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No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL.,
Petitioners,
v.

GRANT BAKER, ET AL.,
Respondents.

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

BRIEF OF THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

TALIS J. COLBERG
Attorney General
CRAIG J. TILLERY
Deputy Attorney General
JOANNE GRACE
Chief Assistant Attorney General
STATE OF ALASKA
DEPARTMENT OF LAW
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-2133

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
MICHAEL J. BURSTEIN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus State of Alaska

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INTEREST OF *AMICUS CURIAE*

The State of Alaska depends on maritime shipping, commercial fishing, and the petroleum industry for most of its economic livelihood. Alaska therefore has a significant interest in ensuring that remedies under the general maritime law balance properly the needs of those industries with the need to compensate Alaska's citizens for, and appropriately deter and punish, corporate wrongdoing. For that reason, Alaska has long supported the efforts of its citizens to recover the full spectrum of remedies for their private economic and emotional losses caused by the *Exxon Valdez* oil spill.

STATEMENT

On March 24, 1989, the *Exxon Valdez* ran aground in Prince William Sound, causing one of the worst environmental disasters in American history. The 11 million gallons of oil that spilled into the Sound that morning had a profound and lasting impact on Alaska and its citizens. *See* Pet. App. 64a. In civil and criminal proceedings, the State vindicated its interest in punishment and compensation for damage to Alaska's natural resources. But Alaska has consistently recognized that the enormity of the harm to its citizens goes beyond environmental damage and that the full spectrum of legal remedies should be available to private plaintiffs who, by obtaining punitive damages to punish Exxon for the wrongs inflicted upon them, complemented the State's efforts.

A. The spill and cleanup efforts

When the *Exxon Valdez* ran aground, it was under the command of Joseph Hazelwood, a known, relapsed alcoholic who was seen drinking heavily before boarding the ship. *See* Pet. App. 63a-64a.

Hazelwood was the only crew member authorized under Alaska's pilotage law to navigate through Prince William Sound,[1] yet he was not present on the bridge to execute a critical turn that would have avoided the reef. *See id.* at 63a.

Hazelwood returned to the bridge after the grounding. He notified the Port of Valdez traffic control and the Coast Guard about his ship's distress. *See id.* at 122a; Supp. JA 80sa; PX92A (Resps. Lodging). He then spoke via satellite phone with his superiors at Exxon Shipping in San Francisco. *See* JA 354-55, 872-76.

The industry response to the spill – led by Exxon – proved "slow and inadequate"[2] and "failed miserably in containing the spill and preventing damage."[3] Exxon took over recovery operations from Alyeska Pipeline Service Company (the manager of the Trans-Alaska Pipeline) in a confusing hand-off of authority. *See State Report* 13-14; 1 United States Coast Guard, *Federal On Scene Coordinator's Report: T/V Exxon Valdez Oil Spill* 104 (Sept. 1993) ("*Federal Report*"). Exxon then implemented its own recovery plan instead of Alyeska's state-approved

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[1] Since the First Congress, the federal government has recognized that States have jurisdiction over pilotage requirements "'in the bays, inlets, rivers, harbors, and ports of the United States.'" *United States v. Maine*, 469 U.S. 504, 513 n.6 (1985) (quoting Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 53, 54)). Alaska requires every oil tanker operating in "state water," Alaska Stat. § 08.62.185, to employ a state-licensed pilot "to safely navigate" through its waters, *id.* § 08.62.157.

[2] Alaska Dep't of Envtl. Conservation, *The* Exxon Valdez *Oil Spill: Final Report, State of Alaska Response* 1 (June 1993) ("*State Report*").

[3] S. Rep. No. 101-94, at 2 (1990).

plan. *See State Report* 14. Exxon did not provide the State with a copy of its plan, which was not specific to Prince William Sound and which was not approved by any state or federal authority. *See id.* at 13-14. Problems of coordination and accountability would continue over the next two years of cleanup operations. *See id.* at 17-20.

Partly as a result of that confused response, a critical window of opportunity to contain and remove floating oil was missed. *See Federal Report* 35. And Exxon's early efforts appeared to focus more on addressing the "public relations nightmare" of the spill than effective cleanup. PX722A, at 6:03-10 (Resps. Lodging). As one Exxon official stated, the company did not "care so much whether it's working or not," so long as there was "something out there that people can see . . . that looks bright and yellow and like somebody's doing something." *Id.* at 1:45-2:00.

The slowness and ineffectiveness of the immediate response meant that, when an impending storm struck two-and-a-half days after the spill, little if any cleanup or containment had occurred. The storm then made the job much more difficult by transforming the "single, compact slick" (*State Report* 91) that "remained within a few miles of the vessel" (*Federal Report* 51) into "[b]reakaway patches and thick windrows of oil and mousse" that extended more than 40 miles from the vessel and began to hit shorelines (*State Report* 91). *See also* PX226 (Resps. Lodging) (depicting spread of *Exxon Valdez* oil).

After the storm cleared, the citizens and commercial fishermen of Cordova and Chenega – towns on Prince William Sound whose economies "depend[ed] almost entirely on commercial fishing," JA 1442 – took matters into their own hands to save the critical

salmon hatchery in Sawmill Bay, which Exxon had not protected at all. *See State Report* 94-96. For nearly two weeks, and with no help from Exxon, individual fishermen committed their fleets to saving the hatchery, often using nothing more than "five-gallon plastic buckets" to "scoop[] oil from the surface by hand." *Id.* at 96.

Although the salmon hatchery survived, *see id.*, significant portions of Alaska's pristine coastline were damaged. *Exxon Valdez* oil contaminated 3,245 miles of beach stretching from Prince William Sound all the way to the Alaska Peninsula, with more than 275 miles classified as "heavily oiled." *See Federal Report* 123-25 & Table 6.1. As the oil washed ashore, it "pooled" and left "stretches of greasy, brown emulsion up to and exceeding two feet deep stranded on shorelines." *State Report* 62.

After several weeks in which there was "little activity on the shorelines," Exxon "made one highly publicized, almost desperate effort to do shoreline cleanup with workers literally wiping rocks by hand." *Id.* That effort "looked ludicrous" and proved "useless and impractical." *Id.* Shoreline cleanup operations did not end until 1992, some three years after the disaster. *See id.* at 146-47. Exxon, however, recovered only 14 percent of the spilled oil. *See* Douglas A. Wolfe et al., *The Fate of the Oil Spilled from the* Exxon Valdez, 28 Envtl. Sci. & Tech. 561A, 566A, Table 2 (1994).

B. Impact of the spill

The oil spill devastated Prince William Sound's natural resources, economy, and social fabric. The Sound's natural beauty and abundant resources are valuable not only in their own right – and suffered

damages estimated at $2.8 billion[4] – but also as the lynchpin of the region's economy and way of life. Seafood and tourism are two of Alaska's largest industries and have historically been the largest non-petroleum basic private sector businesses in the State. *See* Inst. of Social & Econ. Research, Univ. of Alaska Anchorage, *Alaska Gross State Product: 1961-1998*, at 10 (June 1999). With the loss of these resources, the communities' traditional way of life was devastated.

1. Wildlife in Prince William Sound and western Alaska suffered tremendous losses. *See generally* EVOSTC, *Update on Injured Resources and Services 2006*, at 9-34 (Nov. 2006) ("*EVOSTC Report*"). Those losses affected commercial fishermen, tourism, recreation, Native subsistence cultures, and the psyche of the entire region.

In the days immediately following the spill, scores of volunteers on land and sea attempted to rescue and clean sea otters covered in oil. *See Federal Report* 352-53. Despite these efforts, between 1,000 and 2,650 sea otters died in Prince William Sound alone. *See* EVOSTC, Exxon Valdez *Oil Spill Restoration Project Final Report: Information Synthesis and Recovery Recommendations for Resources and Services Injured by the* Exxon Valdez *Oil Spill* 14-4 (Oct. 2006) ("*Information Synthesis*"); *Federal Report* 353. The population of sea otters did not begin to recover until the late 1990s. *See EVOSTC Report* 6.

Harbor seals in the area "swam in oiled water," "surfaced in oil slicks to breathe" air containing

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[4] *See* Richard T. Carson et al., *A Contingent Valuation Study of Lost Passive Use Values Resulting from the Exxon Valdez Oil Spill* 5-123 (Nov. 1992).

"volatile hydrocarbon vapors," and "became heavily coated with oil." *Information Synthesis* 15-2. More than 80 percent of the seals observed in central Prince William Sound had oil on them. *See id.* The harbor seal population did not recover for about 15 years after the spill. *See EVOSTC Report* 6.

Marine and migratory bird populations were devastated. The United States estimated that 260,000 to 580,000 birds died in the spill area, with the "best estimates" ranging from 350,000 to 390,000. *Federal Report* 354. Even rescued birds "frequently d[ied] in [workers'] hands, the apparent victims of heart failure." *Id.* at 351.

Sockeye salmon fisheries were closed in 1989 to avoid putting contaminated fish on the market. That closure created "overescapement," a situation in which an overabundance of fish creates systemic imbalances in the ecosystem. *See EVOSTC Report* 32. As a result, the population of sockeye salmon initially declined and did not return to pre-spill levels until 2002. *See id.* at 32-33. In 1991 and 1992, wild adult pink salmon returns in some parts of the Sound declined by 11 percent. *See id.* at 28. Pacific herring stocks collapsed in 1993 and have never recovered. *See id.* at 24-26; *Information Synthesis* 17-5. "[T]he 1989 year class was one of the smallest cohorts ever to return to spawn." *Information Synthesis* 11-1.

2. The region suffered tremendous economic losses. Commercial fishing accounts for approximately one-fifth of Alaska's employment and is the State's largest private sector source of jobs. *See Information Synthesis* 17-1. For the remaining nine months of 1989, the State closed commercial fisheries for salmon, crab, shrimp, rockfish, sablefish, and

herring in Prince William Sound, Cook Inlet, Kodiak, and the Alaska Peninsula. *See id.* at 17-2; Supp. JA 228sa-230sa (listing closures in detail). The Prince William Sound salmon and shrimp fisheries remained closed into 1990. Prices for fish in those fisheries that reopened were depressed in part because of fears of contamination, and the value of commercial fishing permits decreased after the spill. *See* JA 1392-93. The reviewing courts, evaluating the "actual harm" from the spill, estimated the economic losses at $504 million. *See* Pet. App. 38a, 160a-163a. That figure likely understates the true harm; the closures had a ripple effect that shuttered local businesses supporting the industry, affected city tax revenues and services, and even drove up utility rates. *See State Report* 102-03.

Recreation and tourism in Prince William Sound, Cook Inlet, and the Kenai Peninsula declined markedly in 1989. The spill left visible oil on a wide swath of beaches, damaged the fauna and flora, and prevented the use of affected waters for tourism, kayaking, and other recreational activities. Sport fishing and hunting in the affected area were closed. *See Information Synthesis* 19-1 to 19-2. One study estimated a loss of 9,400 visitors and $5.5 million in in-state spending for summer 1989 alone. *See* McDowell Group, *An Assessment of the Impact of the* Exxon Valdez *Oil Spill on the Alaskan Tourism Industry* 6 (Aug. 1990). Another found the lost revenue from recreational fishing to be $31 million. *See* Richard T. Carson & W. Michael Hanemann, *A Preliminary Economic Analysis of Recreational Fishing Losses Related to the Exxon Valdez Oil Spill* 9 (Dec. 1992).

3. Alaskans' lives and livelihoods are intimately bound with the water. Approximately 85 percent of Alaskans live in coastal areas. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2008*, at 31, Table 26 (Oct. 2007). The spill caused massive and lasting disruption to residents' daily lives.

At the time of the spill, the area around Prince William Sound, Cook Inlet, Kodiak, and the Alaska Peninsula was home to 15 native Alaskan communities. *See Information Synthesis* 18-1. These traditional communities relied on the sea and land around them for subsistence harvests critical to maintaining their traditional way of life; fishing was a central part of their culture.[5] *See* Pet. App. 123a. Those harvests declined by up to 77 percent in the year after the spill. *See Information Synthesis* 18-2, 18-5. "[T]raditional foods became contaminated with oil," and native communities' "confidence in the health of the environment on which they depended was shaken." *Id.* at 18-1. "[D]isorientation and fear" turned many away from traditional consumption patterns. *State Report* 109. The invasion of clean-up crews and equipment created additional stress. *See EVOSTC Report* 37. Eighty-three percent of native Alaskans surveyed in 2005 stated that the "traditional way of life" – "an amalgamation of . . . intergenerational knowledge transfer, subsistence harvesting, and food sharing" – had been injured by the spill. *Information Synthesis* 18-15.

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[5] In addition to the native Alaskans, about 13,000 residents in the affected areas held subsistence permits. *See Information Synthesis* 18-1.

The broader psychic disruption brought about by the oil spill was significant. As the district court noted, for example, "commercial fishermen not only suffered economic losses but also the emotional distress that comes from having one's means of making a living destroyed." Pet. App. 123a. Crime in the city of Seward jumped 100 percent; in Kodiak and Homer, mental health admissions grew by 72 and 177 percent, respectively. *See State Report* 116. Studies revealed a positive correlation between exposure to the oil spill and increases in drinking and drug abuse, and increased rates of generalized anxiety disorder, post-traumatic stress disorder, and depression. *See* Supp. JA 444sa-447sa.

C. Lingering effects of the spill

Even today, almost 20 years after the spill, Alaska is not fully healed. A comprehensive study in 2001 revealed at least 56 tons of lingering subsurface *Exxon Valdez* oil in 78 separate locations. Significant surface oil also remained on Prince William Sound beaches. *See* U.S. Dep't of Justice & Alaska Dep't of Law, *Comprehensive Plan for Habitat Restoration Projects Pursuant to Reopener for Unknown Injury* 2-3 (June 2006).[6]

The oil industry, moreover, has not changed its behavior. In March 2006, British Petroleum Exploration (Alaska) ("BP") discovered a leak in one of its oil transit lines in Alaska. An estimated 200,000 gallons of oil leaked onto the tundra before BP noticed and stopped the leak. *See* Plea Agreement at 8-9, 14,

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[6] On August 31, 2006, Alaska and the United States submitted to Exxon a letter demanding $92 million for cleanup of lingering oil under a "reopener" provision in the 1991 consent decree.

United States v. BP Exploration (Alaska), Inc., No. 07-cr-125 (D. Alaska filed Oct. 25, 2007) ($20 million criminal fine). BP had deferred for eight years a routine and relatively inexpensive maintenance procedure that would have prevented the spill. *See id.* at 11. In December 2007, Conoco discovered an apparently similar leak that resulted in the discharge of more than 4,200 gallons of oil. *See* Wesley Loy, *Crews Clean Up Spill on North Slope*, Anchorage Daily News, Dec. 18, 2007, at B1. Almost 20 years after the *Exxon Valdez* spill, oil companies operating in Alaska continue to behave negligently (if not recklessly) and require the continued close supervision of federal and state law enforcement authorities.

D. The 1991 plea agreement and consent decree

Alaska and the United States brought civil and criminal actions to punish Exxon for harming the environment and to recover the cost of environmental cleanup and restoration. Contrary to Exxon's suggestion, *see* Pet. Br. 4-6, Alaska did not intend for the settlements of these actions to occupy the field of punishment and deterrence. Given the enormity of the harms catalogued above, Alaska intended that Exxon would be punished for harming the *people* through private litigation brought by those people.

In October 1991, Exxon pleaded guilty to criminal violations of the Clean Water Act and agreed to pay a fine of $25 million and restitution to Alaska and the United States of $100 million. *See* Pet. App. 125a. At the plea hearing, the United States made clear that "[t]his oil spill was . . . an environmental crime. The criminal remedy should likewise, in substantial part, be environmental in nature." JA 1518. And the Attorney General of Alaska consistently focused his

remarks on the need to remedy *pollution* harms and "to give pause to those who do not show the proper regard for the Alaska *environment*." JA 1532 (emphasis added).

Alaska (and the United States) also sued Exxon "on behalf of itself and as public trustee of natural resources within the State of Alaska" for damages relating to the loss of natural resources resulting from the oil spill. Complaint at 1, *Alaska v. Exxon Corp.*, No. A91-083 CIV (D. Alaska filed Mar. 15, 1991). The suit sought "all costs or expenses incurred by the State of Alaska in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge." *Id.* at 10; *see also* Governments' Memorandum in Support of Agreement and Consent Decree at 3, *United States and Alaska v. Exxon Corp.*, Nos. A91-082 CIV & A91-083 CIV (D. Alaska filed Oct. 8, 1991) ("*Memorandum*").[7]

Exxon and the governments entered a consent decree to settle those suits. Exxon paid $900 million to help restore damaged natural resources. *See* Agreement and Consent Decree at 7-8, *United States and Alaska v. Exxon Corp.*, Nos. A91-082 CIV & A91-083 CIV (D. Alaska filed Oct. 9, 1991) ("*Consent Decree*"). Alaska entered the decree without the benefit of full discovery, which would have shed more light on the full extent of Exxon's culpability and the amount of damages the State's environment

[7] Alaska also brought suit in state court seeking, *inter alia*, punitive damages for harm to those natural resource and environmental interests. Alaska dismissed that suit as part of the global settlement. Although Alaska compromised *its* punitive damages claim to achieve the federal settlements, that choice had no effect on *citizens'* punitive damages claims.

and natural resources suffered. Instead, the governments chose to end the litigation to ensure that "the restoration of Prince William Sound . . . [would] not await years of legal battles" (JA 55-56) and prove to be too late. *See Memorandum* at 21.

The State left recovery and punishment for non-environmental harms to the private litigation. "The Exxon agreement d[id] not purport to settle any private claims." App., *infra*, 3a. Indeed, several aspects of the settlement were specifically designed to preserve and enhance the ability of private parties to bring their own suits. As the governments made clear in a letter to native Alaskan plaintiffs, the *Consent Decree* and a related settlement expressly did not "impair, diminish or compromise the rights of Alaska Native[s] . . . to bring any private claims for injuries resulting from the oil spill." *Id.* at 4a; *see Consent Decree* at 15-16.

Alaska also reached an agreement "to give the private plaintiffs" in this case "access to the scientific information gathered by the Governments in their ongoing natural resource damage assessment." *Memorandum* at 9. As Alaska argued in urging approval of the *Consent Decree*, that action was intended "to protect third party interests" (*id.* at 32) and to "clear the way for more expeditious resolution" of the private claims (*id.* at 9).

These measures were necessary to quell the public outcry that arose when news of the initial settlement broke in March 1991. Indeed, the original agreement's failure to grant the private plaintiffs access to government scientific data "was one reason the legislature rejected" the original agreement. George Frost, *2nd Spill Settlement Looks Like the 1st; Exxon*

Agrees to $125 Million Criminal Fine for 1989 Oil Spill, Anchorage Daily News, Oct. 1, 1991, at A1.

SUMMARY OF ARGUMENT

I. The punitive damages award in this case is consistent with maritime law and policy.

A. The maritime law of punitive damages has preserved all three of its traditional purposes – punishment, deterrence, and, in appropriate cases, compensation. Historically, punitive damages were available when particularly outrageous conduct – on land or at sea – gave rise to injuries that were not compensable under the existing tort law. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001). As civil law has expanded the range of wrongs for which tort victims may recover compensatory damages, however, maritime law has retained its traditional restrictions on consequential economic and other damages. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Unlike in land-based cases, then, the award in this case can be justified in part to fill the gaps left by the numerous compensatory damages claims that plaintiffs could not recover solely because the reckless conduct occurred at sea.

B. Maritime law also recognizes that shipowners may be liable for punitive damages for the reckless acts of their masters at sea. Vicarious liability for negligence or recklessness is common throughout the general maritime law, and there is no reason why vicarious liability for punitive damages ought not to apply when a master's conduct is particularly reprehensible. This Court did not hold otherwise in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). At most, the Court suggested in dicta a rule consistent with other contemporaneous maritime cases – that

the owner had to be blameworthy in some respect to be liable for punitive damages. The modern managerial agent rule satisfies that requirement because ships' masters occupy positions of sufficient responsibility that they "represent[] the corporation." *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 114 (1893). The managerial agent rule – or even full vicarious liability – is the land-based common law norm, and there is no reason why modern seafaring corporations should be treated differently. Indeed, to the extent the states hold owners liable for their masters' egregious conduct in inland or territorial waters, uniformity favors the managerial agent rule.

C. The size of the award here is supported by the evidence and satisfies the purposes of maritime punitive damages. Exxon's plea that its cleanup costs, compensatory payments, and civil and criminal settlements were punishment enough has no merit. Compensatory damages alone could not achieve optimal deterrence because they failed to account for the full costs of Exxon's wrongful conduct. Public and private punishments are complementary, and there is no reason to restrict the latter solely because of the former. Alaska never intended for its settlements with Exxon to preclude further punishment in the form of punitive damages for respondents' claims. Given that Exxon's criminal fine of $25 million was the only amount devoted exclusively to punishment, the jury acted within its discretion in deciding that Exxon's previous payments to clean up the spill or to remediate natural resource damages were not enough to punish and deter. Exxon has not articulated any coherent rationale for imposing other limits on the size of the award. The award therefore should stand.

II. The Clean Water Act ("CWA") does not preclude this punitive damages award. This case presents neither of the two circumstances in which statutory enactments trump the ordinary presumption that all available remedies accompany an established cause of action.

First, the CWA does not preempt the private suits for damages against oil spillers. Unlike the nuisance actions that the Court held preempted in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), this action turns solely on Exxon's reckless conduct and does not require a court to determine whether the CWA's effluent standards are inadequate.

Second, unlike the statutes at issue in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), there is no indication that Congress intended the CWA to prescribe a comprehensive recovery regime for maritime torts that involved spilled oil. Congressional imposition of civil punishments cannot, without more, preclude punitive damages in an expressly preserved private action.

ARGUMENT

I. THE DAMAGES AWARD HERE IS CONSISTENT WITH MARITIME LAW AND POLICY

A. Punitive Damages In Maritime Law Serve Compensatory, Deterrence, And Punishment Functions

The punitive damages award here vindicates not only the purposes of deterrence and punishment common to land-based and maritime torts, but also the classic maritime law purpose of providing additional, uncompensated remedies to persons harmed by Exxon's egregious misconduct. All of those rationales justify the award in this case.

1. As this Court has recognized, punitive damages at common law "frequently operated" not only to punish and deter malfeasance, but also "to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus.*, 532 U.S. at 437 n.11. In maritime cases in particular, punitive damages "filled th[e] gap[s]" left by the absence of compensation for "pain, humiliation, and other forms of intangible injury." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); *see* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 86 (1997). Early decisions often awarded additional damages as "punishment" *and* "compensation" in cases where "wanton injustice" resulted in otherwise uncompensable harms like "mental sufferings." *Chamberlain v. Chandler*, 5 F. Cas. 413, 414-15 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 2,575); *see also Ralston v. The State Rights*, 20 F. Cas. 201, 209-10

(D.C.E.D. Pa. 1836) (No. 11,540); Robertson, 28 J. Mar. L. & Com. at 88-95.

Unlike modern civil tort law, maritime law still precludes compensatory damages for many common types of harm. The rule in *Robins Dry Dock* limited the scope of compensatory damages in maritime cases. *See* 275 U.S. at 308-09. That rule has "stood against a sea of change in the tort law," *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc), and to this day precludes recovery for "purely economic losses arising from a tort, but unaccompanied by physical injury." *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 625 (1st Cir. 1994). The same rule applies to many claims of emotional distress. *See*, *e.g.*, *Gaston v. Flowers Transp.*, 866 F.2d 816, 820-21 (5th Cir. 1989). And recovery for loss of society or consortium is limited, at best. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-16, at 242-43 (4th ed. 2004).

Because the maritime law maintains anachronistic views about compensatory remedies for harms now commonly perceived to warrant them in the land-based civil law realm, maritime punitive damages continue to serve an important role in "fill[ing] th[e] gap[s]" (*Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting)) for uncompensated "intangible injuries" and other harms (*Cooper Indus.*, 532 U.S. at 437 n.11). Of course, maritime punitive damages are reserved only for conduct that is the most "wanton" (*The Yankee v. Gallagher*, 30 F. Cas. 781, 784 (C.C.N.D. Cal. 1859) (No. 18,124)) and "reckless" (*CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995)). But once authorized by a tortfeasor's reckless acts, punitive damages may be justified – in part – as additional compensation for those egregious wrongs.

2. Following the prevailing maritime law compensatory damages principles, the district court barred many of the plaintiffs' compensatory damages claims. Commercial fishermen could not recover for price diminution in fisheries that were not closed altogether or for the lost value of their permits and vessels, absent a sale. *See* JA 118-26, 127-31. Non-fishing businesses in the City of Cordova that "constitute[d] the entire econom[y] of [the] coastal communit[y]" (JA 142) could not recover for their economic losses unless oil physically damaged their property. *See* JA 144. Owners of unoiled property, the value of which also plummeted, were denied compensation. *See* JA 1368-75. Native Alaskans could not recover compensation for the damage done to their culture or subsistence way of life. *See* JA 149-61. And no plaintiff could recover compensation for the profound emotional distress and dramatic decline in quality of life that the spill caused. *See* JA 1384-90.

It would therefore be inappropriate for this Court to view the entire $2.5 billion punitive damages award in this case as serving solely the "State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). Based on this record, a substantial portion of the punitive damages award here may be justified as additional compensation for Exxon's wanton conduct that caused vast harms to the plaintiffs – harms for which Exxon would have had to pay damages if the oil spill had occurred on land.

B. Maritime Law Holds Employers Liable For Punitive Damages For The Reckless Acts Of Their Managerial Agents

Numerous maritime law principles support the imposition of punitive damages upon shipowners for the reckless acts of masters.[8]

1. Vicarious liability is a well-established and frequently applied principle of maritime law. As this Court stated more than a century ago, it is "elementary" that, "under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior*." *Workman v. Mayor of New York*, 179 U.S. 552, 565 (1900).

Today, shipowners are responsible for a wide variety of reckless or negligent acts undertaken by the masters in their employ. Seamen may recover against shipowners for the negligent conduct of a master (or any other crew member) under both statutory and general maritime law. The Jones Act, 46 U.S.C. § 30104, allows an injured seaman to bring a negligence action against his employer, including for the negligence of fellow employees like masters. *See De Zon v. American President Lines*, 318 U.S. 660, 665-69 (1943). Similarly, the doctrine of unseaworthiness draws no distinction "between the ship's equipment, on the one hand, and its personnel, on the other," *Waldron v. Moore-McCormack Lines, Inc.*,

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[8] For the reasons stated in respondents' brief (at 36-39), Exxon was independently reckless, and the jury was adequately instructed on that independent ground for imposing punitive damages.

386 U.S. 724, 726 (1967), and holds owners liable for negligent orders of the crew, *see id.* at 728.

Cruise lines have long been liable for the negligent acts of their crew that result in injury to passengers. *See*, *e.g.*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 904-05 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 548 (2005). When a third party is injured as a result of negligent pilotage of a vessel, the shipowner is vicariously liable if the pilot was an employee, or even if the pilot was an independent contractor that the owner voluntarily took aboard. *See* 2 Schoenbaum § 13-6, at 80 & n.1. Vicarious liability is thus "well ingrained in the general maritime law." *Stoot v. D & D Catering Serv., Inc.*, 807 F.2d 1197, 1199 (5th Cir. 1987).

Given the other remedies imposed against shipowners who are vicariously liable for the wrongful acts of their masters, there is no basis for excluding punitive damages in cases of egregious conduct, particularly in light of the compensatory role that punitive damages continue to play in maritime cases and the "traditional presumption" that courts may grant "all appropriate relief" when a party has a right of action. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992); *see Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

2. Maritime law itself has long acknowledged that a shipowner can be held vicariously liable for punitive damages. This Court first acknowledged the possibility of such liability in *The Amiable Nancy*. In that case, the Court stated in dicta – the plaintiff not having sought punitive damages – that "vindictive damages" would not be available because the

shipowner was "innocent of the demerit of th[e] transaction, having neither directed it, nor countenanced it, nor participated in it *in the slightest degree*." 16 U.S. at 559 (emphasis added). Exxon is mistaken when it argues that *The Amiable Nancy* established a rule that "[p]unitive damages may not be awarded against a shipowner based solely on the conduct of a ship's master." Br. 18. Not only is the quoted passage dicta, but it is also specific to policies concerning *privateers* – state-employed private vessels charged with damaging other nations' ships. *See* 16 U.S. at 559. The case says nothing about a corporation or a managerial agent.

The better interpretation of *The Amiable Nancy* is that it required "*some* level of culpability for the misconduct" on the part of the owner. *CEH,* 70 F.3d at 705. Many 19th-century decisions following *The Amiable Nancy* allowed full vicarious liability, thus limiting this Court's dicta to its facts. *See*, *e.g.*, *The City of Carlisle*, 39 F. 807, 817 (D. Or. 1889); Robertson, 28 J. Mar. L. & Com. at 121 & n.269. Some imposed vicarious liability for punitive damages where there was some showing that the owner was blameworthy. In *Ralston v. The State Rights*, for example, the court granted "exemplary" damages against an owner who was "too inattentive to the manner in which [the master] was using the authority [the owner] had committed to him." 20 F. Cas. at 210.[9]

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[9] Exxon mistakenly claims that, in *Ralston*, the court "refused vicarious punitive damages." Br. 19. *Ralston* allowed vicarious liability for "exemplary" damages for the owner's "inattent[ion]," but refused further "vindictive" damages. 20 F. Cas. at 210. Although these terms had somewhat different

When this Court returned to the subject in *Lake Shore*, a non-maritime case, it stated that punitive damages "can only be awarded against one who has participated in the offense." 147 U.S. at 107.[10] But the Court did not define the requisite level of "participat[ion]." As the First Circuit more recently observed, those cases indicate that punitive damages may properly be awarded against a corporate defendant for the vicarious acts of its agents when, although "not guilty of *direct* participation, authorization or ratification in his agent's egregious conduct, nevertheless *shares blame* for the wrongdoing." *CEH*, 70 F.3d at 705 (emphases added).

The jury in this case was authorized to award punitive damages against Exxon for the "reckless act" of a "managerial officer" in "the course and scope of the performance of his duties." Pet. App. 301a. That managerial agent rule is consistent with the maritime decisions described above.

A ship's master is no ordinary agent. The record establishes that Hazelwood was not only captain of the *Exxon Valdez*, but effectively the head of a business unit of Exxon Shipping Corp. *See* Supp. JA 65sa, 285sa-290sa. Exxon's expert at trial described the captain of a supertanker as "a CEO." Tr. 3866. Hazelwood had as much responsibility as the "president and general manager, or . . . vice president," that *Lake Shore* believed "may well be treated as so far representing the corporation" to justify awarding

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meanings at the time, both were a species of "punitive" damages. *See Haslip*, 499 U.S. at 16.

[10] *But cf. American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982) (acknowledging that *Lake Shore* "may have departed from the trend of late 19th century decisions").

vicarious punitive damages for his wrongful acts. 147 U.S. at 114. In such circumstances, the corporation shares the blame for the acts of those it sees fit to employ as managers. And punitive damages deter "the employment of unfit persons for important positions." Restatement (Second) of Torts § 909 cmt. b (1979); *see also Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1386-87 (9th Cir. 1985); *The City of Carlisle*, 39 F. at 817.

Exxon cites (at 20) two appellate court decisions reaching a different result, but neither is persuasive when applied to the facts of this case. In *P & E Boat Rentals, Inc. v. Ennia General Insurance Co.*, 872 F.2d 642 (5th Cir. 1989), the court held only that vicarious liability for punitive damages does not apply "for the wrongful acts of the simple agent or *lower echelon employee*." *Id.* at 652 (emphasis added). And, in *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), the court found that the master's conduct was not reckless. *Id.* at 1147.

The court in *Fuhrman* (407 F.2d at 1147) and Exxon here (at 24) suggest that the unique position of corporate ship captains, away at sea beyond the supposed reach of their employers, makes it unfair to hold corporations responsible for their decisions. However true that may have been in the 19th century, modern technology has rendered the concern moot and has eliminated most practical distinctions between land-based and seafaring corporations. *See Protectus Alpha*, 767 F.2d at 1386; Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 10-24, at 884, 894 (2d ed. 1975).

Indeed, Hazelwood was in constant contact with his superiors at Exxon. He used the ship's satellite

phone to confer with Exxon officials in San Francisco about whether to attempt to dislodge the ship. *See* JA 354-55, 872-76. At all relevant times, Exxon was able to communicate with and monitor Hazelwood and the ship. *See* Supp. JA 249sa.

Finally, the common law also supports the punitive damages award here. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996) ("courts sitting in admiralty may draw guidance from . . . the extensive body of state [tort] law"). In 2003, Alaska adopted the managerial agent rule, *see* Alaska Stat. § 09.17.020(k), which the Alaska Supreme Court had previously described as a modern "complicity rule." *Laidlaw Transit, Inc. v. Crouse*, 53 P.3d 1093, 1098 n.8 (Alaska 2002). Similarly, almost every state that allows punitive damages authorizes their award against a corporation for (at least) the reckless acts of a managerial agent. *See* 2 John C. Kircher & Christine M. Wiseman, *Punitive Damages Law & Practice* § 24:5 (2d ed. 2005). Many states go farther and allow punitive damages for the reckless acts of *any* employee; this Court has held it constitutional to do so. *See Haslip*, 499 U.S. at 12-15. The Restatements of Torts and Agency also follow the managerial agent rule. *See* Restatement (Third) of Agency § 7.03 cmt. e (2006); Restatement (Second) of Torts § 909(c).

3. Maritime law's traditional concern with uniformity weighs against excising the managerial agent rule from the general maritime law. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39 (1961). To the extent that state law may provide the rule of decision in maritime tort cases within inland or territorial waters, *see*, *e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 214-15 (1996), most coastal states either follow the managerial agent rule or

allow full vicarious liability for punitive damages. A shipowner therefore will be subject to uniform liability regardless of how far from shore a tort occurs.

Even if state law would not apply in inland or territorial waters – a decision the Court need not make in this case – Alaska has a deep and abiding interest in ensuring proper punishment and deterrence for companies operating off its shores. Given tidal patterns, reckless acts within federal maritime jurisdiction can have a devastating impact on coastal states. The Court should uphold a general maritime rule that is consistent with the considered judgments of most coastal states concerning the appropriate scope of liability for corporate wrongdoers.

C. The Punitive Damages Award Should Not Be Further Reduced As Excessive

1. Maritime law utilizes the same legal framework to review awards of punitive damages that this Court approved as a matter of due process in *Haslip*. *See Lake Shore*, 147 U.S. at 107. In both admiralty and civil cases, "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is *reasonable*." *Haslip*, 499 U.S. at 15 (emphasis added).

The amount of punitive damages "has been always left to the discretion of the jury." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852); *see Barry v. Edmunds*, 116 U.S. 550, 565 (1886). The jury is best suited to express the community's "moral condemnation" of conduct that is sufficiently odious to justify punitive damages. *Cooper Indus.*, 532 U.S. at 432; *see also Haslip*, 499 U.S. at 16-17 (citing early

cases); *BMW*, 517 U.S. at 600 (Scalia, J., dissenting) ("[P]unitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.").

The trial court reviews the jury's punitive damages award only to ensure that it is "reasonable in [its] amount and rational in light of [its] purpose" (*Haslip*, 499 U.S. at 21) and supported by "substantial evidence" (*Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994)). The appellate court's task is circumscribed further still. "If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse-of-discretion standard." *Cooper Indus.*, 532 U.S. at 433 (internal quotation marks omitted).

Early maritime courts reviewing punitive damages awards followed those procedures. *See*, *e.g.*, *The Yankee*, 30 F. Cas. at 785 (upholding award of punitive damages because no "injustice has been done in the assessment of damages by the district court"); *see also* Robertson, 28 J. Mar. L. & Com. at 99-108 (describing early cases). Modern cases are substantially in accord. *See*, *e.g.*, *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 464-65 (7th Cir. 2006).

2. Under those settled principles, Exxon's (and its *amici*'s) attempt to recast the factual record in its favor is inappropriate. "Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (internal quotation marks omitted); *see Exxon*, 517 U.S. at 840-41 (refusing, in an admiralty case, to reject "concurrent findings of fact by two courts below in the absence

of a very obvious and exceptional showing of error") (internal quotation marks omitted). The lower courts' conclusions on the sufficiency of the evidence – for example, that Hazelwood was drunk at the time of the accident, *see* Pet. App. 87a, 255a-257a – therefore should be affirmed.[11] *See id.* at 86a-90a (reviewing sufficiency of evidence).

3. The award of punitive damages in this case is justified by the facts and the purposes of punitive damages under the general maritime law. As an initial matter, the award must be understood in light of the traditional maritime purpose of providing additional compensation for emotional and consequential economic harms that result from especially reckless conduct and that might otherwise go uncompensated. *See supra* pp. 16-17. The plaintiff class members suffered significant economic and emotional harms for which they could not recover pursuant to the *Robins Dry Dock* rule. These harms were not compensable, but they were punishable. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (noting that "a higher ratio [of compensatory to punitive damages] might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine") (internal quotation marks and emphasis omitted).

Exxon's primary submission to the contrary is that the civil and criminal fines paid and cleanup costs incurred by Exxon were punishment and deterrence

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[11] *Amici* American Petroleum Institute *et al.* ("API") assert (at 2), without citation, that courts reviewing punitive damages awards ought to "independently evaluate" the evidence at trial. That assertion is directly contrary to *Cooper Industries* and has no basis in law.

enough. *See* Br. 47-50. But the jury also had before it substantial evidence to conclude otherwise.

First, Exxon's conduct was reprehensible. As this Court has noted, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. The court of appeals found that "Exxon knew Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound." Pet. App. 22a, 89a. Exxon's reckless conduct was all the worse because it was fully aware of the risks involved in transporting highly toxic oil across environmentally and economically fragile waters, and was recklessly indifferent in the manner in which it attempted to contain the spill.

Second, Exxon draws upon law and economics literature to suggest that "[t]he obligation to pay compensatory damages" provides "sufficient" deterrence. Br. 54; *see* API Br. 23-27. But that presumes compensatory damages are set optimally. That is plainly not the case in maritime law, which precludes a court from awarding compensatory damages for numerous classes of injuries. The sheer volume of uncompensated harms in this case means that compensatory damages alone could not force Exxon to internalize the full costs of its wrongdoing and achieve optimal deterrence.

In any event, although Exxon and its *amici* portray corporations as purely rational profit-maximizers, Exxon did not act rationally in this case to replace

Hazelwood with a sober captain "at a small cost when compared to the risk." Pet. App. 233a & n.11; *see id.* at 170a. Indeed, the oil industry's post-spill conduct demonstrates that it still is not taking low-cost measures to reduce the risk of oil spills, providing further evidence that economic incentives are not properly aligned merely by the potential cost of cleaning up after oil spills.

Third, Exxon's and its *amici*'s focus on deterrence also fails to appreciate that the "imposition of punitive damages is an expression of [the jury's] moral condemnation." *Cooper Indus.*, 532 U.S. at 432. Exxon's argument that criminal and civil penalties administered by the state occupy the field of punishment (*see* Br. 47-50, 51-52) denies this well-established role for civil juries. The civil and criminal justice systems are complementary, and punitive damages are allowed in a wide variety of circumstances where the tortfeasor may also be criminally liable. *See* Restatement (Second) of Torts § 908 cmt. a.

In particular, the civil and criminal settlements in this case were addressed only to environmental harms, a small subset of the enormous damage that Exxon caused. The settlement documents co-signed by Alaska and the United States expressed no intent to preclude punitive damages in this litigation. *See supra* pp. 11-12. As the district court stated, "[t]he criminal penalty did not have the all-inclusive nature of the mandatory punitive damages class and did not comprehend the enormity of the harm or number of people adversely [a]ffected by the spill." Pet. App. 242a-243a. The record, therefore, contained "substantial evidence" from which the jury could

conclude that "the criminal penalty alone did not sufficiently punish Exxon." *Id.* at 243a.

Fourth, the sums that Exxon already expended on cleanup and fines do not undermine the punitive damages award here. Exxon has paid only $25 million devoted exclusively to punishment. Exxon's other payments to the United States and Alaska were for environmental cleanup and restoration, a responsibility of any spiller. The jury could well have found, as the district court did, that those payments were inadequate to punish and deter Exxon fully. Similarly, Exxon's expenses for cleaning up Alaska's shoreline – a task Exxon performed poorly – were not punishment but the minimal obligation of a polluter to clean up its mess. And, although Exxon spent significant sums on the cleanup effort, its flawed response to the spill compounded rather than ameliorated the effects of its recklessness.

Finally, Exxon's other suggested limitations on the award have no merit. In particular, Exxon's argument that punitive damages should be limited to the amount of compensatory damages (*see* Br. 52-53) draws support only from dicta in *State Farm*, 538 U.S. at 425. Although some states have capped punitive damages at a certain ratio to compensatory damages, no state has enacted a one-to-one limit; more importantly, Exxon has not articulated any rationale for this Court to make such a legislative determination. Particularly in the maritime context, in which punitive damages also serve a compensatory role, a higher ratio of punitive to compensatory damages is appropriate.

II. THE CLEAN WATER ACT DOES NOT PRECLUDE THE PUNITIVE DAMAGES AWARD

If the Court reaches Exxon's belatedly asserted claim that the general maritime law must yield to the Clean Water Act ("CWA"),[12] it should reject that claim. This case presents neither of the circumstances in which this Court has found that statutory enactments preclude remedies normally available under maritime law: first, when the substantive cause of action interferes with and is effectively preempted by a legislative scheme, *see*, *e.g.*, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); and, second, when Congress has functionally codified the general maritime law and expressed an intent to preclude certain remedies, *see*, *e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

A. The Clean Water Act Does Not Preempt Private Suits For Damages Against Spillers

In the Clean Water Act in effect at the time of the *Exxon Valdez* oil spill, Congress put in place an administrative scheme to penalize "[t]he discharge of oil . . . into or upon the navigable waters of the United States . . . in such quantities" as determined by the President to be "harmful to the public health or welfare." 33 U.S.C. § 1321(b)(3), (4) (1988). Violators who discharge more oil than is permissible under the CWA are subject to civil fines, *see id.* § 1321(b)(6), and are required to reimburse the government for

[12] *See* Resp. Br. 39-44 (arguing waiver of Exxon's CWA argument).

any costs the government might incur in cleaning up an oil spill, *see id.* § 1321(f). The CWA expressly preserves private remedies for damages resulting from oil spills. *See id.* § 1321(*o*).

Exxon does not contend that the CWA preempts private maritime tort actions sounding in negligence or recklessness. Nor could it. By its terms, the CWA's savings clause makes clear that it does not "affect or modify in any way the obligations" of a shipowner "under any provision of law for damages to . . . property" as a result of an oil spill. *Id.* § 1321(*o*)(1).

The plaintiffs' action here also does not conflict with the CWA's administrative scheme, because a determination that Exxon owes compensatory and punitive damages does nothing to interfere with federal oil pollution enforcement. Exxon's citations to *City of Milwaukee* and *Sea Clammers* are therefore beside the point. In those cases, the plaintiffs sought relief on a nuisance theory, claiming that a level of pollution authorized in the CWA nonetheless constituted a common law nuisance. *See City of Milwaukee*, 451 U.S. at 310; *Sea Clammers*, 453 U.S at 4. Because "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the [CWA]," *City of Milwaukee*, 451 U.S. at 320, the Court held that "the federal common law of nuisance in the area of water pollution [was] entirely pre-empted" by the CWA. *Sea Clammers*, 453 U.S. at 21-22. This case – sounding in reckless disregard rather than nuisance – does not call upon any court to alter the standards of conduct set forth in the CWA.

B. The Clean Water Act Does Not Codify The Maritime Common Law Of Negligence For Oil Spills

Congress also has the power to enact legislation that replaces the general maritime law with a "comprehensive tort recovery regime to be uniformly applied." *Yamaha Motor*, 516 U.S. at 215. Such legislation functionally codifies (and modifies) the previously existing maritime law cause of action or creates an entirely new cause of action. In either case, the statute "announces Congress' considered judgment" on the relevant elements and remedies of the cause of action, such as "the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Mobil Oil*, 436 U.S. at 625. The CWA is not such a statute.

The CWA is silent about private actions for recklessness. Instead, it addresses only the obligations of polluters *to the government* for violating the statute. It does not detail the elements of a private maritime tort claim or any other attribute of that potential action. Congress, therefore, did not in the CWA displace the common law in any comprehensive fashion.

In fact, § 1321(*o*)'s savings clause suggests just the opposite. That clause preserves "the obligations of any [ship] owner . . . under *any provision of law* for damages to . . . property." 33 U.S.C. § 1321(*o*) (emphasis added). Exxon argues (at 37-38) that this provision applies only to compensatory damages because punitive damages are not "obligations" or "damages to . . . property." Regardless of whether a plaintiff has a "right" to a punitive damages award, the defendant has an "obligation" to pay it once awarded as authorized by the law underlying the claim. The general maritime law authorizes punitive

damages for torts that involve damage to property. *See supra* pp. 16-17.

This case, therefore, is nothing like those that Exxon cites in which this Court has found that Congress precluded certain types of damages. Whereas the CWA did not create the plaintiffs' right of action here, the Court held in *Mobil Oil* that the Death on the High Seas Act ("DOHSA") "creat[ed]" the cause of action "in admiralty for wrongful deaths." 436 U.S. at 620. The Court then found that the statute's authorization of damages only for "pecuniary" losses indicated Congress's intent to preclude non-pecuniary damages. *Id.* at 625-26. In *Miles*, the Court held that the Jones Act's preclusion of damages for loss of society resulting from a seaman's negligent death evinced Congress's intent similarly to preclude such damages in a strict liability regime. *See* 498 U.S. at 32-33. And, in *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998), the Court turned back an effort to "expand the class of beneficiaries" under DOHSA. *Id.* at 123. A congressional intent to punish does not preclude further private law punishments absent an express indication to the contrary. The CWA contains no such limitations on private remedies.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

TALIS J. COLBERG
Attorney General
CRAIG J. TILLERY
Deputy Attorney General
JOANNE GRACE
Chief Assistant Attorney General
STATE OF ALASKA DEPARTMENT OF LAW
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-2133

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
MICHAEL J. BURSTEIN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amicus State of Alaska

January 29, 2008

APPENDIX

[Seal omitted] **U.S. Department of Justice**

Environment and Natural
Resources Division

RJ:mlf
90-5-1-1-3343

Washington, D.C. 20530

October 31, 1991

Michael D. Hausfeld
Gary E. Mason
COHEN, MILSTEIN, HAUSFELD, & TOLL
1401 New York Avenue, N.W.
Washington D.C. 20005

Lloyd Benton Miller
SONOSKY, CHAMBERS, SACHSE, MILLER
& MUNSON
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501

Samuel J. Fortier
FORTIER & MIKKO, P.C.
2552 Denali Street, Suite 604
Anchorage, Alaska 99503

Kenneth F. McCallion
GOODKIND, LABATON & RUDOFF
122 E. 42nd St.
New York, New York 10168

RE: United States v. Exxon Corp. et al., State of Alaska v. Exxon Corp. et al., Chenega Bay et al. v. United States and State of Alaska

Dear Counsel:

This letter is intended to resolve any confusion or questions you might have regarding certain provisions of the Agreement and Consent Decree settling United States v. Exxon Corp. et al., Civ. Action No. A91-082 CIV; and State of Alaska v. Exxon Corp. et al., Civ. Action No. A91-083 CIV ("Exxon agreement"), entered into between the United States, the State of Alaska ("Governments") and Exxon, and approved on October 8, 1991, and the proposed Consent Decree and Stipulation of Dismissal settling Chenega Bay et al. v. United States and State of Alaska, Case No. A91-454 CIV ("Chenega Bay agreement") between the Governments and the proposed settlement classes of Native entities ("Native Interests") pending in the United States District Court for the District of Alaska. Neither of these settlement agreements impairs or diminishes private claims available to Alaska Native Villages or Corporations for injuries resulting from the Exxon Valdez oil spill, including those private claims based upon injuries to publicly owned or controlled natural resources.

In the proposed Chenega Bay agreement, the Native Interests and the Governments agreed to a division of claims which distinguishes the Governments' claims on behalf of the public for natural resource damages from the Native Interests' private damage claims for private harms resulting from the oil spill. The term "natural resources" is defined specifically in the Chenega Bay agreement to mean resources "belonging to, managed by, held in trust by, appertaining to or otherwise controlled" by either or both Governments, and "natural resource damages" is defined to mean any compensatory or remedial relief recoverable by the Governments in

their capacity as trustees on behalf of the public for injury to, destruction of or loss of natural resources. (Chenega Bay agreement, pars. 4(d) and (f)). Thus, the Chenega Bay agreement specifically preserves the rights of the Native Interests to make any additional claims not encompassed by the natural resource damage claims brought by the Governments in their capacity as trustees, i.e., any private claims.

The Exxon agreement settles natural resources damage claims brought by the Government in their capacity as trustees on behalf of the public, and defines those claims in precisely the same way as the Governments' natural resource damage claims are defined in the Chenega Bay agreement. (See Exxon agreement, pars. 6(c) and (d)). The Exxon agreement does not purport to settle any private claims. In settling with Exxon, the Governments preserved the rights of the Native Interests to bring any private claims for injuries resulting from the oil spill. This is reflected in the language of paragraphs 13(c) and (d) of the Exxon agreement, which corresponds closely to the language in paragraphs 7 and 8 of the Chenega Bay agreement. There is no substantive difference between the private claims preserved in the Chenega Bay agreement and the private claims preserved in the Exxon agreement.

Any difference between language appearing in the Exxon agreement and that of the Chenega Bay agreement should not be construed as limiting the ability of Native Interests to bring any private claims resulting from the oil spill. Indeed, the Exxon agreement could in no way compromise the rights of the Native Interests to bring any available private claims for injuries resulting from the oil spill, even if paragraphs 13(c) and (d) were omitted. The inclusion

of paragraphs 13(c) and (d) in the Exxon agreement merely emphasizes the fact that the Exxon agreement does not impair the Native Interests' rights to bring private claims. Thus, the language of paragraphs 13(c) and (d) neither creates nor limits the private claims that may be available to the Native Interests, and any difference between that language and the language of paragraphs 7 and 8 of the Chenega Bay agreement can have no effect on the Native Interests' rights.

In sum, the Exxon agreement settles the Governments' natural resource damage claims. The Exxon agreement does not impair, diminish or compromise the rights of Alaska Native Villages or Corporations to bring any private claims for injuries resulting from the oil spill.

Sincerely,

FOR THE UNITED STATES:

/s/ BARRY M. HARTMAN

Barry M. Hartman
Acting Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ STUART M. GERSON

Stuart M. Gerson
Assistant Attorney General
Civil Division
U.S. Department of Justice

FOR THE STATE OF ALASKA:

/s/ CHARLES E. COLE

Charles E. Cole
Attorney General
State of Alaska

cc: Edward J. Lynch
Patrick Lynch
John F. Clough III
James F. Neal
Robert C. Bundy
John R. Rebman