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

AMICI CURIAE BRIEF OF SHIP MASTERS AND EXPERT MARINERS CAPTAINS MITCHELL STOLLER, JOSEPH AHLSTROM, ROGER JOHNSON, JOHN SCOTT MERRILL, AND TOM TROSVIG IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Captains Mitchell Stoller, Joseph Ahlstrom, Roger Johnson, John Scott Merrill, and Tom Trosvig have extensive experience in the maritime industry. As former ship masters and expert mariners, *amici* have a strong interest in ensuring that the rules applied in this case are consistent with the realities of the modern shipping industry.

Captain Mitchell Stoller graduated as valedictorian from the California Maritime Academy. Captain Stoller worked for Exxon Shipping Company between 1975 and 1988, first as a third mate from 1975 to 1977, then as a second mate from 1977 to 1979, then as a first mate from 1979 to 1984, and finally as a master from 1984 to 1988, where he became a pilot in Los Angeles Harbor. While employed by Exxon, Captain Stoller worked with and for Joseph Hazelwood – the captain of the EXXON VALDEZ when the spill occurred – and was master on several vessels that made the same run as the EXXON VALDEZ between Valdez, Alaska, through Prince William Sound to various ports in Washington, Oregon, and California. Captain Stoller twice received awards from Exxon for safe vessel operation.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and their letters of consent have been filed with this Court.

During his more than thirty-five-year maritime career, Captain Stoller has served as an expert and consultant for more than four hundred law firms nationwide, has been retained on over one thousand seven hundred cases, and has testified in over sixty-five trials. He has earned an Unlimited Master's License and First Class Pilot's License for, among other areas, Prince William Sound. Captain Stoller has also written safety manuals on oil spill prevention for major oil and shipping companies, and has served as an advisor to Congress, the U.S. Coast Guard, and federal, state, and local organizations on the prevention of oil spills, collisions, allisions, and groundings.

Captain Joseph Ahlstom is Professor of Marine Transportation at the State University of New York, Maritime College. He is a well-known expert in the area of marine communications and has developed several courses in the field. Captain Ahlstom's experience as a Master and Chief Officer spans more than fifteen years. He is currently a United States Coast Guard licensed Master Mariner and is a Captain in the United States Navy Reserve.

Captain Roger Johnson is a retired Master of large ocean-going vessels carrying hazardous commodities, including 200,000-barrel asphalt tankers and 30,000-ton sulphur tankers. He worked for, among others, Sargeant Marine and Duval Sulphur. Captain Johnson's merchant officer's license is Master Unlimited Oceans. For twenty years, he was a member of the Masters, Mates and Pilots Officers

union. He spent the twenty years before that as a member of the National Maritime Union sailing as a deck hand, and working his way up to third mate, second mate, chief mate, and eventually master.

Captain John Scott Merrill has been employed by the Alaska Marine Highway System for eleven years, and is currently the Master of M/V TUSTUMENA, an ocean class vehicle and passenger ferry operated by the Alaska Marine Highway System. He has an Ocean Masters License, unlimited tonnage, with an endorsement as a First Class Pilot, for Alaskan waters including Prince William Sound. During Captain Merrill's twenty-three years of service with the United States Coast Guard, he commanded buoy tenders and cutters, commanded Loran communications stations, and was a staff officer in the Marine Environmental Protection Branch. Between 1984 and 1988, he was the Coast Guard's Alaska Aids to Navigation Branch Chief, and was responsible for management of Alaska's navigable waterways including Prince William Sound. In that role, he was responsible for all of Alaska's seven Loran C electronics navigation stations.

Captain Tom Trosvig is a retired officer of the United States Coast Guard. While in the Coast Guard, Captain Trosvig served as (1) a marine inspector, (2) the first commissioned supervisor of the USCG Marine Safety Detachment in Kodiak, Alaska, (3) an operations officer/navigator aboard the USCGC CONFIDENCE, which patrolled the North Pacific and Bering Sea, (4) the Operations/Administrative Officer

of the USCG Support Center in Kodiak, Alaska, and (5) the Commanding Officer of the Bering Sea patrol vessel, USCGC YOCONA. He maintains a merchant marine license for Master, Steam and Motor Vessels of 2000 Gross Tons Upon Oceans. Currently, Mr. Trosvig serves as the Security, Safety, and Hazardous Materials Officer for an Alaskan shipping terminal.

STATEMENT

On March 24, 1989, the EXXON VALDEZ supertanker "ran aground on Bligh Reef in Prince William Sound, Alaska." Pet. App. 60a. Over eleven million gallons of oil flowed into the Sound, eventually spreading over 11,000 square miles. Pet. App. 64a; Exxon Valdez Oil Spill Trustee Council, *Where the Oil Went*, http://www.evostc.state.ak.us/History/PWSmap.cfm; *see* Pet. App. 123a. This tragedy was the direct result of the recklessness of Petitioners Exxon Shipping Company and Exxon Mobil Corporation (collectively "Exxon") because for many years, Exxon allowed an employee who had longstanding problems with alcohol to command the EXXON VALDEZ supertanker. Pet. App. 63a-64a; JA 212 (Exxon stipulated to its liability for Hazelwood's acts that led to the spill).

By 1985, Exxon was well-aware that its employee, Joseph Hazelwood, had a substance abuse problem that needed treatment and monitoring. That year Captain Hazelwood had attended a twenty-eight-day

residential rehabilitation program. Pet. App. 63a. By the spring of 1986, however, Exxon knew that Captain Hazelwood was drinking again. Pet. App. 121a. It nevertheless left the captain in command of its supertankers, including the EXXON VALDEZ. Pet. App. 121a.

On March 23, 1989, Captain Hazelwood was in command of the EXXON VALDEZ when it left Valdez, Alaska, loaded with fifty-three million gallons of crude oil. *See* Pet. App. 120a-122a. Before leaving Valdez, however, the captain "drank at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars." Pet. App. 64a. Shortly after setting out, "Captain Hazelwood assumed command of the vessel from a harbor pilot and made arrangements to divert the vessel from the normal shipping lanes in order to avoid considerable ice which had calved off Columbia Glacier." Pet. App. 120a. The diversion from the standard shipping lanes meant that the tanker was headed directly toward Bligh Reef. Pet. App. 120a. When it was time to make the critical turn to avoid the reef, Captain Hazelwood was not on the bridge. Pet. App. 120a. He left the Third Mate, who was, "more probably than not, overworked and excessively tired at the time in question," Pet. App. 120a, to make the maneuver, even though Captain Hazelwood, not the Third Mate, was the only one aboard licensed to navigate that portion of the Sound. Pet. App. 63a. As shown at trial, "captains simply do not leave the bridge during maneuvers such as this one and that there is no good reason for the captain to go

to his cabin to do paperwork at such a time." Pet. App. 63a.

Not surprisingly, shortly after the spill, many claims were filed against Exxon. Pet. App. 124a. The civil cases claiming economic and punitive damages "were ultimately (but with a few exceptions) consolidated into this case." Pet. App. 125a. The District Court certified several classes for compensatory damages and a single mandatory punitive damages class, which consisted of 32,677 members. Pet. App. 67a; 123a. The Court of Appeals concluded that the total compensable economic harm caused by Exxon to these plaintiffs was over $500 million. Pet. App. 38a. That court also reduced the total punitive damages award to $2.5 billion. Pet. App. 42a.

SUMMARY OF ARGUMENT

Today's maritime industry and the circumstances under which the EXXON VALDEZ spill occurred bear little resemblance to those of the early 1800s when *The Amiable Nancy*, 16 U.S. 546 (1818), was decided. First, as is obvious, modern commercial maritime business has little in common with the activities of bygone privateers. In addition, modern communications and navigational technologies has revolutionized the ship-to-shore relationship between the captain and the owner. Finally, the cargo transported by ships today is much more dangerous than in the 1800s. The transport of those substances requires

heightened coordination between vessel and shore, which necessitates a very different relationship between shipowner and captain than that of the early 1800s.

Nevertheless, as *The Amiable Nancy* teaches, maritime law should accurately reflect the maritime conditions of the time. Given the current nature of the industry, punitive damages are sometimes necessary to punish and deter intentional or reckless discharges of oil and other hazardous substances into the marine environment. For that reason, and because the punitive damages awarded in this case are appropriate and reasonable, this Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. EXXON'S ARGUMENTS DO NOT COMPORT WITH THE REALITIES OF THE SHIPPING INDUSTRY

A. Modern Maritime Cargo Can Be Very Harmful to the Marine Environment

Thirty-five years ago, this Court recognized in *Askew v. American Waterways*, 411 U.S. 325 (1973), that "not only is more oil being moved by sea each year, but the tankers are much larger." *Id.* at 335. The trend to larger ships has continued unabated since that time. Some container vessels (scheduled to be constructed) will have a capacity of 16,000 20-foot equivalent containers (TEUs), which represents an

increase in capacity of thirty-two times the number of TEUs carried on most vessels at the time of this Court's decision in *Askew*. In addition, more than half of all cargo transported by sea today is harmful to the environment. INTERNATIONAL MARINE ORGANIZATION, IMO AND DANGEROUS GOODS AT SEA 1 (1996).

The impacts from toxic marine spills go far beyond the concerns of safety of ships' crews and passengers. Such spills can have devastating consequences for the environment and for resource-based businesses such as the commercial fishing industry. *See* Br. of Natural and Social Scientists as *Amicus Curiae* in Support of Respondents. In this case, for instance, over 300,000 sea birds were reported dead in the months following the EXXON VALDEZ disaster. S. REP. NO. 101-94, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 749, 750. But the direct lethal effect on marine organisms is only the beginning. Spills of dangerous cargos can also damage marine ecosystems by causing critical changes in the environment. *See* EUROPEAN MARITIME SAFETY AGENCY, EMSA ACTION PLAN FOR HNS POLLUTION PREPAREDNESS AND RESPONSE 44 (2007). In this case, the EXXON VALDEZ spill has caused long-term damage to the Prince William Sound Pacific herring fishery, a once tremendously valuable resource. *See* Richard E. Thorne, *Biological Monitoring in Prince William Sound*, http://www.pwssc.gen.ak.us/hydroacoustics/biologicalmonitoring.shtml.

B. Modern Technologies Allow for Contact Between Ship and Shore at Anytime

Ship-to-shore communications today are also much different than in the 1800s. A shipowner and a vessel's master can be in contact anytime. If there is a serious technical problem on the ship, experts at the shipping company and other locations use modern communication facilities for remote inspection, problem diagnosis, advice, cooperative decision-making and supervision of the repair procedure. *See* N.P. Kyrtatos, *Ocean-going Ship Support Using Multimedia Teleconferencing Via Satellite*, 5 ELECTRONICS & COMMUNICATION ENGINEERING JOURNAL 198-208 (1993). Even supplies, refueling, and weather alerts are handled ashore by the shipping company. *Id.*

Several other technologies are critical to modern maritime communications and contact between ship and shore.

1. Navigational Technology

The Global Positioning System ("GPS") allows a ship to identify its location with absolute precision, conveying this position to the company office via worldwide cellular phone technology or by satellite communications known as Inmarsat, discussed in more detail below. This allows guidance and direction from the office ashore to be provided to the ship on a regular basis rather than only during times of crisis as in the past. *Id.*

GPS information is embedded in the Automatic Identification System ("AIS"). AIS is endorsed by the International Maritime Organization ("IMO") and is used for vessel traffic control around busy seaways. National Space-Based Positioning, Navigation, and Timing Coordination Office, *Marine Applications of GPS*, http://www.gps.gov/applications/marine/index.html. AIS functions by "us[ing] a transponder system that operates in the VHF maritime band and is capable of communicating ship to ship as well as ship to shore, transmitting information relating to ship identification, geographic location, vessel type, and cargo information – all on a real-time, wholly automated basis." *Id.*

More specifically, AIS provides the officer in charge of the navigational watch with a radar display that includes a mark for every significant ship within radio range, each with a velocity vector indicating speed and heading:

> Each ship 'mark' can reflect the actual size of the ship and its position with GPS or differential GPS accuracy. By clicking on a ship mark, the officer can learn the ship name, course, speed, classification, call sign, registration number, and other information. Maneuvering information, closest point of approach, time to closest point of approach, and other navigation information are also available.

U.S. Coast Guard Navigation Center, *AIS Overview*, http://www.navcen.uscg.gov/enav/ais/default.htm; *see*

also U.S. Coast Guard Navigation Center, *How AIS Works*, http://www.navcen.uscg.gov/enav/ais/how_AIS_works.htm (providing more detailed explanation of technology).

While underway, shipboard AIS units broadcast the following information every two to ten seconds and every three minutes while at anchor: (i) the unit's maritime mobile identity ("MMSI"), a unique identifier for each ship radio unit, assigned by the International Telecommunications Union; (ii) the navigation status of the ship (e.g., underway using engine, at anchor, not under command); (iii) rate of turn; (iv) speed over ground; (v) position accuracy; (vi) longitude and latitude; (vii) course over ground, (viii) true heading; and (ix) time stamp. U.S. Coast Guard Navigation Center, *What AIS Broadcasts*, http://www.navcen.uscg.gov/enav/ais/what_AIS_broadcasts.htm. In addition, the AIS unit broadcasts the following information every six minutes: (i) MMSI number (ii) Ship's IMO number; (iii) Ship's radio call sign; (iv) Name of ship (up to 20 characters); (v) Type of ship and cargo; (vi) Dimensions of ship (in meters); (vii) Location on ship where the reference point for position reports is located; (viii) Type of position fixing device utilized by ship; (ix) Draft of ship (in meters); (x) Destination of ship (at master's discretion); and (xi) Estimated time of arrival (ETA) at destination.

AIS is not only vital for navigation, but is increasingly used to bolster the security of ports and waterways by providing governments with greater

situational awareness of commercial vessels and their cargo: "Because the ship's GPS position is embedded in [the] transmissions, all essential information about vessel movements and contents can be uploaded automatically to electronic charts. The safety and security of vessels using this system is significantly enhanced." National Space-Based Positioning, Navigation, and Timing Coordination Office, *Marine Applications of GPS*, http://www.gps.gov/applications/marine/index.html.

As new developments continue to occur, it is clear that we now sail in an age when the control of shoreside owners over vessels at sea will become even more comprehensive. Long Range Identification and Tracking ("LRIT") is a system spearheaded by the United States Coast Guard after September 11, 2001, to track the approximately 50,000 large ships around the world. The LRIT information that ships will be required to transmit include "the ship's identity, location and date and time of the position." IMO, *Long range identification and tracking (LRIT)*, http://www.imo.org/Safety/mainframe.asp?topic_id=905. An important difference between LRIT and AIS – in addition to the disparity in range – is the availability of information. AIS is a broadcast system available to all; "data derived through LRIT will be available only to the recipients who are entitled to receive such information and safeguards concerning the confidentiality of those data have been built into the regulatory provisions." *Id.* The LRIT system will be

operational with respect to the transmission of LRIT information by ships from December 30, 2008. *Id.*

2. Communications Technology

In 1989, ships had instantaneous and continuous communications with the company office ashore available through satellites. This form of communication is known as Inmarsat, which is short for International Marine Satellite Organization. *See* Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, LLOYD'S LIST, Nov. 17, 1999, at 17. There are four Inmarsat satellites that circle the world at the equator and provide instant communication with personnel with public phone access similar to landline phones at home or cell phones. DON I. DALGEISH, AN INTRODUCTION TO SATELLITE COMMUNICATIONS 239 (1989). It was common practice for mariners of that time to use the satellite phone to speak immediately with the company, agent, or charterers. *Id*.

The Inmarsat phone can be used for voice and telex communications. STOJCE DIMOV ILCEV, GLOBAL MOBILE SATELLITE COMMUNICATIONS FOR MARITIME, LAND AND AERONAUTICAL APPLICATIONS 32 (2005). Based on the experience of these *amici*, however, it is clear that the widespread use of worldwide cellular phones has replaced the Inmarsat system for voice communication. In fact, the use of worldwide cellular phones, shore-based communication networks, satellites and ship-board equipment has radically changed

the operating practices of the marine industry. The use of advanced telecommunications, such as high data-rate land networks and satellite links, allows the transmission of digitized moving video, voice and computer data, to support applications such as multimedia conferencing and computer interworking. All of these technologies can be used for the remote support of a ship's master and crews from land-based agencies.

3. Exxon's Use of Modern Communications Technology

To appreciate the import of modern communications in today's maritime industry one need only look at the spill at issue here. On March 24, 1989 when the EXXON VALDEZ ran aground on Bligh Reef the vessel immediately contacted Valdez traffic stating "we . . . should be on your radar." PX92A (Resps.' DVD). Captain Hazelwood received a call on the ship's satellite phone from Exxon executives in San Francisco shortly after the ship's grounding. JA 223-24, 354-55, 872-75. Using that same phone, they discussed his near-disastrous plan to dislodge the EXXON VALDEZ from Bligh Reef. *Id.*

In response to an inquiry from the United States Senate following the grounding of the EXXON VALDEZ, Exxon detailed the communication system on board the ship:

> Is the EXXON VALDEZ equipped to maintain communications with Exxon Headquarters during its shipping operations?
>
> Yes, the EXXON VALDEZ is equipped with a number of ship-to-shore communications to enable the vessel to communicate with any shore location. These systems include Marsat [Inmarsat] voice and telex systems, single sideband radio, VHF Marine radio, HF Radio, cellular telephone, SITOR telex, and facsimile.

SJA249sa.

As of 1995, one of Exxon's employees explained that Exxon had moved from hard copy telexes to electronic mail: "According to *Lamp*, an Exxon publication, 'Exxon ships are tied into a satellite network so they can receive and initiate instantaneous telecommunications, including voice, data and facsimile, just as if they were in a modern office building instead of thousands of miles from civilization.'" Captain Shawn P. Walsh, *Training with Exxon*, QUARTERMASTER PROFESSIONAL BULLETIN (1995), http://www.quartermaster.army.mil/oqmg/Professional_Bulletin/1995/Autumn/walsh.html. He explained further that Exxon had such extensive access to information about its ships that if one was delayed, "shipping specialists [could] immediately approve or disapprove a vessel for movement of petroleum product anywhere in the world." *Id.*

C. The Ship Master's Modern Role Is Akin to Plant Manager or Division CEO

The vessel has become a fully integrated part of the corporate commercial network, and its master the manager of the floating corporate office. Master and vessel are part of the fully integrated corporate network, and the master is a corporate manager responsible for the safety of the ship, cargo, and crew. The marine communication and navigational technologies discussed above have changed the relationship between shipowners and captains, which allows for an increasingly coordinated approach to decision making between ships and shore-side management. *See* Sandra Speares, *Inmarsat 20 Successful Years: A Revolution in Marine Communications*, LLOYD'S LIST, Nov. 17, 1999, at 17.

Well before 1989, oil carriers and many shipping companies recognized this new reality. *See* Edgar Gold, *Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom*, 14 J. MAR. L. & COM. 1, 13 (1983) ("The master is expected to be a key member of a total 'management team' and would disregard instructions at his own professional risk."). In essence, the master is viewed as the corporate manager of a seagoing staff, constantly coordinating with his or her shore-side counterparts. In Exxon's parlance, the master is the "management representative on board the ship." JA 898. Decisions once handled by the master such as course and speed are decided ashore or in conjunction with the shore. Even supplies, refueling, repairs and technological

problems are handled remotely from the shore or are managed with the assistance of integrated computer communications.

D. The Availability of Insurance to Insulate Shipowners from Liability

Exxon has not raised the issue of its capacity to pay punitive damages at the level assessed in this case. Nor has Exxon claimed that pollution liability losses are not capable of being insured. In fact, the capacity of the insurance market is much larger today than it was historically. If a vessel operator such as Exxon is capable of insuring its exposure for compensatory losses, punitive damages become even more necessary from a societal standpoint. If all losses are insurable, there is no longer any element of deterrence and the cost of the risk becomes merely a cost of "doing business."

One of the parties supporting Exxon in this litigation, the American Institute of Marine Underwriters, acknowledged in its brief supporting Exxon at the certiorari stage that punitive damages are even sometimes insurable. *See* Br. of Am. Inst. of Marine Underwriters at 1 n.2, 2 n.3. Regardless of whether punitive damages might be covered by insurance, with the growth of insurance capacity for vessels, there is no longer any serious threat that the vicarious liability of a single reckless corporate shipowner for punitive damages will destroy the marine insurance industry.

II. IMPOSING PUNITIVE DAMAGES FOR THE RECKLESS ACTS OF A SHIP CAPTAIN PROPERLY REFLECTS MODERN MARITIME REALITIES

Exxon's argument against the award of punitive damages in this case relies heavily on *The Amiable Nancy*, 16 U.S. 546 (1818). What Exxon misses, however, is that that case reflected the conditions and customs of the maritime industry at that time – particularly the activities of privateers – not today's world.

A. *The Amiable Nancy*'s Background and Holding

The Amiable Nancy was decided in the context of the War of 1812. When the U.S. declared war on Britain, it had only seventeen seaworthy ships, with four hundred forty-seven guns and five thousand men. DAVID M. COONEY, CHRONOLOGY OF THE U.S. NAVY 1775-1965 (1965). As a result, it was necessary for the United States to encourage "privateers" in order to ensure national security.

A privateer was a quasi-sovereign, privately financed, owned, outfitted, crewed, and operated armed vessel. They were relatively small vessels compared to naval warships, and typically lightly-armed. Nevertheless, they had sufficient power to take on more lightly armed or unarmed cargo ships, which were their primary targets. By virtue of Letters of Marque & Reprisal issued by Congress pursuant to Article I,

Section 8 of the United States Constitution, privateers were allowed to commit maritime torts and to attack the vessels of a declared national enemy for profit.

Although in today's era of professional navies privateers are a historical anachronism, for centuries they were dispatched from most maritime nations at one time or other. In fact, Elizabethan England was "almost totally dependent upon the private initiative and individual enterprise of its privateering establishment." JEROME R. GARITEE, THE REPUBLIC'S PRIVATE NAVY: THE AMERICAN PRIVATEERING BUSINESS AS PRACTICED BY BALTIMORE DURING THE WAR OF 1812, at 5 (1977). For example, Sir Walter Raleigh, a privateer himself, was rescued in his failed attempt at the colonization of Virginia in 1585 by fellow privateer Sir Francis Drake.

In hindsight, the sheer magnitude of such activity was remarkable. Britain's American colonies commissioned one hundred thirteen privateers during King George's War of 1744-1748, and four hundred to five hundred during the Seven Years' War of 1756-1763. *Id.* at 7-8. During the American Revolution, both sides freely employed privateers. Despite having a large public navy, the British commissioned at least seven hundred such vessels, ninety-four of which were from Liverpool alone. During the American Civil War, secessionist states sent about eight hundred privateers to sea in search of prizes.

The activities of a privateer were viewed as vital to the national interest. Accordingly, it was necessary

to insulate those owners who took the risk of committing their vessels to the national service from various consequences relating to the conduct of war. REUBEN E. STIVERS, PRIVATEERS AND VOLUNTEERS: THE MEN AND WOMEN OF OUR RESERVE NAVAL FORCES, 1766 TO 1866 at 29 (1975). As former President Thomas Jefferson explained in 1813:

> [E]very possible encouragement should be given to privateering in time of war with a commercial nation. . . . Our national ships are too few in number . . . [but] by licensing private armed vessels, the whole naval force of the nation is truly brought to bear on the foe.

GEORGE COGGESHALL, HISTORY OF THE AMERICAN PRIVATEERS, AND LETTERS-OF-MARQUE xliv (1956); *see also* GOMER WILLIAMS, HISTORY OF THE LIVERPOOL PRIVATEERS AND LETTERS OF MARQUE 459 (1897).

The Amiable Nancy arose from the activities of the privateer SCOURGE. Peter H. Schenck, the co-owner of the SCOURGE, was already a national hero at the time of the events in question. He had given the nearly bankrupt federal government $10,000 and had transported supplies to New York during the British blockade of that city. COGGESHALL, HISTORY, at 221; JOSEPH ALFRED SCOVILLE, THE OLD MERCHANTS OF NEW YORK 91 (1864).

When the SCOURGE set sail for the north coast of England and Norway to aid the war effort, its owners would not see the vessel again for more than a year.

Nor would they be able to communicate, guide, or even know its whereabouts. Moreover, they would have no ability to make changes in crew, including its captain. COGGESHALL, HISTORY, at 219-23. For example, while in Dronheim, Norway, the ship's master, Captain Nicoll, decided to remain in Norway. *Id.* at 223. He was replaced on March 10, 1814, by Captain J. R. Perry. *Id.* It was not possible to convey the change in command to the owners of the SCOURGE, nor was the owners' approval deemed necessary even if he could have reached them. It was understood that the choice of competent captain and crew was a matter for experienced seamen, not for New York merchants.

The SCOURGE became one of the most successful privateers of the war. *Id.* In the summer and late fall of 1813, it captured and looted dozens of ships, in total amounting to 4,505 tons and sixty guns. *Id.* at 223. A 19th century historian expressed the hope that the ship's "acts and deeds in [its] country's service will ever be appreciated, while bravery and patriotism are held in high regard by civilized nations." *Id.* at 219. After more than a year away from the United States, with only tales of their good fortune reaching home, the SCOURGE sailed into the harbor at Chatham, Cape Cod, in May 1814, along with several captured ships and four hundred twenty prisoners taken along the route home. *Id.* at 225.

On November 4, 1814, armed crewmen of the SCOURGE, led by a Lieutenant Dickenson, boarded THE AMIABLE NANCY. Doing exactly what they had

done for a year and a half, the men looted the ship. The mistake, however was that THE AMIABLE NANCY was neutral. *The Amiable Nancy*, 16 U.S. at 551.

The owners of THE AMIABLE NANCY sued the owners of the SCOURGE – but not any of the men who looted their ship[2] – seeking only compensatory damages. *Id*. at 558. The Court upheld portions of the compensatory damages award against the owners of the SCOURGE. It also explained in dicta that punitive damages might have been warranted if they had been sought against Lieutenant Dickenson and the original wrongdoers. The Court then went out of its way to explain that punitive damages would not have been appropriate against the national heroes Schenck and Brett, owners of the SCOURGE, given the nature of privateering:

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[2] Because the SCOURGE operated in a quasi-sovereign capacity, the crew of the SCOURGE was subject to naval military law for its looting of THE AMIABLE NANCY. After the incident, and "[j]ust before the war ended, a court-martial of naval officers . . . on the 10th of February, 1815, adjudged Jeremy S. Dickenson, first Lieutenant of [the SCOURGE], to imprisonment for . . . mutinous and seditious conduct. At the same time, the same court sentenced the boatswain and three seamen of the Scourge to be flogged . . . for pillaging [the AMIABLE NANCY] and maltreating persons aboard the vessel." CHARLES JAROD INGERSOLL, HISTORY OF THE SECOND WAR BETWEEN THE UNITED STATES AND BRITAIN 37 (1852). In addition, the Lieutenant and the three crew members were forced to forfeit their share of the captures made by the SCOURGE. *Id.* Unlike Exxon's stipulation that Captain Hazelwood was at fault for the EXXON VALDEZ spill, however, it was determined that the Captain of the SCOURGE had no part in the misdeeds of the looting seamen. *Id.*

> 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. . . . While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burthening [sic] the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

Id. at 558-59.

This passage on punitive damages was widely understood at the time to reflect "peculiar relations subsisting between the owners and the officers and crew of a privateer, and on reasons of public policy connected with the employment of privateers in our public wars." *Hopkins v. Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 20 (1857). It was clear that it was not intended to have any application outside of that context.

B. Application of *The Amiable Nancy* to This Case

Like *The Amiable Nancy*, the rule governing this case should reflect the conditions and norms of the incident at issue. But the particulars of *The Amiable Nancy* have little bearing on this case because the circumstances surrounding *The Amiable Nancy* are simply too different from those surrounding the EXXON VALDEZ spill.

First, the cargo transported by ship at the time of *The Amiable Nancy* was relatively harmless. IMO, DANGEROUS GOODS, at 1-3 (1996). It was not until sixty years ago that there was sufficient transport of dangerous goods to justify comprehensive regulation. *Id.* at 1.

Now, given the potential for environmental harm posed by dangerous cargo spills, care must be taken to reduce the risk of such spills. As the district court said in this case: "This is not someone hauling dry cargo, the spilling of which would have minimal impact on the fisheries and other uses of Prince William Sound." Pet. App. 155a.

Shipowners are in the best position to insure that the risks associated with the transport of dangerous cargo are minimized and fully internalized. It is clear from an economic standpoint that a high cost of harm, even when coupled with a relatively low probability of occurrence, serves to promote high avoidance costs. *See* RICHARD POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 1-9 (1982). But if the shipowner

does not have to account for the high cost of harm, then the shipowner is less likely to engage in optimal efforts to prevent such disasters. *See id.*; Mark E. King, Note, *In re Complaint of Armatur, S.A.: The Limitation of Liability Act and Maritime Environmental Disasters*, 21 ENVTL. L. 405, 422 (1991). In other words, the way to get shipowners to pay attention to their responsibilities is to hold them accountable for the high costs of harm caused by their activities.

Second, at the time of *The Amiable Nancy*, once a vessel sailed over the horizon, all contact between the ship and owners ashore ceased. Ships today, however, are no longer the autonomous, isolated entities that they once were. As detailed above, modern ships have available instantaneous and continuous communications with the company office and agents ashore, the Coast Guard, port officials, and other ships.

Third, modern commercial transport of oil is unlike privateering. Privateers were permitted to engage in many activities that were prohibited, including committing acts that would normally amount to maritime torts. Exxon, on the other hand, is engaged in a commercial business that has no similar claim to immunity from tort liability. Moreover, its transport of oil should not include the "irregularities and improper conduct" that were expected in privateering. *The Amiable Nancy*, 16 U.S. at 559.

Finally, ship captains today pilot ships that are enormous compared to those in existence at the time of *The Amiable Nancy*. Modern container ships will soon carry up to 16,000 20-foot containers. In addition to piloting these enormous ships, captains may manage as many as several hundred crew members. In order to run all of the operations on these ships, captains must maintain contact with the shore. As a result, captains of today are much like plant managers of a land-based operation.

Like the selection of plant managers, shipowners will exercise optimal care over the selection of their ship masters if they know that they may be exposed to vicarious punitive damages by reason of the conduct of such onboard managers.[3] Indeed, punitive damages serve the purposes "of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." WILLIAM L. PROSSER, THE LAW OF TORTS § 2, at 9 (4th ed. 1971). Punitive damage awards can also serve to capture some of the externalities associated with harms that

[3] Even early maritime cases recognized that vicarious liability sends the right message to shipowner-employers, encouraging maritime employers to be careful about who they hire. *See, e.g.*, *In the City of Carlisle*, 39 F. 807, 817 (D. Or. 1889) (stating "if owners do not wish to be mulct [sic] in damages for such misconduct, they should be careful to select men worthy to command their vessels"). The justification for the availability of vicarious punitive damages is even stronger today than in the past given the acknowledged potential for extreme environmental harm from dangerous cargos.

are not captured by compensatory damage awards and for which shipowners would not otherwise be held accountable.

Because the vast majority of jurisdictions permit vicarious punitive damages to be awarded based on the actions of an employee who "was employed in a managerial capacity and was acting in the scope of employment," RESTATEMENT (SECOND) OF TORTS § 909 (1979), punitive damages should be available in the same circumstances under maritime law. Maritime law ought to reflect the reality that the modern shipping industry bears many business similarities to land-based operations. *Cf. Norwich Co. v. Wright*, 80 U.S. 104, 122 (1871) (reasoning that shipping industry was analogous to any other industry that used corporate entities).

The punitive damages award here – as revised by the lower court – accurately reflects the relationship between shipowners and masters in the modern shipping industry. Moreover, it accurately reflects the reprehensibility of Exxon's conduct in knowingly allowing a man with a serious substance abuse problem to continue in his managerial capacity, eventually leading to the EXXON VALDEZ catastrophe.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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