No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses and associations, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographic region. One important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The federal courts' fair, consistent, and predictable administration of punitive damages awards – whether governed by federal statute or common law – is of profound concern to the Chamber's members.

Accordingly, the Chamber regularly files *amicus* briefs in significant punitive damages cases, including every case in which this Court has addressed that issue during the past two decades. This case raises critically important issues related to the respect that should be accorded congressional policy decisions on the availability of extra-statutory punitive damages remedies and the proper role of the federal courts in expounding the common law of punitive damages awards under federal maritime law. The Chamber has a vital interest in promoting a predictable, rational and fair legal environment for

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

its members. It also believes that its knowledge of the practical implications for the business community of the legal principles involved in this case will assist the Court in resolving the important issues raised by Petitioners (hereafter "Exxon").

INTRODUCTION AND SUMMARY

This Court understands all too well the dangers of punitive damages "'run wild.'" See *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). See also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994) ("[p]unitive damages pose an acute danger of arbitrary deprivation of property"). Without a uniform framework establishing clear standards, punitive damages "have a devastating potential for harm" and "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections." *Haslip*, 499 U.S. at 42-43 (O'Connor, J. dissenting). Large businesses are particularly at risk of being targeted by such jury determinations. See *Oberg*, 512 U.S. at 431 ("the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries"). Accordingly, where, as here, juries provide an initial assessment of punitive damages, the courts must retain substantial authority to prevent abuse.

The issues presented here are critical to evolving standards governing punitive damages awards under federal statutes and federal common law. In defining the legal framework to be applied, it is critical to American business, and indeed all regulated parties, that the courts establish clear standards that will cabin discretion and lead to fair, consistent and predictable results.

First, Congress's decision to exclude a punitive damages remedy from the comprehensive remedial scheme of the Clean Water Act ("CWA") should displace any federal common law cause of action for punitive damages based on conduct regulated by the CWA. As this Court has made clear, where Congress enacts a comprehensive remedial program that omits a specific remedy, particularly one as obvious as private punitive damages, courts are not free to supplement that scheme with an additional remedy under federal common law. This is true not only under maritime law, but as a general matter: A federal statute with a comprehensive remedial scheme displaces federal common law remedies – especially punitive damages which carry an inherent risk of overdeterrence. Congress struck a specific balance when it enacted the CWA. By doing so, Congress established maritime policy in this area, putting maritime businesses on notice about the specifics of the regulatory regime and the consequences and penalties for violating it and establishing uniform, consistent and predictable rules for regulated entities. Indeed, under the CWA, Exxon paid $900 million for natural resources damages, a fine of $150 million (reduced to $25 million based on its responsible post-spill conduct), and restitution of $100 million. This Court should enforce the regime enacted by Congress, a regime which omitted punitive damages from the panoply of remedies authorized.

Second, in the alternative, this Court should delineate the common law principles that federal courts must apply when reviewing punitive damages awards in maritime cases. In maritime and other federal common law cases, before addressing the question whether a punitive damages award is

constitutional, the federal court must review the award under the relevant principles of federal common law. The court below wholly failed to do so, and thus affirmed an award that contravenes maritime policies in numerous respects. Moreover, because the central goal of maritime law is to protect commerce, federal courts must apply maritime principles and policies that further that goal – including uniformity, consistency, fair compensation, promotion of settlement and judicial economy. By supplying clear standards that can be predictably and fairly administered, this Court can end the damaging uncertainty that plagues this important area of commerce. In addition, whatever standards are ultimately established by this Court, the punitive damages award in this case will not pass muster. It is wholly inconsistent with the policies and purposes of maritime law.

In order for American maritime businesses to conduct commerce on a global level that sustains our national economy, it is essential that punitive damages be imposed based on clear standards that constrain the punishment that can be meted out by a jury and that ensure that similar conduct is treated similarly. Such a regime is also mandated by principles of fundamental fairness in order to "assure the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996). Based on these principles, the Chamber urges this Court to reverse the judgment of the Ninth Circuit.[2]

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[2] Although the Chamber fully supports Exxon's position on all three questions presented, this brief does not address the issue of imputed liability under maritime law, *viz.*, whether punitive damages may be imposed on the owner of a vessel for tortious

ARGUMENT

I. CONGRESS'S DECISION TO OMIT PUNITIVE DAMAGES AS A REMEDY IN THE CWA DISPLACES ANY FEDERAL COMMON LAW CLAIM FOR SUCH DAMAGES ARISING OUT OF CONDUCT REGULATED BY THAT ACT.

A. Once Congress Addresses A Common Law Issue, This Court Defers To The Policy Decisions Embodied In That Legislation.

When Congress enacts a statute addressing an issue of national concern and establishes a comprehensive remedial scheme, the resulting statutory regime is the product of the legislative effort to balance a host of competing interests. For example, in the CWA, Congress had to reconcile the deep tension between the public interests in a clean environment and a robust economy. Once this congressional balancing occurs, courts should defer to the policy decisions that Congress has made. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314-17 (1981).

Thus, as this Court has explained, when Congress "does speak directly to a question," courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625-26 (1978). This principle holds true even in areas in which the federal courts have traditionally enjoyed broad lawmaking authority, such as federal maritime law. See *Nw. Airlines, Inc.* v. *Transp. Workers Union*, 451 U.S. 77, 96 (1981) ("[e]ven in admiralty . . . where

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acts of the master and crew when the owner has not authorized, ratified, or controlled such actions.

the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress").

The punitive damages award in this case is inconsistent with the congressional choices reflected in the CWA. As the court of appeals acknowledged, "[b]efore and after the *Exxon Valdez* oil spill, the Clean Water Act's section on 'Oil and hazardous substance liability' provided a *carefully calibrated set of civil penalties for oil spills*, generally with ceilings on penalties, even if the spills were grossly negligent or willful." App. 74a (second emphases supplied). Specifically, the CWA authorizes substantial civil and criminal penalties. Under 33 U.S.C. § 1319(c), those who negligently or knowingly violate the Act are subject to fines of not less than $2,500 or $5,000 nor more than $25,000 or $50,000 per day of violation, respectively, and/or by imprisonment of not more than 1 or 3 years, respectively.[3] Additionally, as the court below noted, 18 U.S.C. § 3571, "the federal measure for fines in this case," could, under the facts of this case, result in criminal fines of either $200,000 or potentially even $1.03 billion, which is "'not more than the greater of twice the gross gain or twice the gross loss'" suffered by another person as a result of the offense. App. 101a, 102a.

On the civil side, an individual or entity who violates the statute is subject to a civil penalty "not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d). Under § 1321(b)(6)(B), if an "owner, operator, or person in charge of any vessel . . . from

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[3] Repeat offenders are subject to maximum penalties of $50,000 or $100,000 per day of violation, depending upon whether the violation occurred negligently or knowingly. 33 U.S.C. § 1319(c)(1)-(2).

which . . . a hazardous substance is discharged in violation of the statute," that individual or entity may be assessed up to" either $10,000 per violation (up to $25,000) or $10,000 per day for each day for which the violation continues (up to $125,000), depending on the kind of civil penalty assessed. *Id.* § 1321(b)(6)(A)-(B).

This "carefully calibrated" remedial regime imposed substantial costs and penalties on Exxon, see *supra* at 3, but it does not provide for punitive damages awards. Congress readily could have included punitive damages in the detailed remedial provisions of the CWA but plainly chose not to. The CWA displaces any federal common law cause of action for punitive damages arising from the conduct regulated by that Act.[4]

This conclusion is reinforced by fundamental separation-of-powers principles. Under our constitutional system, Congress is tasked with assessing the competing interests involved in federal policy decisions and enacting legislation embodying those choices. And, "when Congress has addressed the problem," this Court's "'commitment to the separation of powers is too fundamental' to continue to rely on

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[4] Indeed, the CWA would displace all federal common law actions, even actions for compensatory damages were it not for certain provisions of the Act saving particular types of claims. Section 1321(o)(1) preserves actions seeking remedies for "damages to . . . *property*" (emphasis supplied). As explained in detail in Exxon's brief, however, this section does not save respondents' federal common law claim for punitive damages. Such a claim is not one for damage to "property." Moreover, § 1365(e) of the CWA limits only the reach of the citizen suit provision. Neither provision preserves the common law remedy of punitive damages for conduct comprehensively addressed by the CWA.

federal common law by 'judicially decreeing what accords with "common sense and the public weal."'" *Milwaukee*, 451 U.S. at 315 (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)). Courts, accordingly, do "not attempt to adjust the balance between those competing [interests] that the text adopted by Congress has struck." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 263 (1993). "This is especially true with . . . [a] complex and detailed statute that resolved innumerable disputes between powerful competing interests." *Id.* at 262.

In enacting the CWA, Congress designed a detailed remedial scheme that imposes a variety of substantial penalties on maritime businesses who violate the Act, but omits any provision for punitive damages awards. The courts should respect the balance struck by the political branches and thus should not supplement Congress's remedial design with a punitive damages provision that Congress did not enact.

B. Federal Common Law Remedies Are Displaced When Congress Comprehensively Addresses The Appropriate Remedies For Unlawful Conduct.

This Court has made clear that where, as here, a federal statute "speak[s] directly to," *Higginbotham*, 436 U.S. at 625, or addresses, "a question previously governed by a decision rested on federal common law," the "exercise of lawmaking by the federal courts disappears." *Milwaukee*, 451 U.S. at 314. Indeed, federal courts begin their analysis of a federal statute's effect with a "willingness to find congressional displacement of federal common law." *Id.* at 317 n.9 (emphasis omitted).

There is no requirement that Congress expressly state that it is displacing federal common law. See *id.* at 315 ("the question [is] whether the legislative scheme 'spoke directly to the question[,]' . . . not whether Congress had affirmatively proscribed the use of federal common law"). Instead, "'[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)); see also *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"); *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116, 123 (1998) ("[b]ecause Congress has already decided these issues, it has precluded the judiciary from enlarging . . . the recoverable damages").

Congressional intent to displace federal common law claims and remedies is routinely found when a statute establishes a "comprehensive regulatory program" that includes a set of calibrated remedies for addressing potential liability. See *Milwaukee*, 451 U.S. at 317-18. Indeed, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Nw. Airlines, Inc.*, 451 U.S. at 97; see also *Sea Clammers*, 453 U.S. at 14 ("In view of . . . elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . . ."); *O'Melveny & Meyers* v. *FDIC*, 512 U.S. 79, 85 (1994) (courts may not "adopt a court-

made rule to supplement federal statutory regulation that is comprehensive and detailed").

These principles have been applied in a variety of contexts and represent a general rule of statutory interpretation. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") contains a comprehensive remedial scheme. Civil remedies for ERISA violations are set forth in § 502, 29 U.S.C. § 1132, which "provides 'a panoply of remedial devices' for participants and beneficiaries of benefit plans." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989) (quoting *Russell*, 473 U.S. at 146).[5] This Court has declined to supplement ERISA's remedial regime for the violation of a benefit plan administrator's duties with extracontractual compensatory and punitive damages remedies under common law, declaring itself "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. In addition, the Court noted, "there is a stark absence – in the statute itself and in its legislative history – of any reference to an intention to authorize the recovery of extracontractual damages." *Id.* at 148. Thus, the Court concluded, "Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Id.*

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[5] Under ERISA § 502(a)(1)(B), a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3)(B) authorizes civil actions "to obtain other appropriate equitable relief (i) to redress . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." *Id.* § 1132(a)(3)(B).

In *Mertens*, this Court similarly recognized that "[t]he authority of courts to develop a 'federal common law' under ERISA, is not the authority to revise the text of the statute." 508 U.S. at 259 (internal citation omitted). Particularly in light of ERISA's complex remedial scheme and the Court's wariness of disturbing congressional balancing, it held that it would not read into the statute a right to pursue money damages against a nonfiduciary of a benefit plan. *Id.* at 262.

Likewise, under the Labor Management Relations Act, which itself gives the federal judiciary federal common law making authority (see *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957)), this Court has concluded that the availability of a "significant array of other remedies" under § 301 for breaches of a collective bargaining agreement prevents courts from adding to those remedies as a matter of federal common law. *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, 415-17 & n.18 (1981). The Court concluded that recognizing extrastatutory remedies is unwarranted precisely because "Congress itself balanced the competing advantages and disadvantages inherent in the possible remedies." *Id.* at 416.

Federal courts of appeals have taken a similar approach in evaluating the effect of the comprehensive remedial scheme of the Family Medical Leave Act ("FMLA"). Under 29 U.S.C. § 2617(a)(1)(A), any employer who violates the statute is liable "for damages equal to . . . the amount of": (1) "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation"; (2) interest on that amount; and (3) "an additional amount as liquidated damages equal to the sum of the amount described

[in number one]." Courts have declined to supplement this detailed plan, uniformly concluding that only compensatory damages are available under the FMLA. See *Brumbalough* v. *Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1007 (6th Cir. 2005) (denying recovery for emotional distress under the statute); *Xin Liu* v. *Amway Corp.*, 347 F.3d 1125, 1133 n.6 (9th Cir. 2003) ("FMLA only provides for compensatory damages and not punitive damages"); *Walker* v. *UPS, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001) ("courts have consistently refused to award FMLA recovery for such other claims as consequential damages and emotional distress damages"); *Nero* v. *Indus. Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999) (same).[6]

This Court's jurisprudence generally reflects its solicitude for the particularized policy choices made by Congress and embodied in detailed statutory regimes. Indeed, a comprehensive federal law directed at a *particular issue* – such as the CWA – displaces not only federal common law, but also federal laws such as § 1983 that give the federal courts jurisdiction to enforce federal law *generally*. Thus, in *Sea Clammers*, the Court held that the comprehensive remedial schemes in the CWA and the Marine Protection, Research, and Sanctuaries Act displaced federal common law remedies *and* prevented the plaintiffs from bringing suit to enforce

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[6] *See also Snapp* v. *Unlimited Concepts, Inc.*, 208 F.3d 928, 930, 933-34 (11th Cir. 2000) (recognizing that §§ 216(a) & (b) of the Fair Labor Standards Act establish "a comprehensive remedial scheme for violations of the FLSA's substantive provisions that covers the whole terrain of punitive sanctions, compensatory relief, private rights of action, and actions brought by the Secretary of Labor," the court declined to authorize awards of punitive damages under the private cause of action).

statutory rights under § 1983. See 453 U.S. at 20-22. See also *Smith* v. *Robinson*, 468 U.S. 992, 1016 (1984) ("[Education for all Handicapped Children Act] is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education," and "Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of § 1983"), *superseded by statute on other grounds*, Education for All Handicapped Children Act of 1975, Pub. 2, No. 94-142, 89 Stat. 773, *as recognized in Plant* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121, 124 (2005) ("[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983").

These cases, like the cases holding that federal common law is displaced, recognize that when Congress enacts legislation, "[t]he ordinary inference [is] that the remedy provided in the statute is exclusive." *Id.* at 122. Courts do not second guess congressional choices regarding the availability of particular remedies when Congress has addressed an issue through comprehensive legislation. The CWA fits comfortably within this framework and displaces any federal common law cause of action for a punitive damages award based on conduct regulated by the Act.

C. Congress Regularly Enacts Statutory Regimes That Provide For Punitive Damages But Declined To Do So In The CWA.

"[W]hen Congress wishe[s] to provide a private damage[s] remedy, it kn[o]w[s] how to do so." *Touche*

Ross & Co. v. *Redington*, 442 U.S. 560, 572 (1979). Congress has specifically provided for punitive damages in a variety of statutes, including, *inter alia*, the Commodities Exchange Act (7 U.S.C. § 18(a)(1)(b)), the Fair Credit Reporting Act (15 U.S.C. § 1681u(i)(3)), the Petroleum Marketing Practices Act (15 U.S.C. § 2805(d)) the Federal Wiretap Act (18 U.S.C. § 2520(b)(2)), the Postal Accountability & Enhancement Act (39 U.S.C. § 3018(g)(2)), the Civil Rights Act of 1981 (42 U.S.C. § 1981a(a)(1)), and the Fair Housing Act (42 U.S.C. § 3613(c)(1)). Many other federal statutes contain punitive measures such as the trebling of damages. See, *e.g.*, 15 U.S.C. § 15 (Sherman Act); 31 U.S.C. § 3729(a) (False Claims Act).

In the domain of environmental legislation, Congress has on occasion authorized punitive damages. For example, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides for punitive damages. See 42 U.S.C. § 9607(c)(3). The punitive damages provision in CERCLA displays the careful attention Congress paid in crafting – and cabining – the availability of this particular remedy. Under 42 U.S.C. § 9607(c)(3), "[t]he President is authorized to commence a civil action . . . to recover the punitive damages" against "any person who is liable for a release or threat of release of a hazardous substance [who] fails . . . to properly provide removal or remedial action upon order of the President." Such damages, however, are limited to "an amount at least equal to, and not more that three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action." *Id.*

Thus, in providing for punitive damages awards in CERCLA, Congress restricted who may seek such

relief and the amount recoverable, manifesting its sensitivity to excessive punitive damages awards in this area. Conversely, Congress omitted punitive damages from the remedial schemes in the Clean Air Act, 42 U.S.C. §§ 7401-7671q, and the Resource Conservation and Recovery Act, *id.* §§ 6901-6992k, two environmental statutes with enforcement provisions similar to those in the CWA. This legislative selectivity creates a strong inference that the omission of a punitive damages remedy from the CWA was not an oversight.

Moreover, the omission of a punitive damages remedy from the CWA is consistent with the limited role Congress saw for private enforcement of the Act. See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found, Inc.*, 484 U.S. 49, 60-61 (1987) (preventing private citizens from bringing suits based on past violations). Expansion of the CWA's menu of available private remedies "would change the nature of the citizen's role from interstitial to potentially intrusive" with respect to the government enforcement efforts. *Id.* at 61.

This is particularly true with regard to punitive damages, which serve the *public goals* of punishment and deterrence. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416-17 (2003) ("punitive damages serve a broader function [than compensatory damages]; they are aimed at deterrence and retribution. . . . [and] serve the same purposes as criminal penalties"). The court below believed that "what saves plaintiff's case from preemption is that the $5 billion award vindicates only private economic and quasi-economic interests, not the public interest." App. 79a. But, punitive damages are public remedies that serve the goals of punishment and deterrence. A

comprehensive scheme of public remedies presumptively displaces punitive damages.

Conspicuously absent from the CWA's comprehensive remedial scheme, set forth *supra* at 6-7, is any provision for punitive damages. "The judiciary may not, in the face of such [a] comprehensive legislative scheme[], fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines*, 451 U.S. at 97. The decision of the court below "upset the balance struck by Congress by authorizing a [remedy] with which Congress was certainly familiar but nonetheless declined to adopt." *Dooley*, 524 U.S. at 124. The federal judiciary's lawmaking authority in maritime cases is not a license to disturb deliberate congressional policy choices. This Court should reverse the Ninth Circuit's contrary conclusion.

II. COURTS MUST REVIEW PUNITIVE DAMAGES AWARDED UNDER FEDERAL MARITIME LAW TO ENSURE THAT THEY SERVE THE POLICIES AND PURPOSES OF THAT LAW.

Assuming that the punitive damages award at issue is not wholly displaced by the CWA, the decision of the court below nonetheless should be reversed. The Ninth Circuit refused to review the punitive damages award under federal maritime law to determine whether punitive damages comport with the policies and purposes of that law. App. 68a-70a, 90a-91a. This refusal cannot be reconciled with this Court's decision in *Oberg*, or with the longstanding common law principles that apply to appellate review of punitive damages awards.

Had the award been reviewed under the appropriate common law standards, it would not have

survived scrutiny. In the circumstances presented here, any punitive damages award, and certainly the massive award in this case, contravenes the policies of consistency, fair compensation, promotion of settlement, and judicial economy that undergird maritime law's central goal of protecting commerce.

A. Federal Courts Must Review Punitive Damages Awards Arising Under Federal Common Law To Ensure They Comport With Common Law Principles.

Unlike all other punitive damages cases before this Court in the past two decades, this case involves an award that arises under federal common law, not state law. Thus, in examining the punitive damages award in this case, the federal court plays the same role played by a state court reviewing an award under its own laws. It is well established that, before determining whether a punitive damages award violates the federal Constitution, the state court decides whether the award comports with state common law principles. Similarly, here, the federal court should have determined whether the award was consistent with federal common law principles, before addressing whether the award violated the Due Process Clause.[7] Its failure to do so was legal error.

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[7] In *Browning-Ferris Industry of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court refused to find a punitive damages award based on a state-law cause of action "excessive as a matter of federal common law," holding that "[i]n a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Id.* at 278. Here, in contrast, the underlying claim arises under federal common law and thus review under federal common law principles is mandatory.

"Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Oberg*, 512 U.S. at 421; see also *Haslip*, 499 U.S. at 15. Long before this Court addressed federal constitutional limits on punitive damages awards, federal and state courts routinely reviewed them under common law principles. *Oberg*, 512 U.S. at 424-25; Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (2001) ("[o]n the common-law side, courts have reviewed punitive damages verdicts for excessiveness since 1763"). The lower court's failure to engage in such review constitutes an abdication of its responsibilities as a federal common law court.

Oberg involved an amendment to the Oregon Constitution that precluded judicial review of punitive damages awards except in certain very narrow circumstances. 512 U.S. at 418. As the Court explained, "if the defendant's only basis for relief [was] the *amount* of punitive damages the jury awarded, Oregon provide[d] no procedure for reducing or setting aside that award." *Id.* at 426-27. This Court rejected Oregon's scheme, holding that "the Due Process Clause requires judicial review of the amount of punitive damage awards." *Id.* at 420, 432.

In so doing, the Court stated that "[j]udicial review of the amount awarded was one of the few procedural safeguards which *the common law* provided against that danger," *id.* at 432 (emphasis supplied). The problem was that "Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts," *id.* at 429. The Court held that, by "remov[ing] that safeguard

without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time," Oregon violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 432.

The Court's decision in *Oberg* makes clear that common law courts must conduct *some form* of review of punitive damages awards sufficient to ensure that "those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. Although some form of judicial review (or some equally effective safeguard against excessiveness and arbitrariness) is required, it is for the common law court – be it state or federal – to determine the precise content or substance of that mandatory common law review. And, *Oberg* makes clear that this common law review is independent of, and precedes, the application of constitutional limits on punitive damages awards. (Notably, this Court did not mandate the application of substantive constitutional limits on such awards until two years later in *Gore*.) Thus, a common law court – state or federal – must review a punitive damages award for compliance with both the applicable common law and the federal Constitution.

Many state common law courts conduct this two-phase review as a matter of course, first applying the pertinent excessiveness standard under common law and then considering the constitutional limits. See, *e.g.*, *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001) ("the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the . . . rational juror review"); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 307 n.33 (Tex. 2006); *Dardinger* v. *Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143-44 (Ohio 2002);

Sweet v. *Roy*, 801 A.2d 694, 714-15 (Vt. 2002); *Bowden* v. *Caldor, Inc.*, 710 A.2d 267, 277-78 (Md. 1998); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 n.12 (1996) ("[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").

In cases involving federal common law, a federal appellate court reviewing an award of punitive damages should assume the same role as state appellate courts and conduct the same two-tier analysis. In reviewing the punitive damages award here, the court of appeals thus should have started by reviewing the punitive damages award under the applicable principles of federal common law – specifically principles of federal maritime law. This legal error, by itself, warrants vacatur of the award.

B. This Punitive Damages Award Contravenes Applicable Maritime Law Principles.

As this Court recently reiterated, "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 25 (2004) (emphasis and internal quotation marks omitted). In order to ensure that this interest is "fully vindicated," the federal judiciary must adopt and apply "'uniform rules'" under maritime law. *Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990). See also *E. River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("[w]ith admiralty jurisdiction comes the application of substantive admiralty law").

This Court has long recognized the necessity for "uniformity and consistency" in maritime law in light of its interstate and international character. *The*

Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874). Maritime law is equally concerned with the establishment of "flexible and fair remedies." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In addition, this Court has emphasized the importance of the "promotion of settlement, and judicial economy" in the development of maritime rules. *McDermott* v. *AmClyde*, 511 U.S. 202, 211 (1994). Considering that the protection of commerce is at the heart of maritime law, the application of these principles demonstrates that the unprecedented punitive damages award in this case is wholly inconsistent with federal maritime law.

The Chamber will not repeat the detailed arguments made elsewhere about the maritime law policies that should inform and guide courts in their review of punitive damages awards such as the one in this case. See, *e.g.*, Exxon Br. 43-50. The Chamber agrees that under the applicable federal common law principles, respondents were not entitled to any punitive damages award because previously imposed criminal and civil sanctions, as well as numerous other compensatory and restitutionary payments, fully vindicated any reasonable public interest in punishment or deterrence of the conduct at issue.

At the very least, maritime law requires that federal common law courts provide some clear, limiting principles for application on the review of punitive damages awards. In light of certain fundamental, well established maritime policies – the requirement of consistent legal rules, appropriate and fair compensation for injury, avoidance of undue burdens on commerce, the encouragement of settlement of claims, and judicial economy – clear standards emerge. As Exxon details in its brief (pp. 17, 51-53), a jury should not be permitted to impose

punitive damages that exceed either the civil fines and penalties that Congress has prescribed for particular conduct, or the compensatory damages paid to address harm resulting from particular conduct. When punitive damages awards exceed these limitations, they cease to be either predictable or to have any consistent or rational relationship to the wrongful conduct being punished.

Nor should maritime courts allow punitive damages awards that go beyond any reasonable deterrent function. Here, for example, there is no basis for arguing that the conduct at issue (a massive oil spill) could go undetected, and thus must be over-deterred by a massive award. Indeed, no reasonable argument could be made that the payments Exxon has already made do not adequately deter any future regulated conduct and incentivize Exxon to prevent future harm. And, the sole possible explanation for the award here – Exxon's net worth – is wholly illegitimate. The same conduct should not receive different punishment simply because an alleged wrongdoer has a higher net worth. That result undermines the maritime law principles of uniformity, consistency and predictability. It also has the practical effect of discouraging robust capitalization of maritime businesses.

The limiting principles articulated by Exxon and its *amici* reflect the pivotal role of commercial interests in shaping federal maritime law. The preeminence of commercial interests is the direct result of a judicial recognition of the risks involved with maritime commerce and the importance of such commerce to the national (and international) economy. The principles that animate maritime law necessarily reflect these considerations.

For example, like most businesses, maritime businesses have a substantial interest in and need for predictability in connection with business risks and costs. As a result, maritime law has always emphasized uniformity and consistency. See *The Lottawanna*, 88 U.S. (21 Wall.) at 575. Punitive damages present a real and inherent danger of arbitrariness and, absent review pursuant to clearly understood, limiting principles, are wholly unpredictable. See *Oberg*, 512 U.S. at 431-33. Indeed, punitive damages awards are a wild card as this case illustrates. Here, the public's interest in punishment and deterrence were fully vindicated through statutory remedies. For example, Exxon paid $125 million in fines under the CWA, and $20.3 million in compensatory damages. Yet, the jury awarded punitive damages in the billions, dwarfing compensatory liability.

For similar reasons, maritime businesses have a strong interest in legal standards that promote fair and accurate compensatory and punitive remedies. Liability for wrongful conduct must be commensurate with the wrong involved so businesses can properly insure risk and put in place appropriate deterrents to wrongful conduct. This interest is substantially undermined when punitive damages are awarded without any significant constraints or guiding principles. Again, this case is illustrative. The punitive damages award here was $2.5 billion, while compensatory damages were $20.3 million. The award comes on top of the $125 million in fines that government authorities deemed adequate punishment and deterrence for the wrong. The likely effect of allowing such an award is to make maritime commerce (and hence the goods transported in it)

more expensive by injecting greater uncertainty into the system.

Again like most businesses, maritime businesses seek to avoid costly litigation, if possible. Allowing uncabined punitive damages awards, such as the massive award at issue here, plainly will discourage the settlement of lawsuits and strain judicial resources. Exxon moved quickly to negotiate with private parties and governmental entities concerning its liability and the appropriate level of compensation. Plainly, Exxon could not have anticipated that years later a jury deciding issues on unsettled claims for purely economic injury could return a $5 billion punitive damages verdict. If this verdict stands, shippers have little incentive to follow the responsible path taken by Exxon here. Instead, there will be a clear incentive to litigate liability and damage issues to final judgment, rather than ceding any legal ground. That outcome is contrary to maritime law's twin goals of promoting settlement and preserving judicial resources.

The appropriate procedural and substantive standards for reviewing punitive damages awards in maritime cases must be determined in light of the federal policies and interests at stake – a task the court below did not even undertake. Federal courts have done so in the closely analogous context of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), a statute that instructs the courts to create a federal common law interpreting, enforcing, and remedying violations of collective bargaining agreements and agreements between labor unions and their members. See *Nw. Airlines*, 451 U.S. at 95, 96 n.35. Pursuant to that statutory command, federal courts have developed the general contours of the law governing labor agreements, and have also

crafted the law governing remedies for violations of such agreements. In doing so, their decisions are informed by the relevant federal labor policy. See *Int'l Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 50-52 (1979) (barring awards of punitive damages for breach of a union's duty of fair representation).

In this case, the Court should adopt the standards articulated earlier in this brief (see *supra* at 19-20), and more fully discussed by Exxon, that limit the imposition of punitive damages in maritime cases. This, in turn, will minimize the arbitrariness of punitive damages awards. The application of such principles plainly requires the vacatur of the award in this case. At the very least, the award must be reconsidered based on the relevant federal common law principles.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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