowner." 2 Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW* § 15-1, at 136 & n.1 (4th ed. 2004). "[L]imitation of liability" has "long" been a principal feature of "[t]he law of the sea." *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 270 (1972). Furthermore, this principle of limited liability "springs from the general maritime law"; "[i]t was not recognized either by the [general] common law or by the civil law." 3 *BENEDICT ON ADMIRALTY* § 4, at 1-31 (7th ed. 2005). See *The Main v. Williams*, 152 U.S. 122 (1894).

The three principal statutes limiting the liability of shipowners are the Limitation of Liability Act of 1851, 9 Stat. 635, currently codified at 46 U.S.C. §§ 30501-30511; the Harter Act, 27 Stat. 445 (1893), currently codified at 46 U.S.C. §§ 30702-30707; and the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 note.

a. *The Limitation of Liability Act of 1851.*

Section 3 of the Limitation of Liability Act of 1851 provides that the liability of a shipowner for "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner" is limited to "the value of the vessel and

pending freight.” 46 U.S.C. § 30505. Accordingly, absent privity or knowledge, the owner’s personal liability – even for compensatory damages – is limited to its interest in the vessel and cargo.

As the statutory text makes plain, Congress’s “real object . . . was to limit the liability of vessel owners to their interest in the adventure.” *The Main v. Williams*, 152 U.S. at 130. Such a policy was necessary

to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. . . . [T]hose who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount.

Norwich Co. v. Wright, 80 U.S. 104, 121 (1871). See also *Moore v. Am. Transp. Co.*, 65 U.S. 1 (1860); *Flink v. Paladini (The Henrietta)*, 279 U.S. 59 (1929); *Am. Car & Foundry Co. v. Brassert*, 289 U.S. 261 (1933); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1064 (11th Cir. 1996).

In adopting this statute, Congress codified an existing principle of maritime law. It is “difficult, if not impossible, to say when and where the restrictions . . . [on liability absent privity or knowledge] originated.” *The Main v. Williams*, 152 U.S. at 126. However, they were recognized in the pre-Liability Act laws of the

shipping states of Maine and Massachusetts, and, even absent positive legislation, the “limitation of the responsibility of the owners, for the tortious acts of the master, . . . appears to be founded in justice, and is recommended by strong and obvious motives of public policy.” *The Rebecca*, 20 F. Cas. 373, 381 (D. Me. 1831) (No. 11,619).

Thus, this limitation of liability is not only embodied in federal statute but represents a principle of maritime law “as old as the law itself . . . that a shipowner does not incur liabilities exceeding the value of his ship and her pending freight.” Wharton Poor, *A Shipowner’s Right to Limit Liability in Cases of Personal Contracts*, 31 *YALE L.J.* 505, 505 (1922).

[T]he right of a shipowner to limit his liability is recognized in some form or other by the maritime law of all nations. . . . The most satisfactory argument in favor of the right to limit liability is that sea adventures are peculiarly liable to mishaps of appalling extent; that the owner “blameless but powerless” must entrust his ship to servants who, no matter how carefully selected, may by a moment’s inattention or carelessness, cause disaster; that in view of these considerations, investments in shipping would be discouraged if unlimited liability were thrown upon shipowners.

Id. This principle of limited liability is directly contrary to the Ninth Circuit’s unprecedented imposition of vicarious punitive-damages liability. *See* Grant Gilmore

& Charles L. Black, Jr., *THE LAW OF ADMIRALTY* § 10.22, at 879 (2d ed. 1975) (“the theory of the Limitation Act and the doctrine of *respondeat superior* are at opposite poles”); James J. Donovan, *The Origins and Development of Limitation of Shipowners’ Liability*, 53 *TUL. L. REV.* 999, 1007 (1979) (English statute of 1734 limiting shipowners’ liability was enacted because “English maritime interests were ... burdened by the common law doctrine[] ... of *respondeat superior*”).

In addition, the “privity or knowledge” exception to this principle further confirms the error of the decision below. The limitation of the owner’s liability to the value of the vessel and its cargo is applicable only where the tortious act occurred “without the privity or knowledge of the owner.” 46 U.S.C. § 30505(b). Such privity or knowledge exists, and thus the owner is exposed to full and unrestricted liability, where the plaintiff’s “loss resulted from the shipowner’s ‘personal act or omission, [and was] committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.’” 1 Linda L. Schlueter, *PUNITIVE DAMAGES* § 10.5, at 827 (5th ed. 2005) (citation omitted; alteration in original).

In applying that standard, courts have recognized that “the men who actually go to sea in ships, and the shore staff who are less than managerial rank, are persons whose knowledge or privity does not affect a corporate shipowner.” 3 *BENEDICT ON ADMIRALTY* § 42, at 5-17. Thus, an owner’s privity or knowledge is not a function of the actions of the captain at sea, and no case has imputed the captain’s conduct to the owner. *Id.* at n.4 (collecting cases). *See also Waterman Steamship Co.*

v. Gay Cottons, 414 F.2d 724, 730 & n.16, 734-35 (9th Cir. 1969) (“we have found no case which has attributed the negligence of the master to the corporate owner”); *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977) (“the errors in navigation or other negligence by the master or crew are not attributable to [the owner] on respondeat superior for limitation purposes”). This settled maritime law squarely forecloses the Ninth Circuit’s attempt to hold the owner vicariously liable under maritime law for punitive damages based on the actions of the captain at sea.

b. *The Harter Act of 1893.*

The Harter Act of 1893 also significantly limits the liability of shipowners by protecting them from liability for “error[s] in the navigation or management of the vessel”:

If a carrier has exercised due diligence to make the vessel in all respects seaworthy and to properly man, equip, and supply the vessel, the carrier and the vessel are not liable for loss or damage arising from an *error in the navigation or management of the vessel*.

46 U.S.C. § 30706(a) (emphasis added).

Thus, the Harter Act distinguishes between the acts of the owner when the ship is in port and those of the captain when the ship is at sea, holding the owner liable for the former and exempting it from liability for the latter. “The net position of the Harter Act came down to this: . . . if [the shipowner] did use due care to send a

seaworthy vessel on the voyage, he could not be held liable for the defaults of those he put in charge, in regard to running her.” Gilmore & Black, § 3-24, at 143. This statutory policy too is violated by the Ninth Circuit’s decision to hold the owner vicariously liable in punitive damages for the misconduct of the captain at sea.

c. *The Carriage of Goods by Sea Act of 1936.*

The Harter Act was the “principal statute governing the carriage of goods by sea to and from the United States for over forty years” until the passage of the Carriage of Goods by Sea Act of 1936 (“COGSA”), 46 U.S.C. § 30701 note. 2A BENEDICT ON ADMIRALTY § 11, at 2-5 (7th ed. 2005). Much like the Harter Act, COGSA contains a congressional limitation of liability for the shipowner due to the acts of its shipboard employees, including the captain, while at sea.

In pertinent part, COGSA provides that the shipowner, although generally liable for the unseaworthiness of the vessel and for the vessel’s condition before it leaves port, shall not be liable for loss or damage arising or resulting from the “[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.” 46 U.S.C. § 30701 note. As did the Harter Act, COGSA imposes responsibilities on the owner while the vessel is in port; in particular, the owner’s responsibility for seaworthiness “is either fulfilled or not fulfilled when the vessel ‘breaks ground’ on the voyage.” Gilmore & Black, § 3-27, at 152. *See also* 2A BENEDICT ON ADMIRALTY §§ 136-37, at 13-20. However, providing that the captain

and crew were properly selected, the owner is not liable for their acts at sea. In particular, the owner is not liable, even for compensatory damages, if the negligence of the captain causes the ship to run aground and be stranded – essentially what happened to the EXXON VALDEZ here. *Id.*, § 135, at 13-18 & n.1 (collecting cases). Once again, the Ninth Circuit extension of vicarious liability for punitive damages cannot be reconciled with this established maritime policy.

2. Congressional policy protects the U.S. maritime industry in order to promote commerce and national security.

In addition to the foregoing statutory limitations of liability, Congress also has enacted numerous other statutes to protect and further the U.S. maritime industry. Once again, these congressional enactments foreclose the exorbitant punitive-damages burden that the decision below would impose on shipowners under maritime law by making them vicariously liable for the wrongful conduct of captains at sea.

From the inception of our nation, maritime law, including congressional enactments, provided special aid and assistance to the U.S. maritime industry. This longstanding maritime policy reflects both the commercial and the national-security interests of the United States. In particular, in order to promote a strong U.S. maritime industry, maritime law has furthered the interests of carriers, shipbuilders, seafarers and other maritime employees, and consumers. Moreover, as experience has tellingly borne out, our national security requires a strong maritime industry, including an

adequate number of vessels, a domestic capacity to build and repair such vessels, and sufficient workers to crew the ships and to build and repair them. *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982) (“[i]t has long been recognized that an adequate merchant marine, with U.S.-flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country”).

Preliminarily, to put the following discussion in context, a number of the statutes discussed below involve “cabotage” or shipments between ports in the United States. A cabotage statute advantaging U.S. carriers was among the initial enactments passed by the First Congress, and this legislative policy continues unbroken to the present. Some 50 other countries also have cabotage statutes protecting their own carriers within their domestic commerce. *See* Robert L. McGeorge, *United States Coastwide Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*, 11 NW. J. INT’L L. & BUS. 62, 62-63 (1990) (“[t]he right of a nation to exclude foreign vessels from its domestic maritime trade is accepted without question in the international community; and most coastal nations, including the United States, have adopted cabotage laws to enforce that right”); Transportation Institute, *The Jones Act: An American Tradition* 2 (1996).

In the United States, the cabotage statute requires that waterborne shipments between U.S. ports be made by ships that are U.S.-owned, U.S.-flagged, U.S.-built, and U.S.-crewed. This preference is needed because

“[t]he American merchant marine as a whole seemingly cannot now or in the foreseeable future operate in free competition; our ships are too expensive and our wages are too high for that.” Gilmore & Black, § 11-5, at 968; *see also id.*, § 11-6, at 970. Accordingly, to ensure the existence and viability of U.S. carriers in the interest of our country’s economy and national security, this congressional cabotage policy is necessary. *See Indep. U.S. Tanker Owners*, 690 F.2d at 911 (“[s]ince the earliest days of the Republic, preferential legislation has mandated that only U.S.-built and U.S.-flag vessels can be operated in commerce between points in the United States”); *Conaco Inc. v. Skinner*, 970 F.2d 1220, 1221-22 (3d Cir. 1992); *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 708 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971).

a. *The Acts of 1789-1817.*

“In 1789, in the second law passed under the new Constitution, Congress enacted a discriminatory tax on foreign vessels in the coasting trade, making it impractical economically for them to operate [between U.S. ports].” Gilmore & Black, § 11-4, at 963 n.34. *See* 1 Stat. 27 (1789). Following independence, “the maintenance of the shipbuilding industry, and the creation of an operating merchant marine, were among the most urgent tasks facing the Congress and the nation.” Gilmore & Black, § 11-4, at 963. Thus, the “coastwide trade was early reserved to domestic vessels.” *Id.*; *see also* 1 Stat. 287 (1792).

In 1817, Congress expressly prohibited foreign carriers from transporting goods between two U.S. ports. *See* Act of March 1, 1817, ch. 31, § 4, 3 Stat. 351.

This provision was part of a broader statute designed to protect the domestic maritime industry.

b. *The Jones Act of 1920.*

This early federal cabotage policy – which provided that “the coastwide trade was prohibited outright to foreign ships” – “has lasted down to now.” Gilmore & Black, § 11-4, at 963 n.34. This policy is currently embodied in the Jones Act of 1920 (Section 27 of the Merchant Marine Act of 1920), ch. 250, 41 Stat. 988 (1920), currently codified at 46 U.S.C. § 50101. Enacted in the aftermath of World War I, the restriction of cabotage trade to U.S. carriers was justified in terms of the critical need to “develop and encourage a merchant marine” in order to serve “the national defense” and “foreign and domestic commerce”:

[I]t is necessary for the *national defense* and for the proper growth of its foreign and domestic *commerce* that the United States shall have a merchant marine of the best equipped and most suitable types of vessels *sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency*, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.

Ch. 250, 41 Stat. 988 (1920), currently codified at 46 U.S.C. § 50101 (emphasis added). *See also* S. Rep. No.

66-573, at 1 (1920) (national policy favors “an American merchant marine, built in American shipyards by American labor, manned by American seamen, flying the American flag”; “[w]e need such a fleet, not only for our commercial growth, but for the Nation’s defense in time of war and the stability of domestic industry in time of peace”).

c. The Merchant Marine Act of 1936.

The next important expression of congressional policy was the Merchant Marine Act of 1936. Adopted in the shadow of World War II and in the midst of the Great Depression, the Act declared it “to be the policy of the United States to foster the development and encourage the maintenance of . . . a merchant marine,” which “is necessary for the national defense and development of its foreign and domestic commerce”:

It is necessary for the *national defense* and development of its *foreign and domestic commerce* that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a *naval and military auxiliary in time of war or national emergency*, (c) *owned and operated under the United States flag by citizens of the United States* insofar as may

be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, *constructed in the United States and manned with a trained and efficient citizen personnel*. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Ch. 858, title I, § 101, 49 Stat. 1985 (1936) (emphasis added). “The Merchant Marine Act of 1936 is designed to develop and maintain an adequate and well-balanced American merchant marine and shipyard industry.” 1 Schoenbaum, § 10-2, at 582.

d. *The Maritime Security Act of 1996.*

Most recently, the Maritime Security Act of 1996 continues to recognize the importance of the U.S. maritime industry to commerce and national security. It provides that “[t]he Secretary of Transportation ... shall establish a fleet of active, commercially viable, militarily useful, privately owned vessels to meet national defense and other security requirements and maintain a United States presence in international commercial shipping.” 46 U.S.C. § 53102.

* * * * *

The foregoing discussion, of course, concerns matters of policy, and respondents presumably will advance their contrary policy arguments. But that policy debate is irrelevant to this case. These are the policies that Congress has duly and consistently adopted into

law over the history of our country. Whether these policies should be modified is for Congress to decide. So long as these represent congressional policy, they provide the basis for federal maritime common law.

C. The Maritime Rule Against Vicarious Punitive-Damages Liability For Shipowners Reflects The Unique And Critical Role Of Captains At Sea.

The question of a shipowner's vicarious punitive-damages liability for the acts of the captain at sea must be informed by the unique and critical role of the captain and the consequent relationship between the owner on land and the captain aboard the ship. The maritime rule against such vicarious liability reflects the singular authority and responsibilities of the captain. For this reason, the issue of vicarious liability in the maritime industry is markedly unlike any other context in which the Court has considered either vicarious liability or punitive damages. *See* 1 Schlueter, § 10.2, at 809 (referring to "the peculiar nature of the maritime setting").

The captain at sea is the absolute master of the ship. This principle was long settled at the time our country was founded and *The Amiable Nancy* decided. The captain's authority is "analogous to that of a parent over his child, or of a master over his apprentice or scholar," and "[s]uch an authority is *absolutely necessary to the safety of the ship*, and the lives of the persons on board." Charles Abbott & Joseph Story, TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN 188 (2d American ed. 1810) (emphasis added). Thus, "the entire

management of the ship is entrusted to the master.”
Id. at 265 (English maritime law).

This Court too has recognized the captain’s absolute authority at sea and the differences between the principal-agent rules that apply in the unique maritime context and the traditional rules generally applicable in other areas of the law.

Ever since men have gone to sea, the relationship of master to seaman has been *entirely different from that of employer to employee on land*. The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master’s care. Every one and every thing depend on him. . . . *Authority cannot be divided. These are actualities which the law has always recognized.*

Southern S.S. Co. v. NLRB, 316 U.S. 31, 38 (1942) (emphasis added). *See also* *Petition of the Kinsman Transit Co.*, 338 F.2d 708, 715 (2d Cir. 1964) (Friendly, J.) (owner “must . . . rely on the skill of a master . . . when a vessel is at sea”), *cert. denied*, 380 U.S. 944 (1965); *Chamberlain v. Chandler*, 5 F. Cas. 413, 414 (C.C.D. Mass. 1823) (No. 2,575) (“[t]he authority of a master at sea is necessarily summary, and often absolute”).

This special maritime principle is grounded in the realities and lessons borne of centuries of seafaring experience. First and foremost, waterborne shipping can be extremely hazardous, involving dangerous and unpredictable weather, currents and tides, and maritime obstructions. Given the distance and duration of sea

voyages, ships frequently encounter fierce storms, large swells, icebergs, and submerged hazards.

[I]t is the nature of the calling of the shipmaster to know of the tempestuous forces of wind and tide and seas. He has to make assessments often from confusing or inadequate facts and then translate them into effective decisions.

Boudoin v. J. Ray McDermott & Co., 281 F.2d 81, 84 (5th Cir. 1960) (John R. Brown, Jr., J.).

Moreover, ships must and do traverse wide stretches of water and do not travel on fixed and marked courses. This significantly increases the dangers facing ships at sea and the difficulties of predicting and averting such perilous conditions.

So, too, a ship's captain has only limited means available to avoid hazards. Ships cannot pull over to wait in safety until a storm passes. They cannot easily maneuver or quickly stop in response to an immediate threat. And ships cannot await help from the home office or call the motor club if they become stranded or equipment breaks down.

In addition, the risks presented by such dangers are enormous. Life itself can be at stake, as can the enormous cargo carried on ships – cargo that typically is many times larger than that of non-maritime conveyances. *See The H.A. Scandrett*, 87 F.2d 708, 711 (2d Cir. 1937); Donovan, 53 TUL. L. REV. at 1002 (“sea carriers incurred greater financial risks than land carriers as ‘sea

adventures are peculiarly liable to mishaps of appalling extent”) (quoting Poor, 31 YALE L.J. at 505).

In view of these dangers, the captain’s authority must be complete and undivided. Maritime experience has tellingly demonstrated the necessity for the captain – on the scene and cognizant of the current conditions – to make instantaneous decisions that do not have to be cleared by anyone else and will be obeyed immediately and without question. Captains never have been, and cannot be, expected to confer with the shipowner on shore or have their orders subject to review or approval by the owner. As this Court has explained:

[E]mergenc[ies] must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner’s knowledge. The latter must rely upon the master’s obeying rules and using reasonable judgment.

Spencer Kellogg & Sons, Inc., 285 U.S. at 511-12.

To be sure, communications and other technologies have changed since the time of *The Amiable Nancy*. Even today, however, and even for those ships that do in fact have the most advanced technological features, decisions are entrusted to the captain on the spot and cannot be delegated to or second-guessed by the landside owner removed from the conditions at sea. See *Waterman Steamship*, 414 F.2d at 735-36 (“[a]lthough modern communication and transportation facilities make all acts performed in any foreign port within the potential

control of the shipowner, we believe that . . . [a change in law] should only come from Congress”); *Fuhrman*, 407 F.2d at 1148 (owner not vicariously liable for punitive damages even though suggestions could have been sent to the captain by radio).

The Sixth Circuit recognized this imperative point in *United States Steel Corp. v. Fuhrman*. There, the district court awarded punitive damages against a shipowner on the theory of vicarious liability, reasoning that the captain’s ability to communicate with the owner during an emergency justified the owner’s vicarious punitive liability. *See* 276 F. Supp. at 181. The court of appeals reversed, adhering to the established maritime rule against such liability. As it explained:

The relationship of the ship master and the authority and control he exercises over his ship in such emergencies is unique. In order to avoid chaos aboard in such situations it is imperative that the vessel remain under the control of a single individual with complete and undisputed authority. The master of the vessel must assume authority in such a crisis and he has the responsibility to make the final decision as to what the proper course of action must be in view of all the factors concerned. To hold otherwise would result in hesitations and disastrous delays on the part of the master while he obtains advice and authority from his superiors many miles from the scene. On this very point the Supreme Court in *Columbian Insurance Co. v. Ashby and Stribling*, 38 U.S.

(13 Pet.) 331, 344 (1839), speaking through Mr. Justice Story, said:

“Indeed, in many, if not most, of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done, must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility. The peril usually calls for action, and skill, and intrepid personal decision, without discouraging others by timid doubts or hesitating movements.”

407 F.2d at 1147. Thus, the court declined to hold that in a punitive-damages suit the “company officials sitting hundreds of miles away had the obligation under the facts of the case to make a decision as to the best course of action to be taken and to countermand the orders of the master who was on the scene and in the middle of an emergency.” *Id.*

Indeed, any other rule would be a prescription for, literally, disaster. In an emergency, the captain’s full attention must be focused on the command of the ship without the distraction or interruption of consultations and debates with the shore-side owner. Any inattention or carelessness, even momentarily, can be catastrophic for the ship and its crew and cargo. The considered and time-tested judgment embodied in maritime law is that divided authority would lead to less rather than more safety for ships at sea. *See* 1 Schlueter, § 10.2, at 809

(“a punitive damages award would lead future shipowners to override the orders of the person on the scene, resulting in even more loss of life or property”). There simply is no basis in experience, and no room in the law, for the maritime rule invented by the Ninth Circuit in this case.

D. The Present Case And *Protectus Alpha* Were Wrongly Decided And Depart From Sound Maritime Principles.

In imposing vicarious punitive-damages liability on shipowners for the wrongful acts of captains at sea, the Ninth Circuit here relied entirely on its prior decision in *Protectus Alpha*. See Pet. App. 84a-86a. However, *Protectus Alpha* was wrongly decided and, as the panel below acknowledged (*id.* at 82a-86a & n.84), departs from the settled *Amiable Nancy* line of cases in this Court and the other courts of appeals.

In *Protectus Alpha*, a fire occurred aboard a ship while it was refueling at an onshore facility. As the fire was almost under control, the dock foreman arrived at the scene and – without consulting any of the firemen who had been battling the fire, and indeed contrary to their directive – ordered that the ship be cast off from the dock. See 767 F.2d at 1381, 1384. Insofar as relevant here, the owner of a grain storage facility was held vicariously liable for punitive damages based on the acts of the dock foreman it employed. *Id.* at 1386.

The Ninth Circuit affirmed. Notably, the court cited *no* maritime cases, including *The Amiable Nancy*. Instead, it referred to non-maritime law imposing

punitive-damages liability on a corporation for the acts of its agent even in the absence of corporate approval or ratification. *See* 767 F.2d at 1386 (citing *Am. Soc’y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982) (antitrust case)). The court of appeals adopted Section 909 of the RESTATEMENT (SECOND) OF TORTS (1979) to hold that, as a matter of maritime law, “[p]unitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, . . . the agent was employed in a managerial capacity and was acting in the scope of employment.” 767 F.2d at 1386 (quoting RESTATEMENT (SECOND) OF TORTS § 909(c)).

Protectus Alpha is incorrect and provides no sound basis for the decision below in the present case. To begin with, *Protectus Alpha* has no foundation in maritime law. As discussed above, the settled maritime rule is expressed in the *Amiable Nancy* line of cases rejecting a shipowner’s vicarious liability for punitive damages on the basis of the captain’s wrongful acts at sea. Nowhere did the Ninth Circuit address either this Court’s decision in *The Amiable Nancy* or the decisions in other circuits following *The Amiable Nancy*. In ignoring maritime law, the court of appeals uncritically adopted the general principles it thought applicable in other areas of law. Whatever the correctness of those general principles in such other areas,⁴ they have no place – and certainly not a dispositive place – in maritime law. *See* Gilmore & Black, § 10-22, at 879-80 (the owner’s limitation of liability “has been much more successfully maintained

⁴ This Court rejected the Restatement with respect to vicarious liability for punitive damages under Title VII in *Kolstad v. American Dental Ass’n*, 527 U.S. 526 (1999).

with respect to his seagoing employees than with respect to his shoreside organization”).⁵

Indeed, the Restatement itself recognizes as much. The RESTATEMENT (SECOND) OF AGENCY, from which Section 909 of the RESTATEMENT (SECOND) OF TORTS is derived (*see* note 5, *supra*), explicitly states that its provisions do not apply where “special rules exist.” RESTATEMENT (SECOND) OF AGENCY, Scope Note (1958). Maritime law plainly is an area where, for centuries, such “special rules” have existed, as this Court recognized in *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001): “Admiralty and maritime law includes a host of special rights, duties, rules, and procedures.” Accordingly, by its own terms, the Restatement does not provide the legal rules that are applicable in maritime law.

Nor has any court other than the Ninth Circuit ever applied the Restatement in a maritime case to determine the vicarious liability of a shipowner for punitive damages based on the conduct of a captain at sea. The panel admitted as much (*see* Pet. App. 82a-83a) and in fact recognized that *Protectus Alpha* “was specifically rejected by the Fifth Circuit” (*id.* at 85a n.84) in *Matter of P&E Boat Rental*.

⁵ The adoption of Section 909 in the RESTATEMENT (SECOND) OF TORTS was quite adventitious. The Reporter and the Torts Advisers voted 9–2 to strike Section 909. Section 909 remained, however, solely because the previously published RESTATEMENT (SECOND) OF AGENCY included an identical provision in Section 217c. *See* American Law Institute, 50TH ANNUAL MEETING PROCEEDINGS 236-37 (May 16, 1973); American Law Institute, RESTATEMENT (SECOND) OF TORTS, Tentative Draft No. 19, at 85 (Mar. 30, 1973).

In addition, *Protectus Alpha* ultimately rested not on law but on the naked policy preferences of the judges on the panel. Purporting to “reflect[] the reality of modern corporate America” (767 F.2d at 1386) – *but see* Pet. App. 288a n.1 (Kozinski, J., dissenting from the denial of rehearing en banc) – the *Protectus Alpha* court expressly stated that its decision was intended to ensure that, as a matter of desirable policy, corporations are broadly responsible for punitive damages: “[i]t seems obvious that no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, *no recovery for more than compensatory damages could ever be had against a corporation* if express authorization or ratification were always required.” 767 F.2d at 1386 (emphasis added). As a matter of policy, that is highly dubious and, at the very least, certainly debatable. But as a matter of law, it simply is untenable. Even under federal common law, courts remain legal bodies that decide, and are constrained by, the law grounded in precedent, tradition, and congressional policy; they are not a policy-making branch of government free at will to adopt policy views as law. *See Miles v. Apex Marine*, 498 U.S. at 36 (“maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent on them”); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 & n.34 (1981) (“we consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch, of government; therefore, federal common law is ‘subject to the paramount authority of Congress’”) (citation omitted).

Furthermore, as essentially conceded by the court of appeals in this case (*see* Pet. App. 85a n.84), this portion of *Protectus Alpha* was dictum. There, the district court had rested its liability ruling on the established grounds that the employer both had required the dock foreman's conduct as a matter of corporate policy and had subsequently ratified the conduct. *See* 585 F. Supp. 1062, 1068-69 (D. Or. 1984). Inexplicably, the Ninth Circuit eschewed those grounds (*see* 767 F.2d at 1387) in order to reach out unnecessarily (and ultimately incorrectly) to render a broader ruling.

Finally, *Protectus Alpha* held that the dock foreman was a "managerial" employee under the Restatement. *See* 767 F.2d at 1387. The issue of an employee's "managerial" capacity often is a vexing one under general law, and in fact the Restatement does not define the term. *See Kolstad*, 527 U.S. at 543. In maritime law, however, it is settled that a captain at sea does not affect the shipowner's privity or knowledge for purposes of limitation of liability (*see* pages 16-17, *supra*); for the same reasons, the captain's acts should not subject the owner vicariously to punitive damages.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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