No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE PROFESSOR ARTHUR R. MILLER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus Professor Arthur R. Miller has devoted much of his almost 50-year career to the study of civil procedure in the federal courts. Prior to joining New York University School of Law as a University Professor in 2007, he was the Bruce Bromley Professor of Law at Harvard Law School, where he taught since 1971. He is the author of numerous books and articles on civil procedure, including the multi-volume *Federal Practice and Procedure* (with C.A. Wright, some with E.H. Cooper, M.K. Kane, and R. Marcus; 1968-2008, West Publishing Co.).

Professor Miller files this brief on behalf of himself individually, and not as a member of the NYU School of Law, to identify certain procedural errors by the Ninth Circuit that, if ratified by this Court, threaten to undermine the district courts' authority to manage their dockets in complex actions.

SUMMARY OF ARGUMENT

After the *Exxon Valdez* oil spill in 1989, thousands of plaintiffs filed lawsuits in state and federal court, most of which eventually were consolidated into a massive action in the United States District Court for the District

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. The parties have filed blanket waivers consenting to the filing of all *amicus* briefs.

of Alaska. After five years of complex litigation, the parties and issues were winnowed down to essentially two points: the amount of compensatory damages due to various groups of plaintiffs, and the liability of Exxon for, and the amount of, any punitive damages. These claims eventually were tried to a jury, which awarded the plaintiffs $5 billion in punitive damages (eventually reduced to $2.5 billion after several appeals). The Ninth Circuit would later remark that the district court did "a masterful job of managing this very complex case." *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001).

Over a year after both the trial and the stipulated deadline for filing any post-trial motions, Exxon sought leave to file a "Motion and Renewed Motion by Defendants Exxon Corporation and Exxon Shipping Company for Judgment on Punitive Damages Claims," in which it argued, for the first time in the six years since the inception of litigation, that punitive damages were unavailable in part because they would go beyond the scope of liability allowed by the Clean Water Act ("CWA"). The district court refused Exxon's request to file the motion.

On appeal, Exxon again advanced its argument that the award of common law punitive damages was inconsistent with the CWA. Over the plaintiffs' objection, the Ninth Circuit held that it would not treat the argument as waived, and instead went on to decide the issue on the merits. The Ninth Circuit held that the CWA does not displace punitive damages.

The Ninth Circuit's decision to reach the argument on the merits, rather than simply affirm the district

court's rejection of the motion, was error. To the extent that Exxon's motion properly was categorized as a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, Exxon's failure to raise the argument prior to submission to the jury was a fatal error that courts do not have discretion to overlook. Moreover, even if Exxon's motion was not subject to the mandatory requirements of Rule 50, district courts have broad latitude to manage their dockets, and their supervisory decisions, including scheduling and determinations of waiver, are subject to abuse of discretion review. This discretion particularly is critical when they manage the sort of exceedingly complex action at issue here. The Ninth Circuit, rather than reviewing the district court's refusal to allow Exxon to file its motion for abuse of discretion, instead disregarded the district court's ruling entirely and reached its own de novo determination on waiver. In so doing, the Ninth Circuit usurped the proper role of the trial court and set an inappropriate precedent for future second-guessing of district court case management decisions. This Court should not ratify the Ninth Circuit's error by reaching the issue on the merits, but instead should affirm on the alternative ground that the district court did not abuse its discretion by rejecting Exxon's motion.

PROCEDURAL HISTORY

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef, releasing 11 million gallons of crude oil into Prince William Sound. In the wake of the spill, thousands of named plaintiffs filed lawsuits in both state and federal court, causing then-Chief Judge H. Russel

Holland of the District Court for the District of Alaska to remark that the litigation had "the potential for being the largest and most complex ever filed in this court" that would "call for an extraordinary level of effort and cooperation on the part of all counsel to the end that the rights of all plaintiffs and defendants may be promptly and effectively determined." Pretrial Order No. 1, Clerk's Docket No. ("CD") 130 (Apr. 25, 1989), at 9. In December 1989, the district court and the state court each issued similar pretrial orders establishing the plaintiffs' case management team and the responsibilities of its members, appointing Lead Counsel, members of the Executive Committee, the Discovery Committee, the Law Committee, the Damages Committee, the Government Liaison Committee, and Liaison Counsel. Pretrial Order No. 9, CD 748 (Dec. 22, 1989); Pretrial Order No. 6, Dec. 22, 1989, *Exxon Valdex Oil Spill Litig.*, Case No. 3AN-89-2533 Civil (Consolidated), Superior Court for the State of Alaska, Third Judicial District at Anchorage. The two sets of cases proceeded on coordinated discovery schedules. Discovery Order No. 2, CD 806 (Feb. 9, 1990); Pretrial Order No. 13 (Discovery Plan), Feb. 9, 1990, *Exxon Valdez*, Case No. 3AN-89-2533. Although in response to the disaster, Congress amended the CWA by passing the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, which created a new scheme of liability for oil spills, that Act did not apply retroactively, and thus could not govern the proceedings in the *Exxon Valdez* cases.

By mid-March of 1991, there were over 150 state court actions with over 3,000 plaintiffs, and over 50 federal court actions with over 1,000 named plaintiffs; by October 1992, after several removals from state court,

the federal consolidated cases consisted of over 150 direct actions on behalf of over 4,000 named plaintiffs, and five certified class actions with estimated membership in the tens of thousands.

In the earliest years of litigation, there were repeated removals by the various defendants (which included Exxon as well as the Alyeska Pipeline Service Company and related entities) from state to federal court, and subsequent motions by plaintiffs to have the cases remanded. In light of the increasingly chaotic docket, in April 1992 the district court indicated its intention to keep a tight rein on motion practice by issuing Order No. 74, which stated:

> The parties to this consolidated litigation . . . have had ample opportunity to propose a case management plan. For whatever reasons, they were unable to do so. The court has had to undertake this task for the time being. . . .
>
> It is neither an efficient use of judicial resources nor a good practice for this court to rule on motions in cases that have pending motions to remand. . . .
>
> Motion practice (except as to discovery) in those consolidated cases which are in this court by reason of removal is stayed and any deadlines previously established with respect to motion practice are stayed until further order of the court.

CD 2423 (Apr. 7, 1992), at 4-6.

In September 1992, the district court denied certain plaintiffs' unopposed motion to lift the stay on motion practice.[2] As the court explained:

> The court is unwilling to simply vacate Order No. 74 . . . unless and until a meaningful case management plan is developed for this case. As counsel are well aware, there have been severe difficulties in the development of such a plan, many of which are directly attributable to the defendants' efforts to move the center of gravity of this litigation from state court to federal court while the plaintiffs are attempting to do just the opposite through motions to remand. It would appear to the court useful for the parties and the court to take up those matters which are most likely to affect the siting of cases for the purposes of the continuation of this litigation. To that end, the stay imposed by Order No. 74 is lifted with respect to motions to dismiss by any plaintiff in this consolidated litigation.

Order No. 98, CD 2871 (Sept. 28, 1992), at 2.

In March and April 1993, the court commented on proposed case management plans and defendants'

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[2] In its order, the court observed that the motion did not specify which plaintiffs were parties to the motion, and admonished counsel to exercise "greater attention to this kind of detail which, if unattended, causes delay and uncertainty for everyone." Order No. 98, CD 2871 (Sept. 28, 1992), at 1 n.1.

request to lift the stay on dispositive motion practice. In Order No. 138, the court stated:

> The court's largest concern is over the extensive motion practice contemplated by the proposed case management order. . . . The court is extremely concerned about the filing of fact-oriented motions for summary judgment. For this reason, the court will not lift the stay on motion practice. To keep this case manageable, the court needs to maintain control over the motions filed. The court will conduct an initial screening of any motion filed to determine if the motion is fact-based . . .
>
> Another concern of the court's is regarding motions based upon the doctrine enunciated in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). . . . [in light of a pending interlocutory appeal], this court is inclined to not render any rulings on the subject until the Ninth Circuit does so.

CD 3395 (Mar. 30, 1993), at 2-3. In Order No. 141, the court ordered that the proposed case management plan be modified to include a provision that legal, issue-oriented dispositive motions would proceed only in accord with a specified schedule, and that parties seeking to file additional such motions seek relief from the stay by submitting "a memorandum explaining in summary fashion the appropriateness and timeliness of the motion – that is, how it fits into the orderly development of the

case for trial." CD 3460 (Apr. 21, 1993), at 5. The court explained the necessity for such a provision:

> By so doing, the court does not mean to stifle legitimate motion practice which will advance the ultimate disposition of this case. The court does, however, feel the need to exercise considerable control over the flow of business in order that it may be timely managed.

Id. at 4. Ultimately, in May 1993, the district court approved a case management plan that, among other things, stayed issue-oriented dispositive motion practice except as to seven specific summary judgment motions scheduled to be filed throughout 1993. Order No. 143, CD 3522 (May 10, 1993). Prior to the issuance of the plan, the district court already had issued three orders addressing various motions for partial summary judgment, judgment on the pleadings, and judgment under Rule 54(b). *See* Order No. 38, CD 1178 (Feb. 8, 1991); Order No. 121, CD 3194 (Dec. 23, 1992); Order No. 139, CD 3421 (Apr. 8, 1993). Ultimately, the defendants would file over 15 fact-based and legal-oriented motions for summary judgment in 1993 alone.

The first summary judgment motion contemplated by the case management plan was the defendants' motion for "Partial Summary Judgment on Claims for Punitive Damages Based on TAPAA Displacement of General Maritime Law." JA60. The motion argued that the federal Trans-Alaska Pipeline Authorization Act ("TAPAA") created a "comprehensive remedial scheme" for oil spills that could not be "supplemented" with additional remedies under maritime law. JA64.

In support of this position, the defendants pointed out that the "narrow scope" of the TAPAA savings clause was "confirmed by comparison with the broader savings clause" of the Federal Water Pollution Control Act (which includes the CWA). JA87 n.9. The defendants explained that the FWPCA savings clause, "[i]n marked contrast to its TAPAA counterpart," preserved state authority to impose "liabilities." *Id*. That the TAPAA savings clause had not done so, the defendants contended, provided further support for its argument that the statute foreclosed claims for punitive damages. *Id*.

Simultaneous with their motion for partial summary judgment based on TAPAA displacement, the defendants also filed a motion for partial summary judgment on the ground that previous settlements had a res judicata effect on plaintiffs' punitive damages claims. The district court denied both motions on October 21, 1993. Order No. 158, CD 3982 (Oct. 21, 1993); Order No. 159, CD 3983 (Oct. 21, 1993).

During this period, as the parties continued to litigate various issues, several interlocutory appeals were filed with the Ninth Circuit, concerning such matters as the propriety of the removals from state court and the availability of various types of damages. *See Exxon*, 270 F.3d at 1224 n.12. In early November 1993, after the Alyeska defendants settled with the plaintiffs, Exxon agreed to stipulate to its liability for negligence and that its negligence proximately had caused the spill. As a practical matter, then, "Exxon's liability for compensatory damages was undisputed, but the amount of plaintiffs' losses was controverted. Exxon's

liability for punitive damages was vigorously litigated." Order No. 365, CD 7837 (Jan. 29, 2004).

With the disputed issues so narrowed, the parties filed their first proposed trial plan, which provided for a four-phase trial structure predicated on the court's earlier conclusion that punitive damages were legally available. Phase I would be devoted to establishing the negligence of individual defendants, and the "reckless indifference" of Exxon and Defendant Joseph Hazelwood. If "willful misconduct" was established in Phase I, then liability for, and the amount of, punitive damages would be established in Phase III. Phases II and IV would address the amount of damages proximately caused by the spill for certain groups of plaintiffs. Proposed Joint Trial Plan, CD 4032 (Nov. 3, 1993), at 4-7.

In the trial plan, Exxon also identified 14 "Issues of Law to Be Resolved," of which seven concerned the propriety of any punitive damages award – including the issue of TAPAA displacement, res judicata, and Exxon's contention that liability for punitive damages would have to be established by clear and convincing evidence. The trial plan did not include any contention that punitive damages were precluded by the federal CWA. *Id.* at 40-43. The day after the plan was filed, Exxon moved for an order requiring that the elements of a punitive damages claim be proved by clear and convincing evidence; the district court eventually denied the motion in Order No. 171 on January 13, 1994. Motion in Limine, CD 4035 (Nov. 4, 1993); Order No. 171, CD 4405 (Jan. 13, 1994).

Even though the trial plan was revised on several occasions, the basic four-phase structure remained, as did Exxon's various challenges to any punitive damage awards. The Third Amended Revised Trial Plan, which eventually became the final pretrial order, ultimately was filed on March 30, 1994, and similarly did not list displacement by the CWA as a legal issue in contention. JA195-97. The plan was approved by the district court on June 22, 1994. JA1410.

The trials in Phases I, II(a) (concerning damages to fishermen), and III ran approximately four months from May to September 1994; the parties reached a settlement on Phase II(b) (concerning Native American subsistence damages) on July 25, 1994. Prior to the trials, the defendants filed more motions for summary judgment regarding the various phases, and, after the close of evidence in each phase, the defendants made oral Rule 50(a) motions. Reporter's Tr., CD 5220 (June 3, 1994), at 3938-49; Reporter's Tr., CD 5224 (July 11, 1994), at 6821-32; Reporter's Tr., CD 5770 (Aug. 29, 1994), at 7547-48.

After the jury returned a verdict of $5 billion in punitive damages on September 16, 1994, the parties entered a stipulation requiring that post-trial motions be filed by September 30, 1994. JA 1410. On that date, Exxon filed 11 motions for new trials and for judgment as a matter of law involving all three phases, objecting to, among other things, the jury instructions in Phase I, the validity of a blood test used in Phases I and III, the weight of the evidence in Phases I and III, and the amount of the punitive damages award. Defendant Hazelwood filed an additional 11 motions in support of a new trial and judgment as a matter of law for all three

phases. In none of these motions did either Exxon or Hazelwood contend that the CWA displaced any of plaintiffs' remedies. The district court denied these motions on January 27, 1995. Order Nos. 264-75, CD 6231-42 (Jan. 27, 1995).

On October 23, 1995 – nearly 13 months after the stipulated deadline for post-trial motions had passed, and more than six years since the inception of litigation – Exxon moved to lift the stay on motion practice to allow it to file what it called a "Motion and Renewed Motion by Defendants Exxon Corporation and Exxon Shipping Company for Judgment on Punitive Damages Claims." BIO App. 30a Exxon contended that the motion was brought pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, but also included a provision that it was made, "to the extent they may be applicable, pursuant to Rules 50(b), 56(b), 56(d), 59(a), and 59(e)." *Id.* at 31a.[3] The request to lift the stay stated that the grounds for the motion were recent decisions in the Ninth and Fifth Circuits (identified in the accompanying brief lodged with the court as *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995) (which had been decided four months earlier), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc)). Bio App. 31a; Memo in Support, CD 6496 (Oct. 23, 1995), at 1. In its brief, Exxon conceded that neither *Glynn* nor *Guevara* actually addressed the question of punitive damages in the context of maritime oil spills.[4] Memo in Support, at 1-2. On November 2, 1995,

[3] Rule 58 has now been reorganized and reworded.

[4] In fact, neither *Glynn* nor *Guevara* discussed the CWA or its relationship to punitive damages at all; both cases concerned (Cont'd)

the district court denied Exxon's request to lift the stay to file its motion. BIO App. 35a.

In January 1996, the parties reached a settlement on the compensatory damages issues slated for resolution in Phase IV. After the entry of final judgment, Exxon and some plaintiffs appealed to the Ninth Circuit.

On appeal, Exxon argued that the CWA displaced any common law claims for punitive damages. The Ninth Circuit, rejecting plaintiffs' contention that the argument had been waived, stated:

> "We conclude that the issue should not be treated as waived. Exxon clearly and consistently argued statutory preemption as one of its theories for why punitive damages were barred as a matter of law, and argued based on the CWA prior to entry of judgment. Because the issue is massive in its significance to the parties and is purely one of law, which requires no further development in district court, it would be inappropriate to treat it as waived in the ambiguous circumstances of this case."

Exxon, 270 F.3d at 1229. After the Ninth Circuit concluded that the CWA did not displace punitive damages claims, this Court granted certiorari.

(Cont'd)

punitive damages for failure to pay "maintenance and cure," a cause of action limited to seamen's relationships with their employers. *See Exxon*, 270 F.3d at 1226-1227.

ARGUMENT

THIS COURT SHOULD NOT PASS UPON THE ISSUE OF CWA DISPLACEMENT OF PUNITIVE DAMAGES

The Supreme Court ordinarily will review only issues that were raised properly before the court of appeals, or passed upon by the appellate court "in an appropriate exercise of its appellate jurisdiction." *United States v. Williams*, 504 U.S. 36, 42-43 (1992) (citations omitted). In this case, the Ninth Circuit abused its discretion and exceeded its authority under the Federal Rules by disregarding the district court's refusal to allow Exxon to file its October 1995 challenge to the punitive damage award. This Court should not ratify the Ninth Circuit's error.

A. The Ninth Circuit Erred in Concluding that Exxon Had Preserved the Issue for Appeal Because the Requirements of Rule 50 Cannot Be Waived

Though Exxon styled its motion as brought pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, neither of these rules is, in and of itself, a vehicle for seeking judgment as a matter of law. Rule 49(a) provides only that juries may be requested to return "special verdicts" with separate findings on each issue of fact, *see* Fed. R. Civ. P. 49(a); Rule 58(2), at the time of Exxon's motion, provided only that a court "must promptly approve the form of the judgment" returned by a jury, *Blazak v. Ricketts*, 971 F.2d 1408, 1409 n.2 (9th Cir. 1992). Neither rule addresses

permissible motion practice; to the contrary, Rule 49 was created merely to provide alternative procedures to the traditional general verdict, *see* 9B Wright & Miller, *Federal Practice & Procedure*: Civil 3d, § 2501, at 88-89, and Rule 58 was added to eliminate uncertainty as to the precise date of judgment for the purpose of allowing proper calculation of time, *see* 11 Wright & Miller, *Federal Practice & Procedure*: Civil 2d, § 2781, at 9. In fact, despite Exxon's invocation of Rules 49 and 58, the only Federal Rule that would permit the relief Exxon sought – judgment as a matter of law *after* a jury verdict – is Federal Rule of Civil Procedure 50(b).[5] Therefore, Exxon's motion must be evaluated under Rule 50's strictures.[6]

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[5] The only other potentially applicable rule, Federal Rule of Civil Procedure 59(e), permits a court to "alter or amend a judgment." That Rule, however, "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Wright & Miller, *supra*, § 2810.1, at 127-28. (Federal Rule of Civil Procedure 56, addressing summary judgment, contains no time-limit but is generally conceived as a pretrial motion. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986); it could hardly be otherwise, else it would render Rule 50 redundant.)

[6] To be sure, in the ordinary case, "a party may assert on appeal any question that has been properly raised in the trial court," 11 Wright & Miller, *supra*, § 2818, at 186; thus, as courts have observed, various errors that do not implicate the sufficiency of evidence, such as the improper admission of evidence or collateral estoppel, may be asserted on appeal even in the absence of a proper Rule 50 motion. *See, e.g.*, *Fuesting v. Zimmer, Inc.,* 448 F.3d 936, 939 (7th Cir. 2007); *Ruyle v. Cont. Co.*, 44 F.3d 837, 841 (10th Cir. 1994). However, in these cases, (Cont'd)

Federal Rule of Civil Procedure 50(a) provides that a litigant may move for judgment as a matter of law at any time before a case is submitted to a jury. Rule 50 further states that

> "If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law."

Fed. R. Civ. P. 50(b). Thus, according to the text of the rule, post-verdict motions for judgment as a matter of law are permissible only if they renew motions on similar grounds made prior to jury submission. *See* 9B Wright & Miller, *supra*, § 2537, at 603-04. This requirement cannot be waived, either by a district court or at the appellate level. *See Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 & 404 (2006). For this reason alone, the Ninth Circuit was without power to consider Exxon's argument, and its decision should be affirmed on the alternative ground that the district court did not abuse its discretion in rejecting it.

(Cont'd)
proper objections were raised prior to a jury verdict, using various other procedural avenues. Here, Exxon raised no objection; thus its motion can be evaluated only as a (failed) Rule 50 motion.

B. The Ninth Circuit Improperly Substituted its Judgment for that of the District Court

Even if Exxon's motion was not subject to the mandatory constraints of Rule 50, the Ninth Circuit still abused its discretion by holding that it would not "treat" the argument as waived.[7] This is because the district court already made that determination when it refused to accept Exxon's motion; the Ninth Circuit erred by ignoring the district court's ruling.

Although "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), there are limits to an appellate court's discretion to consider issues not passed upon below. *See id.* One important limitation is the principle that a district court's determination that an argument has been waived is reviewed for abuse of discretion. *See, e.g.*, *Rates Tech., Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1307 (Fed. Cir. 2005); *Rogers v. Samedan Oil Corp.*, 308 F.3d 477, 483 (5th Cir. 2002); *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1022 (9th Cir. 2000) (citing *Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 419-20 (1st Cir. 1998)).

This review of waiver determinations under an abuse-of-discretion standard arises from the "bedrock" principle of procedure that "trial judges have an abiding

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[7] The issues involved in this case actually concern forfeiture, rather than waiver; however, because "jurists often use the words interchangeably," *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004), this brief will attempt to avoid confusion by employing the term "waiver."

responsibility for the efficient management of the cases on their dockets." *Torres v. Puerto Rico*, 485 F.3d 5, 10 (1st Cir. 2007). Courts have an inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," a process that "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988) (issues that concern the "supervision of litigation" fall within the district court's discretion).

To that end, Federal Rule of Civil Procedure 16(b) requires that district courts issue a scheduling order "as soon as practicable." Fed. R. Civ. P. 16(b). The scheduling order "must limit the time to . . . file motions." *Id.* In creating the schedule, trial judges have "significant discretionary authority" to set filing deadlines in accordance with the Federal Rules of Civil Procedure. *Perez-Cordero v. Wal-Mart P.R.*, 440 F.3d 531, 533 (1st Cir. 2006); *see also Smith v. Insley's, Inc.*, 499 F.3d 875, 879 (8th Cir. 2007); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997).

A necessary corollary to the authority to set schedules is the authority to enforce them. *See Perez-Cordero*, 440 F.3d at 533. "Courts set such schedules to permit the court and the parties to deal with cases in a thorough and orderly manner, and they must be allowed to enforce them, unless there are good reasons not to." *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005). As the First Circuit put it, "[A] district judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he

or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance." *Mendez v. Banco Popular de P.R.*, 900 F.2d 4, 7 (1st Cir. 1990). On this issue, as well, a district court's refusal to accept a tardy filing is reviewed for abuse of discretion. *See Torres*, 485 F.3d at 9-10; *Reasonover v. St. Louis County*, 447 F.3d 569, 579 (8th Cir. 2006); *Wong*, 410 F.3d at 1062; *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 208-09 (5th Cir. 1992).

The district court's discretion to reject new legal or factual contentions is perhaps at its zenith when a party raises the issue after the adoption of the final pretrial order. In that situation, specifically, a district court has discretion to reject new arguments not included in the order. *See, e.g.*, *Trinity Carton Co. v. Falstaff Brewing Corp*, 767 F.2d 184, 192 n.13 (5th Cir. 1985) (district court has discretion to reject amendments to the final pretrial order except when "manifest injustice" otherwise would result),[8] *see also Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 900 (9th Cir. 2000); *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418 (11th Cir. 1998); *Daniels v. Bd. of Educ. of Ravenna City Sch. Dist.*, 805 F.2d 203, 210 (6th Cir. 1986).

In this case, the Ninth Circuit found that the district court had done "a masterful job of managing this very complex case." *Exxon*, 270 F.3d at 1225. Over the course of several years, the district court worked diligently with the parties to manage a sprawling litigation, to resolve dispositive legal issues as quickly as possible, and to narrow the scope of the issues for trial. As the district

[8] Presumably, if "manifest injustice" resulted from the refusal to allow an amendment, the district court would necessarily have exceeded its discretion.

court emphasized on several occasions, it believed that to accomplish this feat it was obliged to "exercise considerable control over the flow of business in order that it may be timely managed" by setting specific schedules for dispositive legal motions, from which either party could seek relief. Order 141, *supra*. Given this history, the district court seems to have acted well within its discretion in refusing to accept a motion proposing a new legal argument – one that was fully available to Exxon at least as far back as 1993 (as evidenced by the fact that Exxon maintained its argument regarding TAPAA displacement consistently throughout the case) – offered for the first time 13 months after the jury verdict. Indeed, no one – not Exxon, and not the Ninth Circuit – ever has contended that the trial court abused its discretion by rejecting the filing, and it is difficult to see how such an argument could be made.

To be sure, appellate courts, as well as district courts, have discretion to consider arguments that were not raised below. *See, e.g.*, *Bagot v. Ashcroft*, 398 F.3d 252, 256 (3d Cir. 2005). However, this is not a situation in which a matter was raised for the first time on appeal; rather, this is a case in which the argument was presented to – and rejected by – the district court. The Ninth Circuit was required to consider Exxon's argument in that context. *Cf. Torres*, 485 F.3d at 9 (disposition of judgment on the pleadings ordinarily is reviewed de novo; when motion is disposed of as a matter of case management, the decision is reviewed for abuse of discretion).

C. By Disregarding the District Court's Refusal to Allow the Filing, the Ninth Circuit Undermined Trial Courts' Authority to Manage Complex Litigation

District courts explicitly are encouraged to oversee complex cases actively by managing them closely, setting reasonable deadlines, and by resolving legal issues early so as to prevent waste of judicial resources. *See* 6A Wright & Miller, *Federal Practice & Procedure*: Civil 2d, § 1530, at 302-04; *Manual for Complex Litigation (Fourth)* § 10.13 (2004); *Manual for Complex Litigation* § 11.66. It was precisely this concern that large, protracted cases were clogging judicial dockets that led the Coordinating Committee for Multiple Litigation of the United States District Courts to develop the Manual for Complex Litigation in the late 1960s. *See* 6A Wright & Miller, *supra*, § 1530, at 304. The Manual explains that effective management of a complex action requires that:

> [o]nce established . . . schedules are met, and, when necessary, appropriate sanctions are imposed . . . for derelictions and dilatory tactics . . . The judge's role is crucial in developing and monitoring an effective plan for the orderly conduct of pretrial and trial proceedings . . . [E]ach plan must include an appropriate schedule for bringing the case to resolution.

Manual for Complex Litigation § 10.13. This is exactly how the district court proceeded; it worked with the parties to develop a case management plan, the plan

provided ample opportunity for the parties to raise their legal arguments, and the court refused to accept a filing that was grossly out of time. The district court's authority to manage its docket would be meaningless if appellate courts were free to examine the merits of rejected arguments without regard for the district court's own case management rulings.

Moreover, this was a particularly poor case to overlook Exxon's tardiness. Ordinarily, appellate courts will decide issues not raised below only in limited circumstances, such as when the law is clear, when the issue is of exceptional importance, or when manifest injustice otherwise would result. *See, e.g.*, *Singleton*, 428 U.S. at 121; *Bagot*, 398 F.3d at 256; *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990). In this case, the issue was one of first impression: no federal court before (or since) had occasion to decide the issue, and the Ninth Circuit believed that the issue was "close." *See Exxon*, 270 F.3d at 1230. Moreover, the CWA no longer governs oil spills, and did not even do so at the time of the Ninth Circuit's ruling. The issue thus had little relevance in 2001, and the lack of further legal development on the subject in the intervening years demonstrates it has even less importance today. Finally, Exxon was a well-financed litigant that vigorously defended its interests, and the trial was structured and predicated, to a large degree, on the assumption that punitive damages were legally available under maritime law. Exxon's unexplained failure to raise its argument at an earlier date potentially added years to the litigation and consumed immeasurable judicial resources. Under these circumstances, the Ninth Circuit arguably would have abused its discretion even if the district court had not

itself previously rejected Exxon's filing; in the face of the district court's own refusal to allow the motion, the Ninth Circuit's failure even to acknowledge the trial court's exercise of its discretion manifestly was improper.

D. This Court Should Not Ratify the Ninth Circuit's Abuse of Discretion

If this Court reaches the issue of CWA displacement of maritime law, it implicitly would endorse the Ninth Circuit's usurpation of the district court's proper role in managing the litigation. The references to irrelevant Federal Rules by Exxon in its October 1995 motion may have obscured the desirability of enforcing the legitimate management controls of the district court and the desirability of honoring trial court discretion in highly complex cases. That should not be validated by the Court's effectively giving credence to such tactics (or appellate courts' riding roughshod over these policies) by compounding the Ninth Circuit's error. Given the enormous challenges of this litigation and the broad discretion of a district court to manage its docket, this Court should affirm the Ninth Circuit's decision on the alternative ground that the district court did not abuse its discretion in rejecting Exxon's untimely filing.

CONCLUSION

This Court should hold that the district court acted within its discretion in rejecting Exxon's October 1995 motion, and that therefore Exxon's argument will not be considered.

Respectfully submitted,

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