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No. 07-219

In The

Supreme Court of The United States

EXXON SHIPPING COMPANY, et al.,

Petitioners,

- against -

GRANT BAKER, et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN MARITIME SAFETY, INC. IN SUPPORT OF PETITIONERS

LEE SEHAM
Counsel of Record
LUCAS K. MIDDLEBROOK
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, New York 10601
(914) 997-1346

Attorneys for *Amicus Curiae*
American Maritime Safety, Inc.

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (13223)

TABLE OF CONTENTS

TABLE OF AUTHORITIES ....ii-iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

ARGUMENT 2

I. Reinstatement of Known Substance Abusers Upon Successful Completion Of Rehabilitation was Consistent with Existing Maritime Industry Practices and the Policies Promoted by the Relevant Federal Agencies 2

II. During the Relevant Time Period, Aggressive Individualized Testing Programs Would Have Been Legally Problematic and Were Not the Maritime Industry Standard 7

CONCLUSION 21

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Hennessey v. Coastal Eagle Point Oil Co.,
609 A.2d 11 (N.J. 1992) 18

Lovvorn v. City of Chattanooga,
846 F.2d 1539 (6th Cir. 1988)............................8

Luck v. Southern Pacific Transportation Co.,
267 Cal. Rptr. 618 (Cal. Ct. App. 1990),
cert. denied, 498 U.S. 339 (1999).....................17

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989)...7

Penny v. Kennedy,
846 F.2d 1563 (6th Cir. 1988)............................8

Railway Labor Executives Association v. Burnley,
839 F.2d 575 (9th Cir. 1988), *rev'd* 489 U.S. 602
(1989)..8

Semore v. Pool,
217 Cal. App. 3d 1087 (Cal. Ct. App. 1990) 17

Skinner v. Railway Labor Executives Association,
489 U.S. 602 (1989)...............................10, 14

Transportation Institute v. United States Coast Guard,
727 F. Supp. 648 (D.D.C. 1989) 13

TABLE OF AUTHORITIES
(Continued)

STATUTES & RULES PAGE(S)

Procedures for Transportation Workplace Drug Testing Programs,
54 Fed. Reg. 49854 (Dec. 1, 1989) 3, 11

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel,
53 Fed. Reg. 25926 (Jul. 8, 1988)............6, 11, 13

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel,
53 Fed. Reg. 47064 (Nov. 21, 1988) 6, 20

Operating a Vessel While Intoxicated,
52 Fed. Reg. 47526 (Dec. 14, 1987) 12, 13

Procedures for Transportation Workplace Drug and Alcohol Testing Programs,
49 C.F.R. Part 40 (2007)..........................passim

49 C.F.R. § 40.219(b) 8

Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug,
33 C.F.R. § 95.035 (2007)...........................11-12

Marine Casualties and Investigations,
46 C.F.R. Part 4 (2007)..................................13

Prohibition of Employer Interference,
San Francisco, Cal., Police Code Art. 33A.........18

TABLE OF AUTHORITIES
(Continued)

NLRB DECISIONS PAGE(S)

Johnson-Bateman Co.,
295 N.L.R.B. 180 (June 15, 1989)....................15

Star Tribune,
295 N.L.R.B. 543 (June 15, 1989)....................15

United Telephone,
1991 NLRB GCM LEXIS 70
(January 31, 1989)...................................15-16

MISCELLANEOUS PAGE(S)

Drug Testing: Handle With Care,
(The National Institute of Drug Abuse 1989)......4

Getting Help: Employer Version,
(The National Institute of Drug Abuse 1989)......4

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, American Maritime Safety, Inc. (hereinafter "AMS") is a non-profit corporation established in 1988 to facilitate maritime industry compliance with the Oil Company's International Marine Forum's Chemical Testing Guidelines (hereinafter "OCIMF"), the United States Department of Transportation (hereinafter "DOT") chemical testing regulations, and the United States Coast Guard (hereinafter "Coast Guard") drug and alcohol testing regulations.[1] The AMS consortium administers a drug and alcohol testing program for the vast majority of U.S.-flag deep sea vessel operators, and over 400 member companies participate in the AMS chemical testing program.

INTRODUCTION

AMS submits this amicus brief in response to Plaintiffs' argument in its Conditional Cross-Petition for Writ of Certiorari that Exxon was appropriately assessed punitive damages because its "knowledge of Hazelwood's relapse rendered its own conduct reprehensible." (Plaintiffs, Grant Baker, et al., Conditional Cross Petition for Writ of Certiorari, at 9). In fact, the reinstatement of known substance abusers to safety sensitive positions, upon successful

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties filed notices with the Court consenting to the filing of an *amicus curiae* brief by any entity. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

completion of rehabilitation, was consistent with both existing maritime industry practices and the policies promoted by the relevant federal regulatory agencies.[2]

AMS also submits this amicus brief in response to the Plaintiffs' argument that Exxon's conduct was reprehensible due to the company's failure to subject Captain Hazelwood to an aggressive individualized testing program. During the relevant time period, however, such a program would have been legally problematic and was certainly not the industry standard.

ARGUMENT

I.

Reinstatement of Known Substance Abusers Upon Successful Completion of Rehabilitation was Consistent with Existing Maritime Industry Practices and the Policies Promoted by the Relevant Federal Agencies

On November 21, 1988, the Department of Transportation (DOT) published an interim final rule that established drug testing procedures applicable to drug testing for transportation employees under six DOT regulations.[3] This interim

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[2] Exxon has already addressed the countervailing legal considerations presented by the Rehabilitation Act and the Americans with Disabilities Act; therefore, the AMS submission will focus primarily on industry practices and agency policy.

[3] These six regulations were published on the same day by the Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, United States Coast Guard, Urban Mass Transportation Administration, and Research and Special Programs

final rule, codified at 49 C.F.R. Part 40 effective January 2, 1990, imported its drug testing regime virtually intact from the model developed by the Department of Health and Human Services (DHHS) for federal employees.[4] Under the DOT testing program, DHHS and its subagency – the National Institute for Drug Abuse (NIDA) – continued to play a major role, which included the development of testing protocols, the certification and inspection of laboratories, and the promotion of private industry Employee Assistance Programs (EAPs).

Throughout the 1980's DHHS and NIDA actively discouraged employers from responding to employee substance abuse with punitive disciplinary policies. This policy was incorporated into a series of video presentations developed shortly before the implementation of transportation industry substance abuse testing. AMS reproduced and distributed these video presentations to its member companies in order to familiarize them with DHHS/NIDA expectations.

In one video presentation, NIDA's Director of Workplace Initiatives, Dr. J. Michael Walsh, asserted that testing was "a very small part" of any substance abuse program and that the purpose of testing was to "identify substance abusers and get

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Administration. *Procedures for Transportation Workplace Drug Testing Programs*, 54 Fed. Reg. 49854 (December 1, 1989).

[4] 54 Fed. Reg. 49854 (December 1, 1989) ("The interim final rule (49 CFR Part 40) followed closely the Department of Health and Human Services (DHHS) regulation entitled 'Mandatory Guidelines for Federal Workplace Drug Testing Programs.'").

them into treatment as early as possible." NIDA also took the position that:

> Testing works best in combination with counseling, rehabilitation, and education. It is a strategy that cannot stand alone.

Drug Testing: Handle With Care (The National Institute of Drug Abuse 1989). Significantly, the video presentation addressed safety sensitive personnel in transportation industries, including the trucking and airline industries.

In a companion video production, NIDA Director Dr. Walsh stated:

> The idea of what am I going to do with this employee or any employee I find to be using drugs has to be one of the first questions any policymaker asks himself.
>
> We feel that the right thing to do with an employee who uses drugs is get them into treatment. So provisions must be made for an Employee Assistance Program.

Getting Help: Employer Version (The National Institute of Drug Abuse 1988). This video presentation featured individuals whose employers had kept faith with them through multiple relapses. Interviewed employees credited their employers' humanitarian concern as having saved their lives. Employees seeking help with substance abuse problems are reassured: The "Employee Assistance Program (EAP) is not going to kick you out just because you're dealing with relapse issues. But we're going to offer the employee the services of EAP as long as they show that they are trying."

The Coast Guard's consideration of the issue in its July 8, 1988, Notice of Proposed Rulemaking (NPRM) also reflected a broad assumption that, even in the context of illegal drug use, rehabilitation would be available:

> The NPRM proposes four different options concerning the circumstances under which employees would or would not be given an opportunity to seek rehabilitation. Under the first option, an employee who comes forward voluntarily or tests positive for drugs for the first time would be eligible for rehabilitation rather than be discharged. . . . Once rehabilitated, the employee could be reinstated into his or her prior position. The second option would give rehabilitation rights to employees who come forward voluntarily or who are identified as drug users during periodic or random tests, but would not require that the same opportunity be afforded to drug users identified in reasonable cause or post-accident tests; those not afforded the right to rehabilitation could be discharged. In the third option, only volunteers could claim rehabilitation rights. Anyone testing positive for drugs could be fired immediately. In the fourth option, employers would not be required to offer an opportunity for rehabilitation. However, the employers could voluntarily offer a rehabilitation program. **In all cases, employers would be free to offer more rehabilitation options than the minimum proposed.** For example, **an employer could voluntarily offer two chances for rehabilitation rather than one,** however,

> drug use following rehabilitation would subject an individual's license, certificate of registry, or merchant mariners document to revocation proceedings. **Employees who undergo rehabilitation, whether voluntary or mandatory, and want to retain or regain their position would have to meet the requirements of this rule to complete the program and receive a recommendation for reinstatement.**

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel, 53 Fed. Reg. 25926, 25936 (July 8, 1988) (emphasis added). Notably, the only limitation the Coast Guard sought to impose on rehabilitation – even multiple opportunities for rehabilitation – was that the seafarer be required to complete the requisite program and receive a recommendation for reinstatement.

The Coast Guard's final rule deleted any agency-mandated rehabilitation requirement from its text on the grounds that "rehabilitation of an employee is not directly related to the safety of the vessel." *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064, 47069 (November 21, 1988). The Coast Guard determined that the availability of rehabilitation "should be a decision of the employer or agreed upon between labor and management during the collective bargaining process." *Id.*

As discussed further below, the deep sea maritime industry's success in implementing the Coast Guard-mandated drug testing program depended on the full cooperation of the maritime unions that effectively controlled the industry's

qualified labor pool through their respective hiring halls. The unions were adamant that seafarers who tested positive for drugs be permitted to retain seniority and, following rehabilitation, continue to bid for positions through the hiring hall.

II.

During the Relevant Time Period, Aggressive Individualized Testing Programs Would Have Been Legally Problematic and Were Not the Maritime Industry Standard.

We understand that the Plaintiffs have also suggested that Exxon's conduct was reprehensible due to the company's failure to subject Captain Hazelwood to an aggressive individualized testing program. During the relevant time period, however, such a program would have been legally problematic and was certainly not the industry standard. As a general rule, testing in excess of federal mandated requirements presented serious obstacles on at least three fronts: 1) the federal regulatory agencies, 2) labor unions and individual employees, and 3) state and local laws.

It is important to remember that, at the time of the accident, the legality of government-mandated substance abuse testing for employee groups without a demonstrated history of substance abuse was, in fact, a fairly close call. The Supreme Court approved such government-mandated testing by a bare five to four majority just eight days before the Exxon Valdez accident occurred. *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (March 2, 1989) (hereinafter "*Von Raab*"). The *Von Raab* decision effectively overturned circuit court precedent finding that random testing, even for

those employees holding safety sensitive positions, was unconstitutional. *Lovvorn v. City of Chattanooga,* 846 F.2d 1539 (6th Cir. 1988); *Penny v. Kennedy,* 846 F.2d 1563 (6th Cir. 1988); *Railway Labor Exec. Ass'n v. Burnley,* 839 F.2d 575 (9th Cir. 1988), rev'd 489 U.S. 602 (1989). In his dissent in *Von Raab,* Justice Scalia condemned the Customs Service drug testing program in the following terms:

> The Court agrees that this constitutes a search for purposes of the *Fourth Amendment* – and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.
>
> * * *
>
> In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

489 U.S. at 680-81.

The United States Department of Transportation's Final Rule governing testing procedures[5] provided that an employer could include alcohol or other controlled substances in its testing protocols "only pursuant to DOT agency approval, if testing for those substances is authorized under agency regulations and if the DHHS has established an approved testing protocol and positive threshold for each such substance." 49 C.F.R. § 40.219(b). The DOT adhered to the view that its success in legally defending its testing regime depended on private

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[5] The Coast Guard's final rule on substance abuse testing required that testing be conducted in accordance with the procedures set forth in the Department of Transportation's final rule – 49 C.F.R. Part 40.

employers' strict adherence to the program's specific scope and testing protocols:

> A number of comments objected to this provision, noting that other substances (e.g., barbiturates, benzodiazapines, **alcohol**) are abused and can cause safety problems. Some comments said that employers were already testing for these additional substances (often stating that they tested for nine or ten drugs currently), and that **the rule would either make them scale back existing programs or increase their testing costs.** Under the approach that most of these comments appeared to favor, an employer, where its authority to do so was not otherwise constrained (e.g., by state law or union contract), could ask the laboratory to test the "DOT sample" for any additional substances the employer chose.
>
> When the Federal government requires an employer to conduct drug tests, it seems clear from court decisions that the fourth amendment applies to the testing that the employer conducts in response to the Federal requirement. Fourth amendment considerations would arguably apply to any testing resulting from a urine sample collection required by the Federal government, including discretionary employer testing piggybacked onto the DOT-mandated collection. The employers' discretionary testing would also probably be reviewed by the courts as part of the courts' consideration of the overall validity of DOT drug testing rules.

In determining whether a testing requirement passes fourth amendment muster, courts typically have tried to balance governmental interests underlying the testing requirement and the privacy interests of employees. One of the factors examined by the courts in determining the strength of the governmental interest is the safety necessity of testing. Another factor examined is the extent to which testing procedures protect the privacy interest of employees, thereby limiting the intrusion on rights protected by the fourth amendment.

Courts have upheld Federally-mandated drug testing for the five drugs under the DHHS Guidelines (see for instance *Skinner v. Railway Labor Executives Association Skinner [sic], 109 S.Ct. 1402 (1989)).*[6] **Testing for additional drugs increases the privacy intrusion of testing. Therefore, a change in this respect may make court approval of DOT-required testing more difficult.**

DHHS-approved testing protocols and positive thresholds for drugs beyond the five for which testing is now required do not exist. DHHS certification of laboratories does not extend to testing of any of the additional drugs. **Consequently, the uniform standards crucial to the accuracy and integrity of the testing process, which courts have relied upon in upholding Federally-required drug**

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[6] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) ("*Skinner*").

> **testing, are not now in place for the additional drugs**. This absence of uniform standards could also make defense of the DOT regulations in court more difficult.

Procedures for Transportation Workplace Drug Testing Programs, 54 Fed. Reg. 49854, 49854 (December 1, 1989) (emphasis provided).

The Coast Guard echoed the DOT's position and emphasized that employers had the option of testing for alcohol on a reasonable cause basis:

> In the case of alcohol, present urine testing technology only permits a rough estimation of alcohol concentration levels in an individual's blood. For this reason, **this proposal does not require urine testing for alcohol.** The rule could be modified if there are advances in urine testing in the future.
>
> This does not mean the Coast Guard condones abuse of alcohol. The Coast Guard has issued a Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, *52 FR 47526,* December 14, 1987) that prohibits an individual from consuming alcohol on-duty or performing duties while intoxicated. Off-duty use is limited and subject to the restrictions contained in the final rule. **With reasonable cause**, testing to determine blood alcohol levels can be directed.

53 Fed. Reg. 25926, 25928 (July 8, 1988) (emphasis added).

Even in the narrow context of reasonable cause, alcohol testing was – and still is to this day – permissive rather than mandatory. *Operating a*

Vessel While Under the Influence of Alcohol or a Dangerous Drug, 33 C.F.R. § 95.035 (2007). Moreover, the Coast Guard was openly skeptical that alcohol testing was an adequate substitute for direct observation:

> While the behavioral standard may be used as a reasonable basis to test a person for drugs or alcohol, **the behavioral standard is also intended to be an independent basis for determining intoxication. The Coast Guard has determined that a behavioral standard independent of a BAC standard is essential.** There may be individuals with a susceptibility to alcohol or drug/alcohol combinations such that they are seriously impaired at levels lower than the BAC standards. Whatever the cause, the objective is to remove dangerously impaired operators from vessels to which *46 U.S.C. 2302* applies.

Operating a Vessel While Intoxicated, 52 Fed. Reg. 47526, 47528 (December 14, 1987) (emphasis added).

> Section 94.035 outlines who may direct a chemical test, when reasonable cause exists to direct the taking of a chemical test, and some general testing requirements. Since marine employers are most likely to be in a position to recognize the need for testing an employee, the Coast Guard continues to **permit** those employers to require chemical testing for reasonable cause. The acceptability of a particular test required by a marine employer will be established during an administrative or judicial proceeding.

Id. at 47530 (December 14, 1987) (emphasis added). Both in the late 1980's, and to the present date, the Coast Guard only **requires** alcohol testing in the aftermath of a serious marine incident. *Marine Casualties and Investigations*, 46 C.F.R. Part 4 (2007).

Maritime labor unions presented a second formidable obstacle to non-mandatory alcohol testing. They shared Justice Scalia's view that substance abuse testing constituted an assault on their members' civil liberties. The unions' conviction was strengthened by the Coast Guard's admission that it could not "specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage," and that its data was "sparse and are not conclusive." 53 Fed. Reg. 25926, 25927 (July 8, 1988). Moreover, at least with respect to the deep sea industry, the safety rationale suffered from a glaring defect – because the program applied only to U.S. flag vessels, it had no application to approximately 97% of the ships entering American ports.[7] The major maritime labor unions united in a sustained legal attack that succeeded in enjoining the Coast Guard's random testing program almost six months **after** the Exxon Valdez accident. *Transportation Institute v. United States Coast Guard*, 727 F. Supp. 648 (D.D.C 1989).

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[7] Exxon's drug and alcohol policy guidelines exceed both OCIMF and Coast Guard standards, and Exxon requires that any party contracting to do business with it must adhere to this heightened drug and alcohol testing protocol. Therefore, these Exxon contracting practices have been an important means for extending U.S. safety standards to a large portion of the international maritime industry.

The formidability of the unions' opposition to non-mandatory alcohol testing was attributable to two independent factors – their administrative power and their rights under federal labor law. The American maritime industry has historically been characterized by a strong presence of organized labor. Moreover, with respect to the deep sea segment of the industry, most maritime employers were, and continue to be, heavily dependent on union-controlled hiring halls for the staffing of their vessels. Consequently, full union cooperation in the implementation of the industry's substance abuse testing program was beyond critical – it was indispensable.

It was a delicate task to obtain the unions' cooperation in the implementation of a program that they considered destructive of their members' civil liberties. In order to obtain this cooperation, AMS took the extraordinary step of inviting the largest maritime union – the Seafarers International Union (SIU) – to participate in the joint selection of specimen collection contractors, a NIDA-certified testing laboratory, and a medical review officer organization. Much to the unions' discomfort, their hiring halls and medical facilities became the means for achieving industry compliance.

A key consideration for the unions' agreement to facilitate the implementation of federally mandated substance abuse testing was the employers' willingness to make the program no more intrusive than what was then required by the United States Coast Guard. Indeed, the National Labor Relations Board ("NLRB") held that, irrespective of the Supreme Court's Fourth Amendment determinations in *Skinner* and *Von Raab*, drug

testing of current employees constituted a mandatory subject of bargaining. *Johnson-Bateman Co.,* 295 N.L.R.B. 180 (June 15, 1989); *Star Tribune,* 295 N.L.R.B. 543 (June 15, 1989).[8] In fact, the NLRB held that even where drug testing is required under federal regulations, employers were obligated to negotiate regarding the discretionary interstitial issues.

In a 1991 General Counsel Memorandum, the NLRB addressed an employer's refusal to bargain over the implementation of a drug testing program pursuant to Department of Transportation and Federal Highway Administration specifications contained in 49 C.F.R. Part 391 and 49 C.F.R. Part 40. *United Telephone,* 1991 NLRB GCM LEXIS 70 (January 31, 1991). Since the drug testing program was mandated by federal regulations, the employer considered it to be "non-bargainable." *Id.* at *7. The NLRB disagreed and concluded that the employer was obligated to bargain with the union concerning the discretionary issues associated with implementation of the drug testing program.

> Although the Employer properly recognized that it was subject to the Federal regulations . . . requiring the implementation of a drug

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[8] In *Star Tribune,* the NLRB ordered the employer to revoke the unilaterally instituted drug and alcohol testing policy and cease and desist from unilaterally instituting any future drug and alcohol testing programs without first bargaining with the unions. Furthermore, the employer was ordered to remove all notices, reports or memoranda from employee files that resulted from the unilaterally implemented drug and alcohol policy, to rescind any discipline imposed on employees as a result of the drug and alcohol policy and to "make such employees whole for any losses they may have suffered." *Star Tribune,* 295 N.L.R.B. at 551.

> testing program, we nonetheless conclude that the Employer violated Section 8(a)(5) and (1) by refusing to bargain with the Union. It is well settled that an employer is excused from the duty to bargain over that which it is legally compelled to do. **The duty to bargain is completely obviated, however, only where an employer has no discretion as to the execution of the legally compelled activity.**

Id. at *12. (emphasis added).

In the late 1980's, the exclusive goal of AMS was to achieve industry compliance with United States Coast Guard substance abuse testing regulations. Due to the absolute necessity of unions' administrative cooperation, and the legal strictures of the National Labor Relations Act, the pursuit of a more ambitious substance abuse testing regime would have risked the collapse of the maritime industry's deep sea compliance program altogether.

An independent reason for restricting the maritime industry's substance abuse testing compliance program to actual Coast Guard requirements was the industry's ability to avail itself of the Supremacy Clause of the United States Constitution. In the 1980's, many jurisdictions were deemed to be hostile to employer drug and alcohol testing programs. For example, in early 1990, a California appellate court held that:

> [T]he right of privacy in the California Constitution protects Californians from actions of private employers as well as government agencies. Accordingly, when a private employee is terminated for refusing

> to take a random drug test, he may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right to privacy.

Semore v. Pool, 217 Cal. App. 3d 1087, 1092 (Cal. Ct. App. 1990). While the California Court of Appeal recognized that certain safety concerns **may** justify "intrusive drug testing of categories of employees under Fourth Amendment analysis," the Court went on to note that "this is **only one factor to be weighed** in the balancing test" to determine whether "the employer's need to assure safe and efficient operation of its plant outweighs the employee's legitimate expectation of privacy." *Id.* at 1098 (emphasis added). Therefore, the fact that an employee may have occupied a safety sensitive position was not, by itself, enough to insulate an employer from liability resulting from intrusive drug or alcohol testing.

The availability to employees of a private cause of action against intrusive employment-based substance testing was a very real concern for employers looking to implement a drug and alcohol testing program in the late 1980's and early 1990's. *Luck v. Southern Pacific Transportation Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App. 1990), *cert. denied*, 498 U.S. 339 (1990) (Affirming a $485,000 award against an employer for wrongfully discharging an employee who refused to provide a urine specimen for screening and finding that urinalysis "intrudes upon reasonable expectations of privacy," and is permissible only if "justified by a compelling interest.").

During this same time period, plaintiffs had also prevailed in similar causes of actions in other

states. For example, in New Jersey, in the late 1980's, a safety-sensitive employee working at an oil refinery was discharged after a random drug test showed that he tested positive for marijuana. The trial court granted the plaintiff employee summary judgment on his wrongful discharge claim and found a "clear mandate of public policy against private random drug testing in the search-and-seizure provision of New Jersey's Constitution." *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 12 (N.J. 1992).

As these cases demonstrate, during the late 1980's and early 1990's, private employer liability under state law for intrusive drug and alcohol testing programs was a serious concern. In addition, local governments were also getting involved in similar legislative efforts. For example, San Francisco enacted an ordinance placing restrictions on an employer's ability to implement a drug and alcohol testing program in the workplace, including a blanket prohibition on random testing. *Prohibition of Employer Interference*, San Francisco, Cal., Police Code Art. 33A. Furthermore, section 3300A.8 of the San Francisco Code established a private cause of action that could be brought by individuals for special and general damages, attorneys' fees and costs for a violation of the ordinance.

There was wide expectation, during this time period, that maritime companies would soon be inundated with litigation by seafarers who either refused to be tested or tested positive for drugs and/or alcohol. AMS consistently described the Coast Guard regulations to its members as a federal shield that protected maritime employers from claims based on inconsistent state or local law. As a

corollary, AMS warned its members that going beyond the border of this shield – i.e., exceeding compliance requirements – would expose the maritime employer to a plethora of lawsuits based on state and local law. The policy of not exceeding the Coast Guard requirements was deemed particularly appropriate in view of the fact that the U.S. industry's competitors – the international flag carriers constituting 97% of vessel traffic in and out of U.S. ports – generally had no substance abuse testing programs or programs that were limited to pre-employment testing.

Due to the conditions that prevailed in 1989 – including the hostility of federal agencies, labor unions, and state authorities – it was unquestionably the maritime industry standard practice to limit substance abuse testing to the strict requirements of the Coast Guard's regulations. The development of an individualized testing regime for Captain Hazelwood would have been a risky departure from this standard.

Furthermore, the suggestion that Exxon should have been involved in the aggressive monitoring of Hazelwood's shoreside conduct was also alien to the Coast Guard's program during the relevant time period. Indeed, the Coast Guard's regulations emphasize that the diminution of an individual's Fourth Amendment rights under the federal program was based on his shipboard activities:

> *"Crewmember",* as used in this part, is an important term as it defines vessel personnel to whom the regulations of this part apply. The intent of these regulations is to chemically test all individuals engaged or

> employed aboard a vessel who perform duties which directly affect the safety of the vessel or its operations. This definition states that **anyone aboard a vessel who is acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not a member of the vessel's crew, is subject to the requirements of this part.**

53 Fed. Reg. 47064, 47073 (November 21, 1988). From the inception of its drug and alcohol testing program, Coast Guard personnel consistently advised AMS that the program's reasonable cause testing component applied only to conduct that occurred on the vessel.[9] Consequently, AMS supervisory training seminars have always included the admonition that maritime employers have no authority under Coast Guard regulations to initiate a reasonable cause drug or alcohol test based on shoreside conduct. As discussed above, such testing outside the mandates dictated by the Coast Guard subjected maritime employers to privacy-based litigation based on state, local, and federal labor law.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court not base any award of punitive damages against Exxon either on its policy of reinstating individuals to safety sensitive

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[9] As the Coast Guard stated in the preamble to its Final Rule: "Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees." 53 Fed. Reg. 47064, 47066 (November 21, 1988)

positions upon successful completion of rehabilitation or its non-implementation of testing that would have exceeded the scope of mandatory Coast Guard testing requirements.

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Respectfully submitted,

Lee Seham
Counsel of Record
Lucas K. Middlebrook
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, New York 10601
(914) 997-1346

Attorneys for Amicus Curiae
American Maritime Safety, Inc.