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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 PETITIONERS

E. EDWARD BRUCE
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for Petitioner Exxon Shipping Company

WALTER DELLINGER
(*Counsel of Record*)
JOHN F. DAUM
CHARLES C. LIFLAND
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner Exxon Mobil Corporation

QUESTIONS PRESENTED

An Alaska federal jury awarded $5 billion in punitive damages against Exxon under federal maritime law for the accidental grounding of the tanker EXXON VALDEZ and the resulting oil spill. The award came on top of Exxon's payment of over $3.4 billion in fines, penalties, natural resource damages, cleanup costs, claims payments and other expenses. The jury was instructed not to punish for harm to the environment, which other proceedings had fully redressed, but only for lost income and similar economic harm to commercial fishermen and other private parties. Applying the Due Process Clause, the Ninth Circuit reduced the award to $2.5 billion—still 123 times the compensatory damages awarded and five times what the court found was the total, fully compensated loss to all private economic interests.

The questions presented are:

1. May federal maritime law impose punitive damages on a shipowner for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law expand the penalties Congress provided by adding a punitive damages remedy?

3. Was this $2.5 billion award within the limits permitted by federal maritime law?

PARTIES TO THE PROCEEDING

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

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

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[1] Citations to "JA" indicate the Joint Appendix filed herewith. "Pet. App." indicates the Appendix to the Petition for Certiorari. Citations to "ER" and "RER" indicate materials available in Appellants' Joint Excerpts of Record and Appellants' Joint Rebuttal Excerpts of Record filed in the first Ninth Circuit appeal (No. 97-35191). "Pl. Br." refers to Respondents' Brief filed in the first Ninth Circuit appeal. ER (2004) refers to

RULE 29.6 DISCLOSURE

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

Appellants' Joint Excerpts of Record in the second Ninth Circuit appeal (No. 04-35182). "Pl. Br. (2004)" refers to Respondents' Brief in that appeal. Citations to "DX" or "PX" indicate exhibits admitted at trial. The trial transcript is cited by volume, page, and line, so that "19/3181:18-82:8" means volume 19, from page 3181 line 18 to page 3182 line 8. "OCCP" refers to the Brief in Opposition to Conditional Cross-Petition for Writ of Certiorari, filed October 1, 2007, in No. 07-276. Emphasis is supplied throughout, except where otherwise stated, and internal quotations and citations are omitted.

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

BRIEF FOR PETITIONERS

OPINIONS BELOW

The two opinions of the Ninth Circuit and the opinions of Judges Kozinski and Bea dissenting from denial of rehearing *en banc* are reported at 270 F.3d 1215 and 490 F.3d 1066 and reprinted at Pet. App. 1a-117a and 287a-293a.[2] The district court's initial opinions are unreported and reprinted at Pet. App. 224a-284a. Its later opinions on the constitutionality of the award (not pertinent to the questions presented) are reported at 236 F. Supp. 2d 1043 and 296 F. Supp. 2d 1071 and reprinted at Pet. App. 118a-223a.

JURISDICTION

The Ninth Circuit issued its opinions on November 7, 2001, and December 22, 2006, and amended the latter on May 23, 2007, upon denial of Exxon's timely petition for rehearing. Pet. App. 285a-286a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Provisions of the Clean Water Act, 33 U.S.C. §§ 1311 *et seq.* (1988), applicable to this spill are reprinted in the Addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

1. In December 1967, Atlantic Richfield Co. and Humble Oil & Refining Co. (an Exxon predecessor), discovered the giant oil field at Prudhoe Bay on the North Slope of Alaska. Developing this field required the investment of billions of dollars by Exxon

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[2] All citation conventions are explained in note 1, *supra*.

and others, and the construction of the Trans-Alaska Pipeline System (TAPS) from the North Slope to Valdez, Alaska—at the time of its completion the largest civil-engineering project in the world. The project received all government approvals to transport the oil by tanker through Prince William Sound to the lower 48 states. Many fishermen protested these plans, arguing that tanker traffic posed the risk of an oil spill, and that the danger to their fishing income was too great. The State of Alaska, however, strongly favored the project. The relevant state and federal officials carefully considered the fishermen's concerns, analyzed the project thoroughly in an Environmental Impact Statement, and balanced all the competing considerations. In 1973 Congress passed the Trans-Alaska Pipeline Authorization Act, directing the construction of the Pipeline, 43 U.S.C. § 1653(a), and, to deal with the well-known risk of a spill, establishing a special liability regime, the Trans-Alaska Pipeline Liability Fund, to pay prompt and adequate compensation, *id.* § 1653(c). With the firm support of the State of Alaska, Congress thus made the political judgment that the risks of tanker traffic through Prince William Sound were worth taking, for reasons of national security and national energy policy. As the Ninth Circuit observed, "fuel for the United States at moderate expense has great social value." Pet. App. 101a.

2. On March 24, 1989, the EXXON VALDEZ, a state-of-the-art, well-equipped tanker, ran aground on Bligh Reef in Prince William Sound. The immediate cause was the failure of Third Mate Cousins to steer the vessel away from the reef. The vessel's master, Captain Hazelwood, instructed Cousins when and where to make the turn, but then left the

bridge—a violation of Exxon's explicit policy requiring two officers to be present. For reasons that remain unknown, Cousins failed to make the turn as instructed, and the ship went aground, spilling 258,000 barrels of oil. Pet. App. 61a-64a.

Exxon immediately dispatched an emergency response team which prevented the discharge of the remaining 80 per cent of the vessel's oil. JA1249-66. Exxon acknowledged responsibility for the spill and initiated a massive cleanup, ultimately spending $2.1 billion on that effort—almost double Exxon's annual profit at that time from all United States petroleum operations. Pet. App. 64a; RER 312; DX-6347.

Exxon also established a claims program that paid commercial fishermen and others asserting that the spill had disrupted their businesses. Pet. App. 64a; *see* OCCP 6-9 (detailing compensation program). Plaintiffs "were almost entirely compensated for their damages years ago." Pet. App. 60a. "Some were paid cash without providing releases, some released claims but not all, and some released all claims. Exxon spent $300 million on voluntary settlements prior to any judgments being entered against it." Pet. App. 64a.

Typically, claims were paid in advance, on estimates of what the fishermen *would* earn in 1989. ER (2004) 452-55. Since fish processors pay fishermen at the end of the season, Exxon paid many fishermen before they would normally have received payment for fish. *Id.* Such payments did not so much compensate for losses as *prevent* them. Alyeska Pipeline Service Company, the operator of TAPS, paid another $98 million to resolve claims that its oil spill contingency plan had been inade-

quate. OCCP 4; Pet. App. 35a. Millions in claims were also paid by the Trans-Alaska Pipeline Liability Fund, the entity created by Congress to provide compensation for a spill. *See In re Glacier Bay*, 944 F.2d 577 (9th Cir. 1991). The Fund sought and obtained reimbursement from Exxon.

In addition, Exxon instituted comprehensive remedial measures to reduce the risk of future spills, including: (1) new navigation policies specifying daylight-only departures and reduced speeds in icy conditions, limitations on deviations from traffic lanes, and increased use of tug escorts; (2) a technologically advanced satellite-based navigation tool; (3) a strengthened policy requiring masters to remain on the bridge; (4) enhanced safety training programs; (5) revised alcohol policies; (6) improved monitoring and reporting procedures; (7) random testing for alcohol or substance abuse; (8) an absolute prohibition against use of alcohol by vessel officers while on a tour of duty; (9) additional mates in port; (10) new mandatory rest periods; and (11) strengthened corporate environmental and safety policies, a new Safety, Environmental and Regulatory Department, and a $1 billion industry-wide program to improve spill response capability. JA51-52.

3. The State of Alaska sued Exxon as *parens patriae* for compensatory and punitive damages, and the United States indicted Exxon for violating the Clean Water Act (CWA), 33 U.S.C. § 1311(a), and other statutes. ER 1, 88. Both governments also sued Exxon for natural-resource damages under CWA § 1321(f). Pet. App. 70a. Exxon resolved all these claims in an October 1991 consent decree and plea agreement. Exxon agreed to pay the governments $900 million for natural-resource damages,

and they dismissed or released all pending or potential claims asserted on behalf of the general public, including Alaska's *parens patriae* claim for punitive damages. Pet. App. 65a; ER 242A. Exxon also pled guilty to certain misdemeanors, including negligent discharge of oil in violation of CWA § 1319(c)(1)(A), and was sentenced under 18 U.S.C. § 3571(d) to pay a fine of $150 million and restitution to the United States and Alaska of $100 million. Pet. App. 103a. The fine was remitted to $25 million in recognition of Exxon's exemplary post-spill conduct, including its extensive remedial measures and payment of $2.1 billion for cleanup and $300 million to compensate private losses. Pet. App. 103a; JA45-56. The net sentence of $125 million exceeded the total of all fines previously imposed by the United States in all CWA cases. JA54. Exxon's pretrial payments, settlements, and fines exceeded $3.4 billion. Pet. App. 100a.

At the 1991 sentencing hearing, the Attorney General's representative affirmed that the criminal sentence by itself "clearly" achieved "adequate deterrence." JA1520-21. Alaska's Attorney General similarly observed that a $150 million fine was "a number which the State can hold up to other polluters … and that certainly should be sufficient … to give pause to those who do not show the proper regard for the Alaska environment." JA1532. The district court agreed, noting that it "says to others in the industry … that you can expect fines that are off the chart in response to oil spills that are off the chart … [b]ut it also says … [that] if you live up to your legal responsibilities [after such a spill] … you will get credit for it." The court found that "Exxon has … been a good corporate citizen … sensitive to its envi-

ronmental obligations" which "immediately after the spill … stepped forward with both its people and its pocketbook and did what had to be done in difficult circumstances," and "will do its utmost to prevent another [spill]." JA1555-58. The court approved the sentence as containing both "an appropriate amount of punishment" and "an appropriate element of encouragement of respect for the law." Pet. App. 103a; JA1557.

B. The Punitive Damages Trial

1. The private punitive damages claims, seeking punishment in addition to punishment already imposed, were tried in 1994 together with claims by commercial fishermen who alleged that the spill caused greater economic losses than Exxon had reimbursed in the claims program. (The spill did not cause a fish kill, so the claims were mostly for business interruption resulting from the State's decisions to close many fisheries.) The district court certified a class of all persons who "possess[ed] or assert[ed]" a punitive damage claim. Pet. App. 126a. The class sought punitive damages under federal maritime law against Hazelwood individually and also against Exxon, Hazelwood's employer and the owner of the vessel and cargo. Since the class included all those who "asserted" a claim as well as those who "possessed" one, many class members in fact suffered no cognizable injury whatever from the spill—*e.g.*, Bristol Bay fishermen, separated from Bligh Reef by a thousand miles and a mountain range, and whose fishery was never closed.

Exxon stipulated that Hazelwood had been negligent in leaving the bridge in violation of Exxon's two-officer policy. Plaintiffs contended that Hazelwood had been *reckless*—the required predicate for

punitive damages—both by leaving the bridge and by allowing alcohol to impair his judgment before that. Exxon disputed these contentions, but if Hazelwood was impaired on duty, that too violated Exxon's explicit policy. Pet. App. 89a. The evidence showed the following.

The Grounding of the Exxon Valdez. The vessel departed Valdez at 9:12 p.m. on March 23, 1989, and was guided through the Valdez Narrows by a state-licensed pilot. JA271-72. Hazelwood joined the pilot on the bridge, and at about 11:20 took active command of the navigation of the vessel. The ship's radar showed ice in the inbound and outbound shipping lanes through Prince William Sound. Ships customarily steered out of the defined lanes to avoid ice, JA1014; the two previous outbound tankers had both done so. JA1021-25; DX 1735A. Hazelwood accordingly radioed the Coast Guard that he was going to do likewise. JA76sa.

Cousins helped the pilot transfer to the pilot boat. When Cousins returned, Hazelwood gave orders for returning to the shipping lanes after safely passing the ice. JA350-53, 813, 838. He instructed Cousins to turn right when the ship came abeam Busby Island light, an easily identifiable landmark. JA352, 834-35. There was nothing dangerous or unusual about the turn Hazelwood planned. The Commandant of the Coast Guard testified that these were *not* treacherous waters. JA989-90. The ship was not traveling at an unusual speed. JA1011, 1016. Visibility was good. The sea was calm. JA827-28, 264. Cousins reviewed the planned maneuver with Hazelwood. JA834-37. The district court acknowledged that Hazelwood's instructions were "specific" and "correct." Pet. App. 269a.

Having given his instructions, Hazelwood left the bridge and went to his cabin, a few steps away, telling Cousins he needed to do some paperwork related to avoiding a storm expected in the Gulf of Alaska. JA352-53, 813. His departure from the bridge violated Exxon's Bridge Manual, a statement of company policy regarding the operation and navigation of its vessels, which was placed on the bridge of every vessel, and which every watch officer was required to read and sign. DX 3450, §§ 2.1.5, 8.5; JA945-46, 346-34. Because the VALDEZ was leaving port, the Bridge Manual required both that the Master be on the bridge and that two officers be on the bridge. By leaving Cousins as the only officer on the bridge, Hazelwood violated both provisions. JA559. Exxon later discharged Hazelwood for violating its rules. JA351-53.

When Hazelwood went below, the position abeam Busby Island light was about two minutes away. JA342, 813-14. There was ample room for the VALDEZ to pass between Bligh Reef and the ice. JA349-51, 826-27. At 11:55, Cousins determined that the ship had come abeam the light. He noted his fix on the ship's chart, ordered the helmsman to turn the rudder 10° right, and called Hazelwood to tell him that the turn had begun. JA817-21, 353-54. The turn, however, had not begun. The ship's course recorder indicates that the rudder did not go over to 10° right until 12:02, seven minutes *after* the ship reached the turning point on which Hazelwood and Cousins had agreed. JA1016-17. The rudder was then held steady at 10° right for five minutes. This steered the VALDEZ back toward the shipping lanes, but not soon enough to avoid the reef, where the VALDEZ ran aground at 12:07 a.m. JA1017-18.

Hazelwood immediately returned to the bridge and took command. The objective evidence shows plainly that the turn was not made in accordance with Hazelwood's instructions.

If the VALDEZ had begun turning abeam Busby Island light, as Hazelwood had instructed, it would have missed Bligh Reef by a wide margin. Even a 5° right rudder turn would have been enough. JA1018-20.

Exxon's Alcohol Policy. Plaintiffs argued that Hazelwood was impaired by alcohol,[3] and that but for his impairment he would not have left the bridge to work in his cabin. Plaintiffs further asserted that Hazelwood was an alcoholic, that Exxon knew it, and that Exxon was therefore *independently* reckless for allowing Hazelwood to serve as master and for not supervising him sufficiently. Exxon's evidence showed that its alcohol policy conformed to industry

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[3] This was hotly disputed. All 20 witnesses who observed Hazelwood on the night of the grounding, Exxon employees and unrelated parties alike, testified that his actions were normal and professional, and that he was not impaired in any way. *E.g.*, JA999, 273-74, 1003-08, 942-45, 934-39, 981-84, 1013-14, 497-98, 380-83, 833. A state court jury *acquitted* him of operating a vessel under the influence. JA1495-97. And even the district court held as a matter of law that Hazelwood's actions before the pilot left the ship (47 minutes before the grounding) gave no basis to believe he was impaired. JA1577, 1580-82.

Plaintiffs relied on dubious "reverse extrapolation" from the questionable results of a blood test administered by the Coast Guard late in the morning after the spill. Pet. App. 108a-109a. But if the test results and the extrapolation were correct, Hazelwood would have had a blood alcohol level of .166 (which equates to vomiting, blurred vision, staggering, stumbling, and impaired motor skills) even at 3:45 a.m. when Coast Guard officers boarded the vessel, and they would never have left him in command, as they did. JA588.

standards, guaranteed that employees seeking treatment would not lose their jobs, and rested on the premise that without job security those needing treatment would hide their affliction—disserving safety, not enhancing it. PX 158; JA684-85, 1082-83, 1088. As this Court has held, it is perfectly consistent with public policy for an employer's substance-abuse policy to provide for reinstatement of relapsed employees, even to safety-sensitive positions. *Eastern Associated Coal Corp. v. United Mine Workers,* 531 U.S. 57 (2000). The Ninth Circuit acknowledged that the jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk." Pet. App. 88a-89a; *see* OCCP 16-25. As will be seen, the district court instructed the jury that it did not need to reach or resolve these issues.

3. As the master of a tanker, Hazelwood was a "managerial officer or employee" of Exxon as the jury instructions defined that term. Pet. App. 301a. Over Exxon's objection, the district court instructed the jury that:

> the reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

Pet. App. 301a. The district court further instructed the jury, again over Exxon's objection, that this was so "whether or not those acts are contrary to the employer's [established and adequately enforced] policies or instructions." Pet. App. 301a-302a.

In the first phase of the trial, the jury returned a verdict that Hazelwood had been reckless. Having been instructed that any reckless conduct of Hazelwood was "held in law" to be reckless conduct of Exxon, whether or not contrary to Exxon's policies or instructions, the jury necessarily returned a verdict that Exxon had also been reckless. Pet. App. 303a.

In the next phase, the jury substantially rejected the fishermen's claims for $800 million in damages based on low fish prices, finding that the spill did not cause prices to decline after 1989. JA1404-07. (Exxon's proof showed that a worldwide salmon glut drove down prices.) After offsetting prior payments, the district court entered judgment for $19.6 million in compensatory damages. Pet. App. 67a. A state court judgment added $700,000 more, for total compensatory damages of $20.3 million. Pet. App. 32a.

In the final phase of the trial, made necessary by the verdicts on recklessness, the jury was asked to determine the amount of punitive damages to be awarded against Hazelwood and Exxon. The district court instructed the jury that in doing so, it could not consider harm to the environment because "[a]ny liability for punitive damages relating to those harms was resolved" in the government proceedings, Pet. App. 96a-97a, a result required by res judicata. Pet. App. 73a. After hearing evidence about Exxon's net worth and income, the jury awarded punitive damages of $5000 against Hazelwood and $5 *billion* against Exxon. The district court denied Exxon's post-trial motions, Pet. App. 224a-280a, and entered judgment for the full $5 billion award. JA1425-27. Exxon appealed.

C. Appellate Proceedings

1. The Ninth Circuit issued its first opinion in November 2001. Pet. App. 57a. The court rejected Exxon's arguments that no punitive damages were authorized, but added a number of significant caveats. Addressing whether judge-made maritime punitive damages remedies could expand the penalties already provided in the CWA, the court acknowledged that the question was "serious," "not without doubt," and "close." Pet. App. 75a, 77a. On the propriety of the jury instructions authorizing vicarious punitive damages liability, the court pronounced itself bound by its decision in *Protectus Alpha Nav. Co. v. North Pac. Grain Growers*, 767 F.2d 1379 (9th Cir. 1985), but acknowledged that *Protectus* conflicted with the historic maritime-law rule as well as with modern maritime decisions of other circuits. Pet. App. 85a-86a & n.84. And while the court did not accept Exxon's argument that maritime law and due process bar punitive damages when prior sanctions and liabilities have satisfied any public interest in punishment and deterrence, it acknowledged that the argument had "force as logic and policy." Pet. App. 68a.

The Ninth Circuit did, however, hold that a $5 billion award could not stand. Applying the due process guideposts of *BMW of North America v. Gore*, 517 U.S. 559 (1996), the court held that Exxon's conduct was not sufficiently reprehensible to justify so high an award because (1) the spill was not intentional; (2) punishment was for economic injuries only; (3) "fuel for the United States at moderate expense has great social value"; and (4) Exxon had spent billions to mitigate harm in the aftermath of the accident. The court further held that pretrial

claims payments and settlements generally should not be included in the "harm" used to analyze the ratio between punitive and compensatory damages, and that a high ratio was unnecessary for deterrence because the $3.4 billion that Exxon had already paid constituted a "massive deterrent" independent of any punitive damages. Pet. App. 95a-104a.

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

3. The Ninth Circuit issued its second opinion in December 2006. Pet. App. 1a. The court again reviewed the award under the *Gore* guideposts, but this time rationalizing a multibillion dollar award. On reprehensibility, for example, the court emphasized that the spill had physically endangered the crew and rescuers of the vessel, even though no one was injured and none of the crew or rescuers was a plaintiff in the lawsuit. Pet. App. 26a-28a. On ratio, the court repudiated its earlier statement that pretrial payments and settlements should not be included in the harm, stating incorrectly that *State Farm* mandated this change of view. Pet. App. 32a-35a, 287a. Accepting the district court's calculation

of $500 million in total losses, the court held that due process would permit a 5:1 ratio because the tort fell within the "mid range" of reprehensibility. Pet. App. 31a-40a. By this reasoning, the court upheld an unprecedented punitive award of $2.5 billion, 200 times the next largest award affirmed by a federal appellate court for unintentional conduct. *See Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991). Judge Browning would have affirmed $5 billion. Pet. App. 42a-56a.

4. Exxon filed a timely petition for panel rehearing and rehearing *en banc*. The court denied it on May 23, 2007, amending its decision to remove its incorrect statement about *State Farm*, but not otherwise changing its result or attempting to justify the repudiation of its prior decision. Pet. App. 285a-286a. Two judges filed dissents from the denial of *en banc* review. Judge Kozinski argued that the court had unjustifiably departed from 200 years of maritime precedent prohibiting vicarious punitive damages, in conflict with every other circuit that had considered the issue. Pet. App. 287a-292a. Judge Bea agreed with Judge Kozinski, and also dissented because a $2.5 billion award was excessive under *State Farm.* Pet. App. 292a-293a.

5. Exxon filed a timely Petition for Writ of Certiorari, which was granted October 29, 2007, limited to Questions 1, 2, and 3(1).

SUMMARY OF ARGUMENT

I. This case involves the largest punitive damages award ever upheld by a federal appellate court, $2.5 *billion*. It was based on a jury instruction that any reckless conduct by Captain Hazelwood is "held in law" to be the reckless conduct of Exxon. Imposing vicarious punitive liability on a shipowner, with-

out requiring the jury to find that the shipowner directed, countenanced, or participated in the conduct, was in conflict with almost 200 years of unbroken maritime law building on this Court's decision in *The Amiable Nancy*, 16 U.S. 546 (1818), and decisions of every court of appeals, other than the Ninth Circuit, that has considered the matter. No maritime law or policy supports overruling this venerable line of cases; yet without overruling them this judgment must be reversed.

The Ninth Circuit's ruling upholding the instruction was even less defensible because the jury was instructed that Hazelwood's acts were imputed to Exxon even though they were *contrary* to corporate policies that Exxon implemented and properly enforced. As a practical matter, the formulation and enforcement of policies is the only way in which a corporate employer may control the activities of its employees, and the Court has recognized—even outside of maritime law—that employers who implement and enforce proper policies should not be subject to vicarious punitive damages. *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

II. Beyond its approval of this clearly erroneous instruction, the Ninth Circuit held that this giant award could be supported under the general maritime law, a form of federal common law. But the power of federal judges to make federal common law governing a particular subject is severely restricted by separation of powers concerns when Congress has already addressed the same subject by statute. Here Congress has enacted the Clean Water Act (CWA), a comprehensive statute that directly addresses both punishment and deterrence of unauthorized discharges of oil and hazardous substances. Punitive

damages are not some sort of private entitlement. Rather, they are allowed, if at all, only to foster the same *public* purposes of punishment and deterrence that Congress addressed in the CWA. Congress enacted a carefully calibrated scheme of fines and civil penalties, natural-resource damages and cleanup costs, but did not provide for punitive damages. This Court's cases, starting with *Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), make plain that when Congress has "spoken directly to the question," as it has here, federal judges "are not free to expand the remedies that Congress has chosen." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). Punitive damages were accordingly unavailable, because punishment and deterrence for maritime discharges were already covered by the CWA.

Even if this Court were to conclude that Congress's enactment of statutory punitive and deterrent measures did not preclude additional judicially-created punishment, that would not answer but only *raise* the question of what this Court, exercising its own judicial authority to determine the general maritime law, *should* decide about the need to allow such extra-statutory punishment. But there is no doubt about the answer. This Court ought to conclude that there is no reason for punitive damages in maritime discharge cases, given the indisputable fact that an appropriate system of fines and penalties to deter such discharges is already in place, and given the well-recognized arbitrariness of unconstrained punitive damages.

III. In any event, punitive damages should not have been awarded *here*, because Exxon's payment of $3.4 billion in fines, penalties, cleanup costs,

claims payments, and other expenses, has fully achieved both punishment and deterrence. Punishment and deterrence are the only purposes of punitive damages, and when those purposes have been achieved, there is no room for punitive damages. The constitutional grant of admiralty and maritime jurisdiction gives this Court the responsibility to set maritime-law rules that serve the federal interest of protecting maritime commerce and are informed by recognized maritime-law policies and principles, including uniformity and predictability, limitation of liability, and the avoidance of undue burdens on maritime commerce. All of those policies preclude assessment of gargantuan punitive damages, and none permits punitive damages when the defendant has already paid criminal and civil fines, penalties, compensatory damages, cleanup costs and other expenses sufficient to deter and punish anyone for anything.

Alternatively, if the Court is prepared to do what Congress did not, and allow punitive damages for this unintentional oil spill notwithstanding that punishment and deterrence have been fully achieved, the Court should nevertheless order a reduction or vacatur of the award consistent with appropriate standards—drawn from maritime-law policies—for the award of punitive damages. Those standards should include the principles that (1) jury-imposed punitive damages may not exceed the civil punishment authorized by Congress; (2) when compensatory damages are substantial, punitive damages may not exceed them; (3) punitive damages are not available when there is no possibility that the underlying conduct will escape detection; and

(4) juries may not make punitive awards based on corporate net worth.

ARGUMENT

I. This Court Should Not Overrule 200 Years of Maritime Law that Preclude Vicarious Punitive Damages for the Acts of a Master at Sea.

Punitive damages are exceedingly rare in maritime law. This Court has never affirmed such an award. Despite the scarcity of awards, however, one rule of maritime-law punitive damages has always been clear: Punitive damages may not be awarded against a shipowner based solely on the conduct of a ship's master.

The maritime-law rule barring vicarious punitive damages is nearly as old as this nation itself. This Court first articulated it in *The Amiable Nancy*, 16 U.S. 546 (1818), a suit in admiralty against the owners of a privateer whose officers and crew had illegally plundered a neutral ship. Speaking through Justice Story, its leading maritime-law scholar, the Court affirmed the Circuit Court's ruling that the owners' liability for the officers' wanton acts did *not* extend to punitive damages:

> [T]his must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment

> which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages.

Id. at 558-59.

The Court reaffirmed this principle in *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107-17 (1893), declaring the *Amiable Nancy* rule to be in accord with "the preponderance of well-considered precedents" and extending it to non-maritime federal cases.[4] For 150 years, federal courts faithfully applied the rule, and refused vicarious punitive damages in maritime cases. *E.g.*, *Ralston v. The States Rights*, 20 F. Cas. 201 (E.D. Pa. 1836); *The Golden Gate*, 16 F. Cas. 141, 144 (C.C.N.D. Cal. 1856); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896); *Pa-*

[4] Notably, while the opinion in *Lake Shore* favorably cites state court decisions that applied the same rule against vicarious punishment, it also makes clear that the Court, in extending the rule to all federal cases under its pre-*Erie* jurisprudence, was "exercis[ing] its own judgment, uncontrolled by the decisions of the several states." 147 U.S. at 106.

cific Packing & Nav. Co. v. Fielding, 136 F. 577, 579-80 (9th Cir. 1905); *The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909); *The Ludlow*, 280 F. 162, 163-64 (N.D. Fla. 1922).

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

The Ninth Circuit initially broke from the long-standing consensus in *Protectus*, a 1985 decision that adopted a new rule of vicarious liability for acts of "managerial" employees proposed by the authors of the Restatement (Second) of Torts § 909. 767 F.2d at 1386. While the panel below declared itself "bound by *Protectus*," Pet. App. 86a, it did not meaningfully defend *Protectus*' departure from settled maritime law.

Having no maritime-law support for *Protectus*, the best the panel could cite was this Court's holding in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 15 (1991), that vicarious punitive damages are not unconstitutional. But the question is not whether the *Constitution* permits such liability. It is whether *maritime law* does so. Pet. App. 289a n.3. The answer turns on maritime-law precedents, not on cases interpreting the outer limits of due process. All maritime-law precedents (other than *Protectus*) forbid such liability.[5]

The reasons given in *Protectus* for departing from maritime law are no better. The court primarily relied on a footnote in *American Society of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982), an antitrust treble damages case, observing that a majority of land-based jurisdictions allow vicarious punitive damages for acts of "managerial" employees, citing the Restatement (Second) of Torts §909(d)—and perhaps did so even at the time of

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[5] The panel below suggested that Exxon was not in the same position as the innocent owners in *The Amiable Nancy* because the jury *might* have found that Exxon was independently reckless for not relieving Hazelwood of his command. Pet. App. 83a. But that point is legally irrelevant in light of the jury instructions. The panel conceded that a jury verdict as to Exxon's independent recklessness could have gone either way. Pet. App. 88a-89a; *see also* OCCP 16-25. The instructions, however, required the jurors to find Exxon reckless if they found Hazelwood reckless, even if they found that Exxon itself acted appropriately. When it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, "the judgment must be reversed." *Greenbelt Co-op Publ'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *see Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993).

Lake Shore.[6] But the fact remains that in *The Amiable Nancy*—a case *Protectus* does not even cite, let alone distinguish—the Court squarely adopted the contrary rule for maritime cases. Indeed, Justice Story's opinion adopted that rule even though it found the case to be one of "gross and wanton outrage" where "the honour of the country" and the "duty of the court" were at stake.

And the Court in *Lake Shore*, "exercis[ing] its own judgment" after considering the merits of state law rules on both sides of the issue, 147 U.S. at 106, squarely reaffirmed the *Amiable Nancy* rule. *Stare decisis* alone thus compels rejection of *Protectus*, and with it, the decision below. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification"); *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 500 (1990) (longstanding precedents of regular application are entitled to special weight).

Moreover, even if the issue were open, the result should be the same. There is no consensus, even in land-based jurisdictions, favoring vicarious imposition of punitive damages. The law of some states, like maritime law, continues to bar such awards.[7]

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[6] As Judge Friendly pointed out, the *Hydrolevel* footnote "seems to have been quite unnecessary" because "the issue was not corporate liability for punitive damages but for the treble damages provided for private antitrust suits in 15 U.S.C. § 15, and rules limiting a principal's liability for punitive damages do not apply to specific statutes giving treble damages." *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 67 n.10 (2d Cir. 1985).

[7] *See, e.g.*, *Matthiessen v. Vanech*, 836 A.2d 394, 404-05 (Conn. 2003); Miss. Code Ann. 11-1-65(1)(a). Several other states bar punitive damages altogether. *See*, *e.g.*, N.H. Rev. Stat. Ann. § 507:16 (2007).

And the authority of the Restatement (Second) of Torts on this point is especially suspect. Nothing in Tentative Draft No. 19 (which gave rise to § 909), or the American Law Institute (ALI) proceedings[8] that approved § 909 suggests that the Reporter, his advisors, or ALI members intended to repudiate the maritime-law rule stated in *The Amiable Nancy* and consistently applied in all maritime cases. On the contrary, §909 was added only to avoid conflict with Restatement (Second) of Agency § 217C (1958). But that Restatement states expressly that its rules do not apply "to persons or combinations of persons concerning whom special rules exist." *Id.* Thus the Restatements should not be assumed to apply to the "special rules" of maritime law. *See Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001) (recognizing "special rules and procedures" of admiralty).

Indeed, "some of the Torts group … were in doubt whether the position taken [in § 909] is the right one," but thought the question "foreclosed" because the ALI could not revisit whether § 217C was wrong. Tentative Draft No. 19 at 85. Even so, the "Torts Advisors voted, 9 to 2, to strike the Section [909] or at least to strike the Comments, with a mere reference to the Agency Restatement," *id.*, and the Reporter noted that "the trend, … although not heavily, is in the direction of *not*" awarding vicarious punitive damages. ALI Proceedings at 236. But at the May 16, 1973 ALI meetings, it was decided that § 909 had to remain because of §217C. *Id.* Just as there is no consensus among land-based courts on

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[8] Am. Law Inst., *50th Annual Meeting Proceedings 1973* at 236-41 (1974) [ALI Proceedings].

this issue, there was also no consensus among the drafters of the Restatement.

The issue, moreover, should not depend on the Restatement nor on land-based decisions, but on maritime policy. The Ninth Circuit did not even consider the unique problems with vicarious punishment for misconduct of officers and crew at sea (an issue not raised in *Protectus*). But the court in *Fuhrman*, again drawing on Justice Story, explained why such punishment is not only unfair but potentially counterproductive:

> 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.... "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 (quoting *Columbian Insurance Co. v. Ashby & Stribling*, 38 U.S. 331, 344 (1839)).

Rather than address maritime policy, the Ninth Circuit chose to jettison the traditional maritime rule in reliance on sweeping abstractions, such as the claim that "no reasonable distinction can be made between the guilt of the employee … and the guilt of the corporation." *Protectus*, 767 F.2d at 1386. But whatever the merits of that idea when an employee's acts implement company policy, as in *Protectus* itself, Pet. App. 85a n.84, it is self-evidently untrue when, as here, the employee's act is forbidden by his employer and hostile to its vital interests. *Fuhrman*, 407 F.2d at 1148; *In re P&E Boat Rentals*, 872 F.2d at 651-52.

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

Not only do the arguments put forth in *Protectus* fail to support vicarious imposition of punitive damage under maritime law, they fail to support vicarious imposition of punitive damages in *any* setting. Indeed, since the decision in *Protectus*, this Court itself has expressly rejected the Restatement position as a matter of federal civil rights policy, *see Kol-*

stad v. American Dental Ass'n, 527 U.S. 526, 539-46 (1999). In *Kolstad*, the Court held that implementation and enforcement of good faith policies to prevent misconduct is a defense to vicarious punitive damages for acts of managerial employees. As Justice O'Connor explained:

> Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages—that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." Where an employer has undertaken such good faith efforts at Title VII compliance, it "demonstrat[es] that it never acted in reckless disregard of federally protected rights."

527 U.S. at 544 (citations omitted).

The same reasoning should apply in most corporate settings, where the primary means of controlling employee misconduct hostile to both corporate and public interests is the promulgation and enforcement of policies prohibiting such misconduct. If there is to be any relaxation of the maritime rule against vicarious punitive damages for employee misconduct, it should at a minimum incorporate the defense recognized in *Kolstad*. In this case, the instructions did the opposite, telling the jury that Exxon must be deemed reckless solely on account of Hazelwood's reckless acts *whether or not* those acts violated properly enforced corporate policies. Pet. App. 302a.

There is no reason to depart from maritime law's historic prohibition against vicarious punitive damages, and ample reason to adhere to it.

II. Punitive Damages for Unauthorized Discharges of Oil and Hazardous Substances Are Not Available in Federal Maritime Tort Actions.

Beyond the fatally flawed jury instruction, a more fundamental maritime-law question in this case is whether plaintiffs were entitled to *any* punitive damages in addition to the full compensatory damages they obtained. The answer implicates no issues of federalism or state sovereignty—the governing legal rules and policy interests are entirely federal. It implicates instead basic separation of powers principles concerning how federal law is established—more specifically, what role federal judges should play vis-à-vis Congress in determining how best to deter and punish oil spills.

Two basic propositions frame the analysis.

First. Punitive damages are not a matter of private right for plaintiffs seeking redress of injury, but instead are allowed—when they are allowed at all—solely to serve the *public* purposes of punishment and deterrence. Punitive damages "'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 & n.14 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).[9] Punitive damages and com-

[9] *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or mali-

pensatory damages "serve distinct purposes." Whereas compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages "have been described as 'quasi-criminal'" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman*, 532 U.S. 424, 432 (2001); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) (punitive damages are "similar" to "civil penalties"). In then-Judge Kennedy's words:

> [Punitive damages plaintiffs] act as private attorneys general to effect the deterrence and retribution functions of [punitive damages]. So far is this from being a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest.

In re Paris Air Crash, 622 F.2d 1315, 1319-20 (9th Cir. 1980).

Second. Even where the federal judiciary has constitutional authority to "make" federal law through the exercise of its common-law power—as in cases arising in admiralty—that power is strictly circumscribed, if not displaced outright, where Congress has already addressed the problem. "Federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 n.14 (1981). This general rule applies equally in admiralty. As explained in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the time is long past when admi-

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cious, and to deter him and others from similar extreme conduct.").

ralty courts were the primary sources of public regulation of maritime conduct: "Maritime tort law is now dominated by federal statute," *id.* at 36, and "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance," *id.* at 27. Despite the history of judicial lawmaking in admiralty, "Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Id.*

Indeed, quite unlike the principle that governs whether Congress intended a federal statute to preempt *state* law, if the question is "which branch of the Federal Government is the source of *federal* law," *Milwaukee*, 451 U.S. at 319 n.14, courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as matter of federal law," *id.* at 317. This rule reflects the Court's longstanding "commitment to the separation of powers," which is "too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *Id.* at 315. "While federalism concerns create a presumption *against* preemption of state law, including state common law, separation of powers concerns create a presumption *in favor of* preemption of federal common law whenever it can be said that Congress has legislated on the subject." *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). In other words, the question is "not whether Congress ha[s] affirmatively proscribed the use of federal common law" (*Milwaukee*, 451 U.S. at 315) or whether there is "evidence of a clear and manifest purpose" to displace common-law rules (*id.* at 317)—

questions familiar from the state-law preemption context. The question in the maritime-law context instead is simply "whether the legislative scheme 'spoke directly'" to the issue before the maritime court. *Id.* at 315 (quoting *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 625 (1978)). If "Congress has legislated on the subject," *Oswego Barge*, 664 F.2d at 335, that legislation displaces (or obviates the need for) supplemental judicial regulation of the same subject through application of judge-made maritime law.

Here, the courts below applied maritime law not only to compensate plaintiffs for economic losses, but also to impose on Exxon an additional $2.5 billion judicial penalty, for the regulatory purpose of punishing Exxon for the spill. Using a private maritime tort case to impose that regulatory sanction was wrong. The need for judicially-created measures to punish and deter unauthorized maritime discharges of oil and hazardous substances was eliminated by Congress's legislative action on precisely the same subject in the Clean Water Act, and by the comprehensive *public* enforcement scheme for punishing and deterring such discharges which Congress established. In determining what punishment is required, courts should defer to Congress's judgment about the proper balance between the public interest in deterrence and punishment, on the one hand, and the public interest in promoting maritime commerce, on the other.

A. The Clean Water Act Establishes Federal Maritime Policy Concerning Punishment and Deterrence of Unauthorized Discharges and Displaces Judicial Regulation of the Same Subject

The Clean Water Act (CWA) specifically addresses the problem of both negligent and intentional maritime oil spills. The "discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States" is expressly "prohibited" by the Act. *Id.* § 1321(b)(3). The Act charges the President with determining "those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to … public and private property." *Id.* § 1321(b)(4). It authorizes the Administrator of the Environmental Protection Agency to enforce the President's regulations through civil actions seeking monetary penalties for unauthorized discharges, *id.* § 1321(b)(6), and it establishes criminal penalties—including imprisonment—for negligent discharges of oil, with greater criminal sanctions for knowing discharges, *id.* § 1311(c); *see also* 18 U.S.C. § 3571(d) (authorizing criminal fines of up to twice third-party pecuniary losses).[10] The CWA also capped a vessel owner's liability to the federal government for cleanup costs and natural-resource damages, but

[10] Enforcement of these provisions by the federal government led to the record fine imposed on Exxon in this case. After the spill, Congress increased the statutory civil penalties for such spills—subject to reduction on account of mitigation efforts, prior penalties, etc., *see* § 1321(b)(7)-(8), enacted as part of the Oil Pollution Act of 1990—but still did not authorize private punitive damages.

eliminated the cap in cases of "willful misconduct within the privity and knowledge of the [ship]owner." 33 U.S.C. § 1321(f).

Apart from these provisions aimed at punishing and deterring spills, the CWA provides for a limited private right of action. It includes a citizen's suit provision allowing an injured private party to abate a continuing violation of the statute and even to enforce the statute's prescribed civil penalties. *Id.* § 1365(a). But the CWA did not and does not include in its enforcement scheme a private action for punitive damages, even for willful misconduct. The public interest in punishing and deterring negligent and intentional oil spills is left exclusively to the calibrated *public* enforcement mechanisms established by the Act.

The CWA reflects Congress's "comprehensive long-range policy" for punishing and deterring maritime oil spills, and includes "the most comprehensive and far-reaching" provisions ever enacted on the subject. *Milwaukee*, 451 U.S. at 317-18; *see Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (noting "comprehensive scope of the [CWA]"). The CWA thus involves an explicit *balance* of Congress's twin goals of protecting the environment *and* limiting the liability of shipowners and other carriers so as not to impair commerce, consistent with longstanding maritime policy generally favoring limited liability for seagoing accidents. *See* S. Rep. No. 91-351 at 5 (1969) (citing as important factors "the effect of too rigid a liability test on maritime commerce" and "the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil, and the consumer"); *see also Tull*, 481 U.S. at 422-23 & n.8 (de-

scribing balancing of factors Congress wished courts to use in imposing CWA punishments).

The CWA thus speaks directly and comprehensively to the only issue presented by plaintiffs' claims for punitive damages: what punishment is necessary and appropriate to satisfy the *public* regulatory goals of punishing and deterring maritime oil spills? The CWA's answer is that these objectives are satisfied by cleanup costs and natural-resource damages, as well as substantial but calibrated monetary civil and criminal penalties—and even potential imprisonment—all subject to the prosecutorial judgment of federal administrators and prosecutors. Of course Congress knows how to provide punitive damages—when it thinks they are necessary.[11] Its failure to provide them here speaks volumes.

This Court's precedents make clear that the CWA's public enforcement scheme for punishing and deterring unauthorized discharges leaves no room for supplemental judicial regulation of the same subject by judge-made punitive damages remedies. *Milwaukee* and *Sea Clammers* are especially in point. In *Milwaukee*, a plaintiff brought a federal common-law public nuisance action to abate a discharge of sewage into U.S. navigable waters. This Court earlier had explicitly sanctioned public nuisance actions under federal common law, but it held

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[11] *E.g.*, Commodities Exchange Act, 7 U.S.C. § 18(a)(1)(B); Bankruptcy Code, 11 U.S.C. § 363(n); Fair Credit Reporting Act, 15 U.S.C. § 1681u; Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d); Federal Wiretap Act, 18 U.S.C. § 2520(b)(2); Postal Accountability & Enhancement Act, 39 U.S.C. § 3018(g)(2); Civil Rights Act of 1981, 42 U.S.C. § 1981A; Fair Housing Act, 42 U.S.C. § 3613(c); CERCLA, 42 U.S.C. § 9607(c)(3).

in *Milwaukee* that subsequent amendments to the CWA displaced the existing common-law action. The "question whether a previously available common-law action has been displaced by federal statutory law," the Court explained, "involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." 451 U.S. at 315 n.8. Because the CWA amendments established a comprehensive program for regulating water pollution, the Court held that there was no longer "room for courts to attempt to improve on that program with federal common law." *Id.* at 319.

The Court applied that rule two months later in *Sea Clammers* to displace a private nuisance claim asserted under both maritime law and federal common law on facts closely analogous to this case. 453 U.S. at 21-22. In that case, as here, the defendant improperly discharged a prohibited substance into coastal waters governed by the CWA. There, as here, the plaintiff—a fishermen's organization—alleged that the discharge had damaged the economic livelihood of its members. There, as here, the plaintiff sought recovery of compensatory and punitive damages on a tort theory (there, public nuisance) under maritime law. 453 U.S. at 10 & n.15. This Court rejected the claim, holding that "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope" of the CWA. *Id.* at 22.

The rule that federal common-law remedies applicable to a given subject are displaced when Congress has addressed the same subject applies as well to remedies sought under the general maritime law. In *Mobil*, this Court held that the Death on the High

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

Similarly in *Miles*, a unanimous Court held that a survival action by the heirs of Jones Act seamen under general maritime law could give no remedies not provided by the Jones Act. 498 U.S. at 32 ("It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action"). *Miles* emphasized not only the subordinate role of judge-made federal law in matters addressed by Congress, but also the strong maritime policy of uniformity:

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

498 U.S. at 36-37. This Court most recently reaffirmed these principles in *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998), declining, again unanimously, to approve a general maritime law survivorship remedy for pre-death pain and suffering dam-

ages not recoverable under DOHSA. 524 U.S. at 121-24.[12]

Notably, both *Milwaukee* and *Sea Clammers* held that the plaintiffs' claims were *entirely* displaced by the CWA—so the fishermen in *Sea Clammers* were allowed no private recovery at all. The Court need not go so far to resolve this case, because here the only question is whether the CWA's comprehensive scheme for *punishing and deterring* unauthorized discharges obviates the need for judge-made *punitive damages awards* to accomplish—imperfectly and standardlessly—exactly the same *public* purpose. The relevant "subject" on which "Congress has legislated" (*Oswego Barge*, 664 F.2d at 335), in other words, is the measure of punishment appropriate

[12] The principle that judge-made maritime tort remedies for particular conduct are precluded when Congress has not provided them in a statute addressing the same conduct has been routinely applied by federal courts in maritime cases. *E.g.*, *Conner v. Aerovox, Inc.*, 730 F.2d 835, 838-42 (1st Cir. 1984) (*Milwaukee* and *Sea Clammers* equally foreclose judge-made *maritime*-law nuisance claims for pollution damage to fishing grounds); *In re Oswego Barge Corp.*, 664 F.2d 327, 339-44 (2d Cir. 1981) (CWA forecloses maritime-law negligence claims for government cleanup costs exceeding government's maximum recovery under the CWA). And multiple circuits have held that these principles bar recovery of *punitive* damages under maritime law when federal statutes do not authorize them. *E.g.*, *Miller v. American President Lines*, 989 F.2d 1450, 1454-59 (6th Cir. 1993); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1091-94 (2d Cir. 1993); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1500-13 (5th Cir. 1995) .

and necessary to deter such discharges and punish wrongdoers.[13]

The CWA's focus on punitive and deterrent measures is clear from the provision of the statute that saves certain private claims for damages to property. It provides in pertinent part:

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel … under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of … any oil.

33 U.S.C. § 1321(o)(1). A vessel owner's duty to pay actual compensation for damage caused to property is clearly an "obligation[] … for damages to … property." The obligation to pay compensation for an injury is fundamental to the common law. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803). Punitive damages, by contrast, are not "obligations," since "a key feature of punitive damages" is that "they are never awarded as of right." *Smith v. Wade*, 461 U.S. 30, 52 (1983). As discussed above, they are allowed only in the rare case in which they are deemed necessary to serve public purposes of punishment and deterrence—objectives entirely *distinct* from satisfying a person's basic legal entitlement to monetary

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[13] The Ninth Circuit incorrectly suggested that Congress intended the CWA to punish only "public" as distinguished from "private" harm. Pet. App. 77a. In fact, the CWA expressly includes the protection of "private property" within its administrative enforcement scheme, 33 U.S.C. § 1321(b)(4). Moreover, if the court meant that private punitive damages are intended to serve something other than *public* interests, its opinion fundamentally misconceives both the nature and purpose of punitive damages. *See* pp. 27-28, *supra*.

compensation for property damage caused by another. *See* pp. 27-28, *supra.* Punitive damages are also manifestly not "for damages *to property,*" or to anything else. Punitive damages instead punish and deter the conduct that caused the damages—distinct public purposes directly and fully addressed by the CWA's public enforcement scheme.

Plaintiffs misread § 1321(o)(1) as intended to save punitive damages awards in maritime oil spill cases. The clause cannot bear the weight plaintiffs would put on it. First, their reading is inconsistent with the statutory language just discussed.[14] Second, plaintiffs erroneously assume that maritime punitive damages were a significant remedy Congress would have sought to save. But at the time § 1321(o)(1) was enacted in 1970, *see* Pub. L. No. 91-224 sec. 102, § 11(o)(1), 84 Stat. 91, 97 (1970), no maritime case had ever awarded punitive damages for an oil spill, few cases (if any) had awarded punitive damages for conduct not involving an intentional tort,[15] and certainly no maritime case had ever

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[14] It also conflicts with the clause's limitation to claims asserted under any "provision of law," which refers to "a clause in a statute, contract or other legal instrument." Black's Law Dictionary 1262 (8th ed. 2004). Plaintiffs' punitive damages claims are based on no such provision of law.

[15] This Court has never affirmed an award of punitive damages under maritime law. *See Guevara*, 59 F.3d at 1508 n.11. Nineteenth-century cases in the lower courts sometimes awarded "vindictive" damages in maritime cases, but those were all cases of intentional torts committed by ships' officers or crew. Recent punitive damages cases effectively began with *Robinson v. Pocahontas, Inc.,* 477 F.2d 1048 (1st Cir. 1973), and other cases allowing punitive damages for refusal to pay maintenance and cure—all of them involving intentional conduct. These decisions were based on a misreading of *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and have now generally been re-

imposed vicarious punitive damages on a shipowner for the actions of a master at sea, *see* Part I, *supra*. Punitive damage liability against shipowners in maritime oil spill cases thus was virtually unknown and would not have been remotely considered a significant aspect of maritime tort law, to be "saved" specially by Congress.[16]

Finally, plaintiffs' view implausibly assumes that Congress tacitly sought to supplement its carefully calibrated public enforcement scheme with the wildly unpredictable and frequently excessive puni-

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pudiated. *Guevara*, 59 F.3d 1496; *Glynn v. Roy Al Boat Management Co.*, 57 F.3d 1495 (9th Cir. 1995). Some courts also held punitive damages available to seamen and others in personal injury cases, *e.g.*, *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981); the overwhelming majority of these cases can no longer be considered good law in light of *Miles*. The largest maritime punitive damages award affirmed by a federal appellate court before this one, in *Protectus*, was $500,000, equal to 1/14 of the $7 million in compensatories, 767 F.2d at 1381, for a deliberate and purposeful act, required by the employer's rules, that resulted in a death, in stark contrast to the award here, for lost commercial income from an unintentional spill that caused no personal injury. Pet. App. 98a.

[16] Plaintiffs have also cited a separate savings clause in the CWA, § 1365(e). That clause is part of the CWA's "citizen suit" provision. It provides that "[n]othing in this section"—*i.e.*, the citizen suit provision—"shall restrict any right which any person … may have … to seek any other relief." Unlike § 1321(o)(1), § 1365(e) explicitly speaks to common-law relief; it thus underscores § 1321(o)(1)'s irrelevance to this case, since the latter preserves at most "provisions" of law, not common-law remedies. Section 1365(e), however, is inapplicable to this case. In *Milwaukee*, this Court confirmed that § 1365(e) means only that the citizen suit provision (*i.e.*, "this section") does not in and of itself revoke other remedies. 451 U.S. at 328-29. "It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions." *Id.* at 329.

tive damages imposed by juries. As this Court has noted, punitive damages are essentially the *opposite* of rational, calibrated enforcement measures: Juries generally "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused," *Gertz*, 418 U.S. at 350, and thus "the impact of these windfall awards is unpredictable and potentially substantial," *Foust*, 442 U.S. at 50; *see Haslip*, 499 U.S. 1, 42 (1991) (Kennedy, J., concurring) (noting the "size and recurring unpredictability of punitive damages awards" as a "necessary consequence of [juries'] case-by-case existence"). A judge-made, jury-imposed punitive damages remedy literally billions of dollars higher than the penalties Congress provided does not just disrupt the balance that Congress struck, it *obliterates* it. Certainly no unstated intention to allow such a result can be read into the savings clause: to the contrary, this Court has repeatedly held that limited exceptions to comprehensive regulatory statutes must be read *narrowly* to preserve the primary operation of the statutory policy. *See, e.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings*, 510 U.S. 86, 97 (1993); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989).

* * *

Read properly, the savings clause thus confirms and reinforces what is obviously the overall design of the CWA. The statute is not addressed to compensation for private harms, but instead prescribes a comprehensive, calibrated scheme of *public* enforcement, aiming to avoid unauthorized discharges, including oil spills, by punishing the offender and deterring the conduct that led to the discharge. Congress be-

lieved the criminal and civil penalties it provided were adequate to achieve punishment and deterrence without overdeterring socially useful commerce, and Congress omitted punitive damages. "Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles*, 489 U.S. at 27. Accordingly, the CWA's omission of punitive damages itself suffices to establish the relevant federal policy, and precludes punitive damages here.

B. Even if the CWA Leaves Room for Judicial Lawmaking Concerning Punishment and Deterrence of Maritime Oil Spills, the Court Should Not Choose to Authorize Punitive Damages.

Even if one took the view that the CWA does not fully determine federal regulatory policy concerning maritime oil discharges, so that there remains room for substantive judicial lawmaking, that view only raises, but does not answer, the question whether this Court *should* increase the punishment for conduct that is already proscribed by statute and subject to significant civil and criminal punishment. Where Congress has not "spoken" to an issue, the power to make maritime law belongs to this Court. *See* pp. 43-44, *infra*. But it is an inescapable fact that substantial civil and criminal penalties for unauthorized maritime discharges exist. A court asked whether to endorse punitive damages awards in unpredictable and essentially unbounded amounts therefore still must ask whether additional common-law punishment is necessary, and if so, why. To answer those questions, in turn, the court would need to identify judicially-manageable criteria for assess-

ing whether existing statutory penalties are adequate to the regulatory task, and for identifying those which can be effectively improved upon by a common-law device such as private punitive damages awards.

The ultimate question is therefore whether judges should impose common-law punishment for a maritime oil spill in the form of punitive damages awards. And that question must be answered in light of the relevant considerations already discussed.

- Congress has already and repeatedly addressed the federal regulatory interest in this issue.
- Congress has never considered punitive damages an appropriate enforcement device in maritime policy.
- Punitive damages have rarely been awarded in maritime cases, and never for an unintentional discharge of oil or other hazardous substance.
- Maritime law seeks to protect maritime commerce and generally disfavors expanded liability.
- Punitive damages are a blunt and arbitrary mechanism for punishing and deterring certain conduct, and may well overdeter useful conduct.

Taken together, those considerations surely make the answer clear. Even assuming arguendo that the CWA does not itself operate to displace judge-made punitive damages awards, there is no practical need nor any sound policy basis for courts to choose to au-

thorize supplemental common-law punishment that Congress has not provided.[17]

III. Maritime Law Does Not Permit This Punitive Damages Award.

Federal courts have a "unique role in admiralty cases," since the "need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998). Article III of the Constitution therefore vested in this Court jurisdiction over cases of an "admiralty and maritime" nature. It has long been settled that with the grant of jurisdiction came the power and the duty to determine the rules of the general maritime law, consistent with the policies that underlie the jurisdictional grant, in the same way that state courts determine the common law of their states. *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 22-25 (2004); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207-08 (1994); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975).

Accordingly, if there are to be punitive damages in oil spill cases, it is still the duty of the federal courts, under this Court's guidance, to clarify, shape, and ultimately declare, as common-law courts, the uniform general maritime law of the United States

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[17] The Court's decision as to what law, if any, should be made in light of these considerations would, of course, be unaffected by the savings clause: Nobody could plausibly suggest that a 1970 savings clause forever *requires* this Court to provide a punitive damages remedy for oil spills, even if this Court decides, in the exercise of its common-law judgment, that such a remedy would be contrary to sound maritime policy.

applicable to the issue of punitive damages. Yet despite Exxon's express request, the Ninth Circuit affirmatively declined to perform its duty as a maritime court to articulate, based on the policies of maritime law, the rules that should govern punitive damages, and to reduce the award accordingly. It held that the only applicable limit on the size of the award was the constitutional one. Pet. App. 68a-70a, 90a-91a. In so doing, the Ninth Circuit evaded a central question posed by this litigation: Should punitive damages be awarded under maritime law to plaintiffs who have received full compensation when deterrence and punishment have been fully achieved?

A. Substantive Maritime Law, Not Just the Constitution, Sets Limits on Maritime Punitive Damages Awards.

In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that common-law judicial review of the size of punitive damage awards is a vital part of the traditional justification for allowing juries to make such awards, and that it cannot be omitted consistent with procedural due process. *See also Gore*, 517 U.S. at 598 (Scalia, J., dissenting). As the Second Circuit explained:

> [E]ven where the punitive award is not beyond the outer constitutional limit marked out … by the three *Gore* guideposts, we retain an appellate responsibility to review punitive awards for excessiveness in applying federal statutes …. [T]he appellate function must be exercised, and review of punitive awards for excessiveness is an especially appropriate context in which the reflective role of a court of appeals follows the often dramatic arena of a trial court.

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

State common law courts conduct two-phase review as a matter of course, first applying the pertinent standard under state common law and then considering the constitutional limits. *See*, *e.g.*, *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143-44 (Ohio 2002); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 277-78 (Md. 1998); *Routh Wrecker Serv. v. Washington*, 980 S.W.2d 240, 244 (Ark. 1998). This Court has expressly upheld and endorsed that procedure on the ground that "[f]or rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996).

Individual Justices have emphasized the power and duty of common-law courts to make rules governing punitive damages. *E.g.*, *Haslip*, 499 U.S. at 42 (Kennedy, J., concurring) ("We do not have the authority, *as do judges in some of the States*, to alter the rules of the common law …. *Were we sitting as state court judges*, the size and recurring unpredictability of punitive damage awards might be a convincing argument to reconsider those rules."); *TXO*, 509 U.S. at 472 (1993) (Scalia, J., concurring) ("State … courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime."); *State Farm*, 538 U.S. at 438 (Gins-

burg, J., dissenting) ("state high court[s]" could "cap punitive damages").

In maritime cases, federal appellate courts perform the same function state high courts do when ruling on state common law. The court of appeals thus should have started by reviewing the punitive damages award here under applicable principles of the general maritime law. This Court has reiterated that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Kirby*, 543 U.S. at 25; *accord Sisson v. Ruby*, 497 U.S. 358, 367 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). Maritime commerce entails risks not found on land. Even with the greatest of prudence, accidents will happen, and mariners must often make difficult decisions. Therefore "[t]hrough long experience, the law of the sea … is concerned with … limitation of liability." *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 270 (1972). This Court has also reiterated that maritime law demands the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. 558, 575 (1874); *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994). And this Court has referred from time to time to admiralty's policies of fair compensation for injury, promotion of settlement, and judicial economy. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211 (1994).

None of these policies supports punitive damages in this case. Such awards penalize maritime commerce rather than protect it; they expand rather

than limit liability; they are unpredictable and inconsistent; they have nothing to do with compensation for actual injury; and they impede rather than promote settlement and judicial economy. Because of the unique role of federal courts in shaping maritime law (assuming Congress has not spoken to a particular issue), federal courts are the "proper institutions of our society to undertake th[e] task," *TXO*, 509 U.S. at 472 (Scalia, J., concurring), of specifying, based on maritime policies, whether or when maritime punitive damages are permissible, and what, if any amount, should be their permissible size.

B. No Punitive Damages Are Available Under Maritime Law Where Prior Criminal and Civil Sanctions Have Already Satisfied Any Reasonable Interest in Punishment or Deterrence.

This Court has recognized that the only proper purpose of punitive damages is to vindicate the public interest in retribution and deterrence. *Haslip*, 499 U.S. at 19; *accord Gore*, 517 U.S. at 568. In *State Farm*, the Court recognized that punitive damages should be awarded only when compensatory damages are not sufficient "to achieve punishment or deterrence." 538 U.S. at 419; *see Gore*, 517 U.S. at 584-85 (requiring consideration of whether "less drastic remedies could be expected" to achieve punishment and deterrence). While *Haslip* and *State Farm* concerned constitutional principles, those principles derive from the common law. *See Haslip*, 499 U.S. at 19, *Gore*, 517 U.S. at 568. Common-law courts have long followed this rule to determine when punitive damages should be available, well before this Court's recent decisions addressing the constitutional limits on punitive damages. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832,

841 (2d Cir. 1967) (Friendly, J.) ("Criminal penalties and heavy compensatory damages … should sufficiently meet [the social] objectives [of punishment and deterrence]."); *accord McMillan v. Massachusetts SPCA*, 140 F.3d 288, 306 (1st Cir. 1998); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985); *Mirkin v. Wasserman*, 858 P.2d 568, 583 (Cal. 1993); *Rosado v. Santiago*, 562 F.2d 114, 121 (1st Cir. 1977). This Court should apply the same rule to maritime tort cases: When a defendant, prior to trial, has been fully punished and deterred by the combined imposition of compensatory damages, civil sanctions, criminal penalties, and other costs, there is no role left for punitive damages.

That is the situation here. The Ninth Circuit found that "[t]he plaintiffs here were almost entirely compensated for their damages years ago." Pet. 60a. And long before punitive damages were awarded, society's interests in punishing Exxon and deterring future oil spills had been fully achieved. As a result of the spill, Exxon was required to pay $2.1 billion in cleanup costs, $900 million to settle government claims for natural-resource damages, $125 million in criminal fines and restitution, and over $300 million to compensate private persons; and Exxon incurred a casualty loss of $46 million for vessel and cargo. JA331sa. As even the Ninth Circuit recognized, using a colorful "ink on the rug" example, "the cleanup expenses Exxon paid should be considered part of the deterrent already imposed." Pet. App. 99a-100a. The $125 million in fines and restitution was itself "one of the largest recoveries in a criminal case in the world," and more than twice the aggregate of *all amounts previously paid* in criminal proceedings for

environmental fines. JA50-51, 53-54; *see also* pp. 5-6, *supra*.

Punitive damages are meant to serve public purposes of deterrence and punishment. It is unclear what *public* purpose could support allowing an Alaska jury to transfer to Alaska plaintiffs a windfall of $2.5 *billion*, on top of the full compensation they already received for their (purely economic) losses.

It is not deterrence. Plaintiffs virtually concede that the award was unnecessary for that purpose, since Exxon's $3.4 billion in spill-related costs and expenses was enough to deter anyone from anything. Instead they seek to justify the award on the basis of "punishment." *See* Pl. Br. 68-70.

But it is not punishment, either. Congress prescribed by statute the appropriate penalties and punishment for oil spills. It did not provide for punitive damages. The district court applied that statute and imposed the punishment it deemed fully adequate to balance the harm to public interests protected by the Clean Water Act with the court's appreciation of Exxon's exemplary post-spill conduct. Surely any public interest in punishing a defendant has been satisfied and discharged when the defendant has received the punishment specified by law and imposed by the court.

The strong maritime policies of uniformity, predictability, and avoiding undue burdens on maritime commerce only underscore the conclusion that maritime law should not allow punitive damages in these circumstances. Uniformity and predictability mean that punishment ought to be prescribed for everyone equally under the law, not imposed in the essentially standardless discretion of a jury. Avoiding undue burdens on maritime commerce means that those

who suffer losses should be compensated, but that courts will prevent civil punishment going beyond what is necessary for deterrence. In such circumstances, punitive damages are overkill; they pile liability upon liability to give a windfall to plaintiffs who already have been fully compensated.

C. In the Alternative, the Court Should Set Appropriate Standards for Punitive Damages Under Maritime Law, Consistent with Maritime Policies.

If punitive damages may be awarded in maritime cases where Congress has not provided them by statute, *but see* Part II *supra*, and even where all purposes of punishment and deterrence have long since been achieved, *but see* Part III(B) *supra*, still it is for the federal courts, under this Court's guidance, to make sure that such awards are limited to what maritime law and policy permit. No case illustrates better than this one the need for simple, reasonable, and easily administered *standards* to constrain unfettered discretion in the award of punitive damages. *See Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057, 1062 (2007); *Gore*, 517 U.S. at 587 (Breyer, J., concurring). If the Court is to permit punitive damages in circumstances where neither Congress nor maritime law has ever previously provided them, then it must at least control the "game-show mentality," *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996), that drives juries in land-based cases to award whatever they will; and absent such standards an expanded regime of punitive damages should not be grafted onto federal maritime law. The maritime policies of uniformity, predictability, protection of maritime commerce, and limitation of liability require no less.

The standards identified below are drawn from or consistent with maritime policy, and each would require a complete or substantial reduction of the $2.5 billion award in this case. Certainly a $2.5 billion judgment that meets *none* of these standards, and which contravenes *all* maritime law policies, cannot stand.

1. *Civil punishment by a jury should not exceed the civil punishment that Congress has prescribed.*

Even if the CWA were not sufficient to preclude punitive damages altogether, *but see* Part II *supra*, respect for the pre-eminent role of Congress in the maritime area surely means at least that federal courts should not impose, through punitive damages, civil punishment that exceeds the maximum Congress has prescribed. Here Congress prescribed penalties, and permitted affected states to prescribe civil penalties of their own. *See* 33 U.S.C. § 1321(o)(2). Plaintiffs' brief below reckons that the civil penalties allowed by Congress for this oil spill (including those imposed by Alaska) total $80.2 million. Pl. Br. [2004] 65-66.

When Congress has specified by statute the civil punishment available, its decision should limit the size of punitive damages that civil juries may award. Federal courts are "not free" to impose civil punishment totaling more than what Congress has specified, and thereby "to rewrite rules that Congress has affirmatively and specifically enacted." *Dooley*, 524 U.S. at 122. Thus if the maximum civil punishment under the CWA is $80.2 million, civil punishment via punitive damages cannot be $2.5 billion. Such a result would entirely defeat congressional policy, directly contradict the statutory language, and destroy

the maritime-law policies of predictability and uniformity.

2. *Where, as here, compensatory damages are substantial, punitive damages awarded by a jury may not exceed them.*

Borrowing from common-law principles, many state courts and legislatures impose caps on punitive damages, generally requiring that they not exceed a fixed multiple of compensatory damages. *See Gore*, 517 U.S. at 615-16 (Ginsburg, J., dissenting). In *State Farm*, this Court stated that when compensatory damages are substantial, "then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

Because the Court was interpreting the Constitution in *State Farm*, it did not make this principle into a rule applicable in every situation. The Court has been deeply mindful of the federalism interests involved in interpreting the Due Process Clause to prohibit particular punitive damage verdicts. *E.g.*, *Gore*, 517 U.S. at 568 ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages they will allow in different classes of cases and in any particular case."); *id.* at 598 (Scalia, J., dissenting). But that concern is absolutely irrelevant in this case, since it involves no rule of law announced by any sovereign state.

Rather, the same considerations of "size and recurring unpredictability" that have led state courts and legislatures to impose caps on punitive damages should lead the Court to set a limit here. *See Haslip*, 499 U.S. at 42 (Kennedy, J., concurring). Enforcing such a limit would serve the maritime policies of uni-

formity and predictability. It would also promote the maritime policies of settlement and judicial economy. When there is an accident, compensation should be paid promptly and fairly, as Exxon did here. But if compensation paid quickly and fairly nevertheless is treated as part of the multiplier for punitive damages, then there are strong incentives to litigate compensation. Every dollar paid in compensation can, as the Ninth Circuit held, increase punitive damages by five dollars.

The prospect of punitive damages thus interferes with what would otherwise be desirable incentives to pay claims quickly and fairly. It creates windfalls for some plaintiffs, and for many plaintiffs' lawyers. But it means that injured parties will be compensated more slowly, that compensatory payments will be scrutinized because of their potential to affect punitive damages, and that punitive damages, which are supposed to serve public purposes, will end up defeating or restricting one of the most important public purposes of maritime tort law (or land-based tort law, for that matter), the prompt and fair compensation of injured parties.

3. *When there is no likelihood that wrongful conduct will escape detection, there is no need for punitive damages greater than what is necessary to remove any profit from the wrongful conduct.*

The modern theory of compensatory damages in tort is that they are awarded to create proper incentives for safety. The economic theory of punitive damages, however, assumes that there are situations where merely requiring those able to prevent accidents to bear the costs of them will not suffice to reduce accidents to a minimum or correctly incentivize potential tortfeasors. The often-overlapping

situations relevant here are: (1) deliberate, intentionally tortious conduct, where one person derives profit, pleasure, or amusement from causing an injury to another; and (2) conduct that the actor believes will always or at least frequently escape detection. In these situations, the obligation to pay compensatory damages may not be sufficient to deter wrongful conduct, and punitive damages may be needed. *See Gore*, 517 U.S. at 592-93 (Breyer, J., concurring); *Kemezy v. Peters*, 79 F.3d 33, 34-35 (7th Cir. 1996) (citing economic literature); Shavell, ECONOMIC ANALYSIS OF ACCIDENT LAW 162 (1987).

But the reverse is also true. If there is no potential profit from the conduct, and no likelihood that the conduct will escape detection, then there is no economic rationale for the award of punitive damages. *Id.* The obligation to pay compensatory damages is sufficient to align the tortfeasor's incentives properly, and thus to make sure that the costs of accidents are reduced to the optimum. There is no need and no warrant for punitive damages. Such a rule of law is particularly appropriate for maritime law, where the basic objective is the protection of maritime commerce. *Kirby*, 543 U.S. at 25; *Sisson*, 497 U.S. at 367; *Foremost Ins. Co.*, 457 U.S. at 674.

This maritime accident is clearly one where an award of punitive damages makes no economic sense. The spill was immediately known. There was no possibility of hiding it, even for a few minutes. Exxon made no profit, and had no prospect of profit, from any of the activities that plaintiffs point to as wrongful. If Exxon made mistakes, it has paid dearly for them. But that does not change the grounding into a situation economically appropriate for punitive damages. The rules of maritime law,

designed to protect maritime commerce, ought to be shaped by this Court to fit economic reality. Economic reality does not warrant punitive damages in these circumstances.

4. *Juries may not be instructed to consider the net worth of corporate defendants in awarding punitive damages.*

Plaintiffs' evidence in Phase III of the trial was entirely devoted to Exxon's income and net worth. The jury was instructed it could and should consider that evidence in determining the proper size of the award. ER 517-19. Punishment on such a theory is clearly contrary to the maritime policies of predictability and uniformity, since it implies that the punishment of different actors for the same conduct may be different. It rests on an economically irrational foundation, a false analogy between the wealth of individuals and corporate net worth, as Judge Easterbrook has cogently explained. *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992).

Allowing juries to consider corporate net worth permits punishment of companies disproportionately based on size, which is directly contrary to the fundamental maritime-law policy of encouraging adequate capitalization for risky activities. It also invites juries to vent "raw redistributionist impulses," *TXO*, 509 U.S. at 468 (Kennedy, J., concurring), lets them "use their verdicts to express biases," *Honda*, 512 U.S. at 432, and "provides an open-ended basis for inflating awards." *Gore*, 517 U.S. at 591 (Breyer, J., concurring). None of this serves the policies of maritime law.

* * *

The identification of clear standards to tether the award of punitive damages to maritime policy may

seem an awkward policymaking task for a federal court, even though common law courts routinely perform such tasks. But a choice necessarily must be made one way or another. The position advanced by plaintiffs calls for the Court to make a most extraordinary policy choice—that judges should permit juries to impose whatever level of punishment they desire, capped only by the outer limits of the Constitution. If such policy judgments are difficult ones for a court to make, that is simply another reason why the decision to provide a punitive damages remedy should be made by Congress.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

E. EDWARD BRUCE
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for Petitioner Exxon Shipping Company

WALTER DELLINGER
(*Counsel of Record*)
JOHN F. DAUM
CHARLES C. LIFLAND
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner Exxon Mobil Corporation

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STATUTORY PROVISIONS INVOLVED

RELEVANT PROVISIONS OF THE CLEAN WATER ACT

Clean Water Act, 33 U.S.C. §§ 1311(a), 1311(c), 1319(c), 1319(d), 1321(b), 1321(f), 1321(o), 1365(a), and 1365(e), as they read on March 24, 1989:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

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

* * *

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

§ 1319. Enforcement

* * *

(c) Criminal penalties

(1) Negligent violations

Any person who-

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title
* * *

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who-

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328 or 1345 of this title
* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title * * * and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

* * *

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

* * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title * * * and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per

day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * *

§ 1321. Oil and hazardous substance liability

* * *

(b) Congressional declaration of policy against discharges of oil or hazardous substances; * * * ; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

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

* * *

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or wel-

fare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

* * *

(6) * * *

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based on consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this clause where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for

the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

* * *

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000,

whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

* * *

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

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

* * *

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

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

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

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the elev-

enth amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * *

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).