

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 OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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QUESTION PRESENTED

Amicus addresses the following question only:

Was the \$2.5 billion punitive damages award within the limits permitted by federal maritime law and/or other sources of federal common law?

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**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation¹ is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, tort reform activities constitute a substantial portion of WLF's work. WLF is concerned that economic development and consumer welfare not be impeded by improper and excessive punitive damages awards. WLF has regularly appeared before this and other federal courts in cases raising punitive damages issues. *See, e.g., Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *BMW of North America v. Gore*, 517 U.S. 559 (1996). WLF also filed briefs in this case in 1997 when it was before the U.S. Court of Appeals for the Ninth Circuit, and in this Court in support of the petition for a writ of certiorari.

WLF fully supports Petitioners' efforts to overturn the judgment below based on each of the three Questions Presented. WLF is submitting this brief

¹ Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. By blanket letters of consent, all parties have consented to the filing of this brief.

because of its particular interest in persuading the federal courts to establish clearer limits, based on federal common law, on the availability and size of punitive damages awards. The Ninth Circuit essentially held that no such limits exist. WLF urges the Court to declare that that holding is inconsistent with the Court's traditional view of remedial issues arising under federal causes of action.

STATEMENT OF THE CASE

The EXXON VALDEZ ran aground in Prince William Sound, Alaska in 1989, spilling several hundred thousand barrels of oil into the Sound. Petitioners (collectively, "Exxon") subsequently spent \$2.1 billion in cleaning up the spill and paid private claims totaling \$300 million. The proceedings commenced against Exxon by state and federal governments were settled in 1991, with Exxon agreeing to pay environmental and natural resources damages of \$900 million. Exxon also paid criminal and restitution fines in the amount of \$125 million. The total liabilities incurred by Exxon as a result of the oil spill exceeded \$3.4 billion. Notwithstanding the liabilities that Exxon had already incurred, an Alaskan jury awarded an additional punishment of \$5 billion as punitive damages. The U.S. Court of Appeals for the Ninth Circuit upheld a punitive damages award of \$2.5 billion, several orders of magnitude larger than the next highest punitive damages award ever upheld by a federal appellate court. The petition requests the Court to hold that, under the circumstances of this case, federal law does not permit an award of punitive damages or, alternatively, does not permit a punitive damages award of that magnitude.

The immediate cause of the grounding of the EXXON VALDEZ is not in dispute. As the ship was leaving Valdez harbor, Joseph Hazelwood (the ship's captain) explained to Gregory Cousins (the officer on watch) a maneuver that would be required to avoid ice detected in the ship's path. In violation of Exxon's written policy regarding operation of Exxon vessels, Hazelwood then left the ship's bridge and went to his cabin, leaving Cousins and a helmsman alone on the bridge. Cousins failed to steer the ship away from a reef (the final step necessary to complete the maneuver Hazelwood had explained to him), and the ship ran aground. Hazelwood had a history of alcoholism (a history of which Exxon was aware), and there was evidence at trial that he was drinking heavily on the night of the grounding.

In an action filed in federal district court in Alaska, the plaintiffs (a certified class consisting of all persons who possessed or asserted a punitive damages claim arising from the spill) sought punitive damages under federal maritime law against Hazelwood and Exxon. The case was tried in 1994 along with compensatory damages claims filed by commercial fishermen who alleged that their economic losses exceeded the compensation they had received under Exxon's claims program.

In the first phase of the trial, the jury was instructed to determine whether Hazelwood and/or Exxon had acted recklessly (a necessary predicate for a punitive damages award). It was instructed that because Hazelwood was a supervisory employee, his conduct (even though it violated official Exxon policy) was attributable to Exxon, and thus that if it found that

Hazelwood acted recklessly, it should also find that Exxon acted recklessly. The jury found that both acted recklessly.²

In the second phase of the trial, the jury considered the economic damages claims of commercial fishermen. Rejecting the great majority of those claims, the jury awarded \$287 million in compensatory damages; after Exxon was given credit for its prior claims payments, the net award was \$19.6 million. In the third phase, the jury considered punitive damages. It awarded \$5,000 in punitive damages against Hazelwood and \$5 billion in punitive damages against Exxon. The trial court entered judgment on those awards.

On appeal, the Ninth Circuit in November 2001 affirmed in part, vacated in part, and remanded. Pet. App. 57a-117a. The court rejected each of Exxon's challenges to the permissibility of a punitive damages award. *Id.* 68a-79a. In particular, it rejected Exxon's claim that such damages were impermissible because, in light of the \$3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* 68a. The court said:

² The plaintiffs contended – and submitted relevant evidence hotly disputed by Exxon – that Exxon also should be deemed reckless based on actions of Exxon officials other than Hazelwood. For example, the plaintiffs contended that Exxon officials acted recklessly in allowing Hazelwood to continue to captain the EXXON VALDEZ despite their knowledge of his history of alcoholism. But the jury made no separate finding on that claim; it was instructed to arrive at a finding that Exxon acted recklessly once it determined that Hazelwood acted recklessly.

Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. . . . [W]e reject the argument.

Id.

The appeals court also rejected Exxon's argument that federal maritime law bars punitive damages awards against a shipowner on the basis of the ship master's reckless conduct, in the absence of a finding that the owner directed, countenanced, or participated in that conduct. *Id.* 80a-86a. The court said it was bound in that regard by an earlier Ninth Circuit decision in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), which held that punitive damages could be imposed on a maritime company based on the grossly negligent conduct of a dock foreman employed in a managerial capacity and acting within the scope of his employment. *Id.* 84a-85a.³ The court did not address Exxon's alternative argument that even when punitive damages are permitted under maritime law, it strictly limits the size of such awards.

The court held that the \$5 billion punitive damages award was too high to withstand review under

³ The appeals court conceded that it was impossible to determine from the verdict whether the jury's finding that Exxon acted recklessly was based on anything other than an imputation from Hazelwood's recklessness. *Id.* 88a. Accordingly, the determination that Exxon acted recklessly – and thus can be held liable for punitive damages – depends on whether *Protectus Alpha* is a proper interpretation of federal maritime law.

the Due Process Clause. *Id.* 90a-104a. The court noted that the district court had upheld the verdict prior to this Court's decision in *BMW* and thus did not have an opportunity to apply that decision's three guideposts for review of punitive damages awards – degree of reprehensibility, disparity between the harm or potential harm suffered by the victim and his punitive damages award, and the difference between the award and the civil/criminal penalties authorized in comparable cases. *Id.* 94-95 (*citing BMW*, 517 U.S. at 574-75). After discussing how those three factors might be applied in this case and suggesting that a more appropriate punitive damages award might well be significantly less than \$5 billion, the court vacated the \$5 billion award and remanded “so that the district court can set a lower amount in light of the *BMW* and *Cooper Industry* standards.” *Id.* 104a.

The case made two more round-trips to the district court and back to the appeals court, with each decision focusing on due process limitations on the punitive damages award. Finally, in May 2007 a Ninth Circuit panel announced that it was “time to for this protracted litigation to end,” and directed the district court to reduce the punitive damages award to \$2.5 billion. *Id.* 1a-56a. The appeals court denied Exxon's petition for rehearing *en banc*, with two judges writing dissents from the denial. *Id.* 285a-293a. Judge Kozinski dissented on the ground that the panel decision conflicted with a well-established federal maritime law prohibition against vicarious punitive damages awards against ship owners. *Id.* 287a-292a. Judge Bea agreed with Judge Kozinski that punitive damages were not awardable in this case, and added that the award was excessive under *State Farm* because the ratio between

punitive and compensatory damages was too high. *Id.* 292a-293a.

SUMMARY OF ARGUMENT

Even in an era in which punitive damages awards are often “many times the size of such awards in the 18th and 19th centuries,”⁴ the \$2.5 billion award in this case stands out as particularly noteworthy. It is nearly 100 times larger than the largest punitive damages award ever previously affirmed by a federal appeals court. It is imposed in a case lacking any of the usual hallmarks of particularly culpable conduct, *e.g.*, personal injury, intentional misconduct, or efforts to cover up the results of one’s wrongdoing. It is imposed in a field of law (maritime law) with a long tradition of limiting damage awards in tort suits. WLF agrees with Petitioners that an award of punitive damages in this case is inconsistent with that maritime law tradition, and also agrees that Congress, when it adopted the Clean Water Act, 33 U.S.C. § 1311 *et seq.*, intended to preclude such awards in cases involving either negligent or intentional maritime oil spills.

WLF writes separately to focus on the third Question Presented by the Petition, which addresses limitations imposed by federal maritime law on the *size* of punitive damages awards. WLF respectfully suggests that the lower federal courts are in need of guidance regarding federal common law limitations on the size of punitive damages awards arising (as here) under federal law causes of action. When such cases arise, the lower

⁴ *Philip Morris USA v. Williams*, 127 S. Ct. at 1064.

federal courts all too often confine their analysis of limits on the size of punitive damages awards to a due process analysis. If the size of the award passes muster under the *State Farm/BMW* line of cases, the analysis comes to an end. That is essentially what happened here: the Ninth Circuit spent a decade examining whether the size of the punitive damages award violated the Due Process Clause, but it barely glanced at the substantial statutory and federal common law arguments raised by Exxon.

Yet it stands to reason that the federal common law imposes far more demanding standards on punitive damages awards than does the Due Process Clause. This Court has long recognized that state courts are entitled to a significant degree of deference regarding how they go about furthering a State's legitimate interests in punishing unlawful conduct and deterring its repetition. For that reason, the *State Farm/BMW* line of cases grants States substantial leeway in determining the proper size of punitive damages awards, and only steps in to impose limits when an award is so large as to amount to arbitrary punishment that serves no legitimate state interest.

The need for deference disappears when (as here) the punitive damages award arises in a case raising federal questions. In such cases, whether punitive damages are an appropriate remedy and, if so, the appropriate size of such awards are issues that must be settled by the federal government alone. When Congress has adopted legislation that addresses those issues, the job of the federal courts is relatively easy; they simply do their best to discern congressional intent. Petitioners make a strong case that Congress

has indeed addressed the issues raised here, and has decreed, through adoption of the Clean Water Act, that punitive damages are unavailable in federal maritime suits alleging negligent or intentional maritime oil spills. But Congress often fails to address punitive damages issues when creating new causes of action, thereby leaving it to the courts to fill in the blanks through the creation of federal common law.

Rather than fulfilling that role in the appropriate manner – by, for example, turning for guidance to the general common law or discerning rules based on the purposes sought to be served by punitive damages awards – lower federal courts often turn to the *State Farm/BMW* line of cases. But those cases articulate due process rules that are intended to create an absolute minimum level of fairness, not to govern proceedings peculiarly within the province of the federal courts.

The Ninth Circuit inappropriately abdicated its role in creating rules governing the appropriate size of punitive damages awards in federal-question cases, by devoting virtually its entire analysis to the due process limits on the size of the punitive damages award. For example, the Ninth Circuit conceded that there was “some force as logic and policy” behind Exxon’s argument that punitive damages were inappropriate because its \$3.4 billion in post-spill payments had already “thoroughly punished and deterred any similar conduct in the future.” Pet. App. 68a. But it was unwilling to adopt federal common law rules implementing that “logic and policy,” because it was unable to locate any case law establishing precedent for doing so. *Id.* WLF agrees with Petitioners that – in light of overwhelming evidence that prior criminal and

civil penalties imposed on Exxon have already satisfied any reasonable interest in punishment and deterrence – the Ninth Circuit erred in failing to impose federal maritime law limitations on punitive damages. Moreover, in the absence of an explicit congressional directive to the contrary, that same evidence would preclude (or at least strictly limit) punitive damages awards under *any* federal-law cause of action, regardless whether it arose at sea or on land. WLF urges the Court to provide lower courts with guidance regarding the propriety of adopting federal common law rules governing punitive damages awards. In the absence of such guidance, lower courts will continue to focus solely on due process limitations – limitations that often are insufficient by themselves to ensure that punitive damages awards are properly serving society’s interests in deterrence and retribution.

Guidance is particularly warranted in light of recently developed empirical evidence demonstrating that juries are largely incapable of producing consistent and predictable punitive damages verdicts. Although jurors exhibit a fair degree of consistency in ranking the “outrageousness” of wrongful conduct, their translation of that ranking into dollar values is enormously variable. Accordingly, if the consistency (and, ultimately, the legitimacy) of federal-law punitive damages awards is to be maintained, federal judges must play a greater role in overseeing the size of such awards, to ensure that they are properly serving their legitimate functions. Such oversight is fully consistent with the proper allocation of roles between judges and juries because, as the Court has explained, “the level of punitive damages is not really a fact tried by the jury.” *Cooper Industries, Inc. v. Leatherman Tool Group*, 532

U.S. 424, 427 (2001) (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 ((1996) (Scalia, J., dissenting)).

ARGUMENT

I. FEDERAL COMMON LAW, AND FEDERAL MARITIME LAW IN PARTICULAR, IMPOSE STRICT LIMITATIONS ON THE SIZE OF PUNITIVE DAMAGES AWARDS ARISING UNDER FEDERAL-LAW CAUSES OF ACTION

In a line of case stretching back 16 years, the Court has recognized that the Fourteenth Amendment’s Due Process Clause imposes limitations on the size of punitive damages awards. The Court has recognized that when such awards can fairly be categorized as “grossly excessive” in relation to a State’s interests in punishment and deterrence, they “enter the zone of arbitrariness that violates the Due Process Clause.” *BMW*, 517 U.S. at 568.

At the same time, however, the Court has been cognizant that States have very legitimate interests in imposing punitive damages for purposes of punishment and deterrence. Accordingly, the Court has repeatedly expressed federalism-based warnings that its due process standards are not intended to dictate to state courts all facets of their punitive damages jurisprudence but instead impose bare minimum standards designed to prevent only those awards that most clearly constitute nothing more than arbitrary punishment. Thus, in *BMW*, the Court explained, “In our federal system, States necessarily have considerable flexibility

in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.” *Id.* In *Cooper Industries*, the Court said, “As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards.” *Cooper Industries*, 532 U.S. at 433 (2001). *See also Philip Morris USA*, 127 S. Ct. at 1065 (“States have some flexibility to determine what kinds of procedures” they will adopt to ensure that punitive damages award comport with due process.).⁵

Similarly, those justices who have opposed recognition of substantive due process limits on the size of punitive damages awards have based their opposition in part on a reluctance to invoke the U.S. Constitution to interfere with States’ prerogatives to decide how best to punish and deter wrongdoing. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., concurring in the judgment) (“State legislatures and courts have ample authority to

⁵ The Court’s reluctance to interfere with state law governing punitive damages has been evident in its consideration of standard-of-proof issues. The Court has noted that state laws requiring a plaintiff seeking an award of punitive damages to prove her claim by “clear and convincing” evidence is “an important check against unwarranted imposition of punitive damages.” *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994). Nonetheless, the Court has declined to impose “clear and convincing” standards as an element of a defendant’s due process rights. The Court stated in *Haslip* that “there is much to be said in favor of a State’s requiring” a higher standard of proof, but held that Alabama’s much lower standard, that the jury be “reasonably satisfied from the evidence,” was constitutionally permissible. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991).

eliminate any perceived ‘unfairness’ in the common-law punitive damages regime, and have frequently exercised that authority in recent years.”); *BMW*, 517 U.S. at 598-99 (Scalia, J., dissenting) (“[T]he Court’s activities in this area are an unjustified incursion into the province of State governments. . . . The Constitution provides no warrant for federalizing yet another aspect of our Nation’s culture”); *id.* at 607, 613 n.3 (Ginsburg, J., dissenting) (“The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States’ domain. . . . In any ‘lawsuit where state law provides the rule of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.”) (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989)).

By way of contrast, in lawsuits where (as here) it is *federal* law that provides the rule of decision, there are no federalism-based reasons for federal courts to restrict themselves to adopting bare-minimum fairness standards, and every reason to adopt rules to ensure that punitive damages awards are serving their proper purposes. This Court has stated repeatedly that punitive damages serve two legitimate purposes only: deterrence and retribution. *State Farm*, 538 U.S. at 419 (“[P]unitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”); *BMW*, 517 U.S. at 568, 584-85; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

Moreover, the proper level of deterrence and

retribution is an issue of law to be determined by Congress and the courts – not simply handed off to the jury with instructions to do its best to come up with a result that it deems just. As the Court explained in *Cooper Industries*, it is wholly appropriate for courts to impose strict limits on the size of permissible punitive damages awards in federal-law cases and to review such awards carefully to ensure that juries adhere to those limits; unlike the measure of actual damages suffered, “the level of punitive damages is not really a fact tried by the jury.” *Cooper Industries*, 532 U.S. at 437 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).⁶

Petitioners have convincingly demonstrated that Congress has already addressed the availability of punitive damages awards in cases of this sort -- it determined (when adopting the Clean Water Act) that such awards are impermissible in tort suits involving either negligent or intentional maritime oil spills. Pet. Br. 27-43. But were this Court to determine that Congress had not addressed the issue, it would then be incumbent on federal courts to determine, as a matter of federal common law, whether punitive damages should be available in cases of this sort and, if so, what limitations should be imposed on such awards.

Although federal courts have assumed that punitive damages are available under a wide range of federal-law causes of action, Congress generally has not

⁶ *Cooper Industries* determined that because a jury’s award of punitive damages does not constitute a finding of fact, careful appellate review of a district court decision upholding the award “does not implicate” Seventh Amendment jury-trial rights. *Id.*

directly addressed their availability or how federal courts should go about quantifying such damages. Only a handful of federal statutes provide explicit caps on punitive damages awards. *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (imposing \$300,000 monetary cap on punitive damages in cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*). By and large, when enacting new federal-law causes of action, Congress generally has not specified whether punitive damages are among the available remedies. Even when it has specified that punitive damages *are* available, it has left to the courts the job of fleshing out federal common law rules governing the size of punitive damages awards.⁷ *See, e.g.*, 15 U.S.C. § 1681n(a)(2) (providing for award of punitive damages in such amount “as the court may allow” against one who “willfully fails to comply” with provisions of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681, *et seq.*).⁸

Unfortunately, rather than fulfilling that

⁷ When confronted with federal statutes that provide little guidance regarding appropriate standards for awarding punitive damages, the Court has not hesitated to establish federal common law standards not grounded in the statute itself. *See, e.g., Kolstad*, 527 U.S. at 541-46 (turning to general common law for guidance in determining corporate employer’s vicarious liability for punitive damages under the Civil Rights Act of 1991, 42 U.S.C. § 1981a).

⁸ The meaning of the phrase “willfully fails to comply” was at issue in the Court’s recent decision in *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007). The federal courts continue to be inundated with putative class action suits seeking punitive damages awards under the FCRA.

function, many federal appeals courts have simply turned to the due process limitations imposed by the *State Farm/BMW* line of cases as the sole check on excessive punitive damages awards in federal-law causes of action. *See, e.g., Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007) (applying due process limitations, court reduces from \$2.2 million to \$400,000 punitive damages award under FCRA); *Gaffney v. Riverboat Servs. of Indus.*, 451 F.3d 424, 464 (7th Cir. 2006) (rejecting challenge to size of punitive damages award under 46 U.S.C. § 2114, which prohibits discharge of seamen for acting as whistleblowers; only review available besides due process review is abuse-of-discretion review), *cert. denied*, 127 S. Ct. 933 (2007); *Bowles v. Osmose Utils. Servs., Inc.*, 443 F.3d 671 (8th Cir. 2006) (applying due process limitations, court rejects challenge to award of punitive damages under 42 U.S.C. § 1981 for racial harassment of employee); *Evans v. Fogarty*, 241 Fed. Appx. 542 (10th Cir. 2007) (reinstating jury's \$1.35 million punitive damages award under 42 U.S.C. § 1983; declined to consider defendants' challenge to the size of award because defendants had not raised a due process challenge).

That is precisely what the Ninth Circuit did in this case. It simply declined to consider Exxon's argument that federal common law imposed limits on the size of the punitive damages award. Pet. App. 68a.⁹ Exxon argued that such damages were impermissible because, in light of the \$3.4 billion paid by Exxon in the

⁹ That federal common law argument was in addition to Exxon's arguments that both federal maritime law and the Clean Water Act prohibited *any* punitive damages. *See id.* at 80a-86a, 73a-78a.

aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* While acknowledging that “Exxon’s argument has some force as logic and policy,” it declined to consider the argument in the absence of precedent supporting Exxon’s position. *Id.* But cases of this type provide compelling circumstances for adoption of federal common law rules limiting the size of punitive damages awards. If, in fact, Exxon’s prior payment of \$3.4 billion meant that a punitive damages award would have little or no deterrent or retributive effect, then the appeals court should have applied federal common law to reduce or eliminate the punitive damages award in this case.

II. THE \$2.5 BILLION AWARD CANNOT BE JUSTIFIED ON EITHER DETERRENCE OR RETRIBUTION GROUNDS

The overwhelming evidence indicates that the huge \$2.5 billion punitive damages award cannot be justified on either deterrence or retribution grounds. Because this Court has held repeatedly that deterrence and retribution are the *only* grounds that can justify a punitive damages award, federal common law principles dictate that no punitive damages are properly awardable in this case – even without taking into account Congress’s identical determination, expressed through the Clean Water Act.

A. Deterrence

As Justice Breyer has noted, economic theory holds generally that proper deterrence will be achieved if defendants pay the total cost of the harm they cause.

BMW, 517 U.S. at 592-93 (Breyer, J., concurring). When tort law requires defendants to compensate for such harm, it forces them to “internalize” the harm’s cost, thereby providing appropriate incentives for them to invest in precaution (or scale back activities where accidents may occur) up to the point where social welfare is maximized, *i.e.*, where the marginal cost of increased precaution equals the marginal cost of reduced accidents. *See generally*, Landes & Posner, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987). Here, Exxon has already incurred liabilities exceeding \$3.4 billion as a result of the oil spill. The Ninth Circuit’s failure to give serious consideration to the deterrent impact of these liabilities already incurred by Exxon cannot be squared with this Court’s precedents. It defies reason to suggest that accident costs of \$3.4 billion would not induce Exxon (or any similarly situated company) to implement corrective measures.

There is only one scenario that economists cite under which compensatory damages might not fully deter unintentional torts: the so-called “underenforcement” or “undercompensation” rationale. This rationale posits that compensatory damages may deter incompletely where difficulties in detection or shortfalls in enforcement diminish the likelihood that a defendant will incur liability for the full social cost of its conduct. *See Ellis, Fairness & Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). However, that scenario has no bearing to the facts of this suit, where there is no fear that the harm and attribution of liability will go undetected. Injury is evident, the defendant is known, and mass lawsuits for all compensatory damages soon follow.

Nonetheless, much judicial treatment of punitive damages, despite reliance on the deterrence objective, remains strikingly “oblivious[] to the basic point that ordinary civil damages – in the course of providing compensation – concurrently function to deter.” Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV., 133, 137 (1982). The Court should make clear to lower courts that plaintiffs seeking punitive damages in federal-law causes of action must support their claims with evidence that a punitive damages award – over and above all compensatory awards – is necessary for deterrence purposes. If the tort system is going to hand out multi-billion dollar awards based on the ostensible need for deterrence, federal common law demands no less. The courts below failed even to consider whether the \$3.4 billion paid by Exxon as a result of the EXXON VALDEZ spill is sufficient to induce shippers to take all practicable steps to prevent a recurrence. That failure requires reversal of the judgment below.

The Ninth Circuit’s justified its imposition of \$2.5 billion in punitive damages on Exxon’s great wealth. But as Justice Breyer has pointed out, the relevance of wealth to deterrence is difficult to understand, given “the distant relation between a defendant’s wealth and its responses to economic incentive.” *BMW*, 517 U.S. at 591 (Breyer, J., concurring). Emphasis on wealth is particularly misguided in the case of corporations:

For natural persons the marginal utility of money decrease as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporations[, however,] are abstractions; investors own the net worth of the

business. These investors pay any punitive award (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992).

Moreover, excessive punitive damages may actually lead to “overdeterrence,” a result that harms not only the defendant but society as well. Punitive damages exceeding the amount needed to fill any deterrence gap promote inefficiency and misallocation of resources. *See BMW*, 517 U.S. at 593 (Breyer, J., concurring) (larger damages can potentially “overdeter’ by leading potential defendants to spend more to prevent the activity that causes harm, say, through employee training, than the cost of the harm itself.”). In sum, the overwhelming evidence before the court of appeals was that the \$2.5 billion punitive damages award was unnecessary to deter future misconduct.

B. Retribution

Nor can the punitive damages award be justified as a means of punishing Exxon. As a practical matter, it is doubtful whether retribution could ever be substantially or meaningfully served by the assessment of punitive damages against fictitious entities such as corporations. As the Supreme Court said in *City of Newport v. Fact Concept, Inc.*, a case forbidding

assessment of punitive damages against municipal corporations as a matter of law:

Under ordinary principles of retribution, it is the [individual] wrongdoer himself who is made to suffer for his unlawful conduct. . . . A municipality, however can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the government entity itself.

453 U.S. 217, 267 (1981) (emphasis in original).

The same, obviously, is true of private corporations, particularly widely held corporations whose shareholders have no meaningful ability to manage their day-to-day affairs. The goal of retribution may be served by punishing individual corporate agents who commit blameworthy acts – as the jury did in this case by assessing punitive damages against Captain Hazelwood – but it is not served by punishing entities incapable of having malice (or any other blameworthy state of mind sufficient for punitive damages) independent of that of their separately punishable agents. As commentators have long noted, “[T]he entire notion of punishment-as-punishment becomes deeply problematic when applied to the corporate form.” Schwartz, *supra* at 144.

A number of courts have made this same point, not least the Supreme Court in *City of Newport*:

Regarding retribution, it remains true that an award of punitive damages against a municipality

“punishes” only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon shoulders of blameless or unknowing taxpayers. . . . Whatever its weight, the retributive purpose is not significantly advanced, if advanced at all, by exposing municipalities to punitive damages.

453 U.S. at 267-68. At the very least, the fact that the award comes entirely at the expense of innocent parties precludes any sanction of the massive magnitude assessed here.

The appropriateness of a \$2.5 billion award is particularly problematic when compared to the \$125 million paid by Exxon in connection with criminal proceedings. That amount represented the considered judgment of officials of the United States and Alaska governments regarding the appropriate level of “punishment.” There can certainly be no more legitimate measure of society’s disapprobation than the penalties enforced by society’s elected officials.

By contrast, there is no principled reason for allowing punitive damages juries to impose much greater sanctions, at the behest of self-interested tort victims and their lawyers, on the theory that the public interest in retribution demands more than the public’s official representatives have found appropriate. Such a procedure confuses retribution – a purely public expression of social disapproval – with private revenge, a consideration that courts have never recognized as a proper purpose of punitive damages.

In sum, neither deterrence nor retribution can justify a punitive damages award anywhere near the \$2.5 billion upheld by the Ninth Circuit. More importantly, the Ninth Circuit failed even to consider whether, as a matter of federal common law, the absence of any deterrence or retribution rationale required elimination or substantial reduction of the punitive damages award. That failure requires reversal of the punitive damages award and, at the very least, remand to permit the appeals court to consider the issue in the first instance.

III. JURIES ARE LARGELY INCAPABLE OF PRODUCING CONSISTENT AND PREDICTABLE PUNITIVE DAMAGES VERDICTS

Guidance from this Court regarding the propriety of adopting federal common law rules governing punitive damages awards is particularly warranted in light of recently developed empirical evidence demonstrating that juries are largely incapable of producing consistent and predictable punitive damages verdicts. Although jurors exhibit a fair degree of consistency in ranking the “outrageousness” of wrongful conduct, their translation of that ranking into dollar values is enormously variable.

Much of that research is collected and synthesized in a recent book written by preeminent scholars in a variety of relevant fields. *See* Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* (“*How Juries*

Decide") (2002).¹⁰ Among their other principal findings:

- Deliberation by groups of jurors does not moderate the unpredictability of punitive damages awards. Instead, it exacerbates such unpredictability – juries deliberating collectively return consistently higher and more variable awards than do individual jurors. *Id.* at 43-61; see also, David Schkade, *et al.*, *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139 (2000).
- Juries will not and cannot apply standard economic deterrence theories, even when instructed on how to do so. Instead, juries will impose punitive damages based on an amount they deem an appropriate level of punishment, without regard to whether other payments by the defendant have adequately deterred future misconduct and whether a punitive damages award will result in overdeterrence. *How Juries Decide*, 132-41; see also Cass R. Sunstein, *et al.*, *Do People Want Optimal Deterrence?*, 29 J. Legal Stud. 237, 241-46 (2000); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. 313, 325-37, 342-44 (2001).

¹⁰ The authors are experts in the area of behavioral analysis of the law (Professor Cass R. Sunstein of the University of Chicago), cognitive psychology (Professors Daniel Kahneman of Princeton University, David A. Schkade of the University of Texas, and John W. Payne of Duke University), jury decisionmaking (Professor Reid Hastie of the University of Chicago), and behavior economics (Professor W. Kip Viscusi of Harvard University).

- Juries assess punitive damages in significantly varying amounts based on factors bearing no relation to the purposes such awards are intended to serve (detering future misconduct and imposing a punishment commensurate with the severity of the past misconduct) – such as the amount of punitive damages requested by plaintiffs’ counsel and bias in favor of local plaintiffs suing out-of-state defendants. *How Juries Decide*, 62-74. *See also*, Reid Hastie, *et al.*, *Juror Judgments in Civil Cases: Effects of Plaintiff’s Requests and Plaintiff’s Identity on Punitive Damages Awards*, 23 *Law & Hum. Behav.* 445 (1999).
- Juries impose punitive damages based on hindsight bias and on irrational attitudes toward risk – such as awarding higher punitive damages against defendants that conduct cost/benefit analyses than against those that do not. *How Juries Decide*, 96-108, 112-31; *see also*, W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act*, 52 *Stan. L. Rev.* 547, 552-59 (2000).

The empirical research consisted of large-scale studies of jury-eligible citizens. Researchers initially provided 899 individuals with materials describing ten personal injury scenarios of varying degrees of reprehensibility. They asked the mock jurors to rank the scenarios on a bounded scale of one to six, by both degree of outrageousness and severity of punishment that should be imposed, and then to specify the dollar punishment the defendant should have to pay. *How Juries Decide*, 17-26, 31-42; *see also*, Cass R. Sunstein, *et al.*, *Assessing Punitive Damages (with Notes on*

Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998). In a follow-up study, 3,000 mock jurors were asked to perform the same task individually, and then as members of about 500 deliberating juries. *How Juries Decide*, 43-61. Both studies demonstrated the striking unpredictability of punitive damages awards even when juries agree on the blameworthiness of the defendants' conduct, and the second study demonstrated that that variability only increases when deliberations are conducted in a group setting. *Id.* at 31-62.

The researchers proposed two highly plausible explanations for this huge variability and the increased variability that comes with joint deliberations. First, jurors asked to compute punitive damages have no frame of reference: they are unlikely to have engaged previously in any similar exercise, and they essentially are told that punitive damages can be imposed within a range of zero to infinity. *Id.* at 41. Second, because zero is the lower bound on a punitive damages award but there is no upper bound, juries – once they have collectively decided to award a non-zero amount – tend to resolve their collective disagreements by shifting toward the unbounded end. *Id.* at 58.

Regardless of the causes of the huge variability, its existence is not open to serious challenge and has major implications for punitive damages law. It means that a given jury verdict regarding whether (and in what amount) to award punitive damages cannot realistically be deemed to constitute the collective views of the citizenry regarding the proper level of deterrence and punishment to be meted out in a given instance. It certainly confirms *Cooper Industries's* determination

that a jury's punitive damages award in no way represents a finding of fact by the jury. *Cooper Industries*, 532 U.S. 427. A jury may reach a reproducible consensus regarding the defendant's blameworthiness and even regarding the monetary penalty necessary to deter future misconduct, but the empirical research cited above demonstrates that there is little if any correlation between such findings and a jury's actual punitive damages award.

The research confirms the need for courts to carefully monitor all punitive damages awards, which – in the absence of careful monitoring – impose on defendants “an acute danger of arbitrary deprivation of property.” *State Farm*, 538 U.S. at 417. That danger is particularly severe when, as here, the defendant is a large, out-of-state corporation being sued by local plaintiffs. *Honda Motor*, 512 U.S. at 431-32. As noted above, federalism concerns counsel restraint in invoking federal law as the basis for overturning punitive damages awarded on the basis of state law. No such restraint is warranted when, as here, the award is based on federal law. When as here, the evidence demonstrates that a punitive damages award imposed under federal law furthers no legitimate federal interest in either punishment of wrongdoing or deterrence of future misconduct, federal courts should not hesitate to overturn such awards.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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