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 Courts of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND PUBLIC JUSTICE, P.C. IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice ("AAJ") and Public Justice, P.C. respectfully submit this brief as *amici curiae*. The parties have filed letters of consent to the filing of amicus briefs.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ, through its Admiralty Law Section, has championed the remedies that courts have traditionally made available under general maritime law. Those remedies would be undermined by this Court's adoption of Petitioners' proposed new rules to govern punitive damages in maritime cases.

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating in the federal and state courts, Public Justice prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. In 1989, Public Justice, on behalf of a coalition of environmental groups, sued Petitioners over the environmental harms caused by

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than Amici Curiae, their members, or counsel make a monetary contribution to its preparation.

the oil spill at issue in this case. Through its work, Public Justice helped to document the full effects of the disastrous spill and prompted a major increase in the government's recovery for environmental damage. Although Public Justice does not have any role or monetary interest in the outcome of this case, it remains committed to ensuring that Exxon is adequately punished for the disastrous impact of its wrongful conduct.

SUMMARY OF THE ARGUMENT

1. Exxon's second Question Presented asks whether the criminal and civil penalties in the Clean Water Act preclude an award of punitive damages in this maritime tort action. That question has long been settled.

a. Every state that permits punitive damages, permits them for misconduct that may also result in criminal or civil penalties. Federal courts, including this Court, have indicated that punitive damages may be imposed in maritime actions for reckless or willful wrongdoing that is also subject to criminal sanction. Indeed, this Court looks to the criminal or civil penalties applicable to a defendant's misconduct as an indicium of the reprehensibility of the conduct.

Criminal and civil penalties further the same purposes of punishment and deterrence, but they do not overlap entirely with punitive damages. Criminal and civil fines paid to the government are designed to punish a harm that is separate from the harm punished by awarding punitive damages awarded to the victim of misconduct. Moreover, penalties established in the abstract by the legislature may not provide sufficient punishment or deterrence in a

particular case. For that reason, punitive damages have long been viewed as a needed supplement to the criminal law. That rationale is applicable in this case, where statutory penalties were plainly insufficient punishment and deterrence for widespread destruction of environmental resources by America's largest and most profitable publicly traded corporation.

b. Exxon, however, urges an exception for oil spill cases such as this one. Exxon proposes that punitive damages under general maritime law be barred whenever Congress has addressed the same subject in a statute, here, the Clean Water Act. The intent of Congress in enacting the statute, in Exxon's view, is irrelevant.

The only support Exxon has found for its "same subject" rule consists of two decisions by this Court which do not deal with maritime law, but with the specialized application of federal common law to resolve interstate disputes. In that context, federal common law is interstitial; it necessarily gives way whenever Congress provides statutory law governing the dispute at hand.

On the other hand, development of federal common law outside that context – and general maritime law in particular – more closely resembles a shared venture between Congress and the judicial branch. This Court has on occasion supplemented statutory remedies with additional judge-made remedies. For example, the Court has recognized new rights of action for wrongful death under general maritime law, although Congress has addressed the same subject in legislation. The interstate common law decisions supporting Exxon's

"same subject" rule are simply inapposite to this case.

Where a remedy is provided both by a statutory right of action and a judge-made right of action, as in maritime wrongful death, this Court has limited claimants to the types of damages "affirmatively and specifically" enacted by Congress. These decisions are also inapposite to this case. The Clean Water Act provides no private cause of action at all for damages caused by oil spills. In such circumstances, this Court has repeatedly held that the damages traditionally recoverable under general maritime law remain available.

c. Whether punitive damages that have generally been recoverable in maritime tort actions have been displaced by the Clean Water Act turns on the intent of Congress. Exxon bears the burden of proving that Congress so intended. On this question, express provisions of the statute which explicitly preserve common law remedies are conclusive.

33 U.S.C. § 1365(e) of the Act states that the section allowing citizens to sue to enforce pollution standards, which is the only private action provided by the Act, does not restrict "any right" that any person may have "to seek any other relief." Any uncertainty that this provision preserves the remedy for plaintiffs in this case is clarified by the legislative history.

In addition, 33 U.S.C. §1321(o)(1) provides that enforcement of pollution standards does not affect or modify "the obligations of any owner or operator of any vessel, . . . under *any provision of law for damages*" caused by a discharge of oil.

Despite these statutory provisions explicitly preserving Respondents' remedies in this case, Exxon insists that the Clean Water Act is "comprehensive" legislation that leaves no room for non-statutory remedies. Even accepting that the Act provides a comprehensive regime for setting pollution standards and authorizing the government to recoup its cleanup costs, the statute makes no provision for – and does not even address – the recovery by private parties for harm caused by oil spills. This Court has interpreted Congress's silence on private causes of action as legislative intent that traditional judicial remedies remain available.

Finally, Exxon asserts that awarding punitive damages for reckless misconduct would upset the balance struck by Congress in the Clean Water Act between protecting the environment and protecting vessel owners. Implications of intent, of course, do not control over the express provisions of the legislation. Moreover, the balance Congress struck is far different than the one Exxon describes. As the legislative history makes clear, Congress balanced competing interests by imposing strict liability for cleanup costs on vessel owners up to a limit that was insurable. But Congress specifically imposed unlimited liability on vessel owners who are guilty of reckless or willful conduct resulting in oil spills.

2. In response to the third Question Presented, Amici submit that the excessiveness review of punitive damages under general maritime law is no more restrictive than the standards established by this Court for reviewing such awards under due process.

Although this Court has not had occasion to address standards of excessiveness in maritime actions, the traditional course followed by the Court

has not been to concoct new principles that have never applied to punitive damages before. Instead, the Court has looked to familiar applicable common-law standards.

The longstanding recognition that punitive damages are recoverable in maritime tort actions is entitled to great respect. Exxon certainly has offered no persuasive reason to abandon the common-law approach that this Court has repeatedly approved.

That approach depends upon the wisdom and common sense of juries to tailor an award of punitive damages to the particular facts and circumstances of an individual case. Although this Court has modified this emphasis on the jury's prerogative, it has not abandoned the precept that an individualized assessment of the misconduct must remain the touchstone for a proper punitive damage award.

Exxon, however, proposes standards that have no anchor in the common law. Instead, it seeks to measure the appropriate size of an award on the basis of one-size-fits-all standards based on ill-fitting factors relating to congressional preference, compensatory damages, illicit profits from the misconduct, and prohibiting consideration of a defendant's wealth.

This Court has rejected such arbitrary approaches in favor of a proportionality test that looks to the enormity of the harm, including harm that may not be quantified and reflected in the compensatory damages award.

The careful repeated analysis of the courts below, faithful to a substantial factual record and to this Court's refined due process analysis of punitive damages, has sustained an award in this case that

fully comports with the principles of maritime law, common law and constitutional law.

ARGUMENT

I. NEITHER THE EXISTENCE OF STATUTORY CRIMINAL AND CIVIL PENALTIES FOR CAUSING THE EXXON VALDEZ OIL SPILL, NOR EXXON'S CONVICTION AND PAYMENT OF A CRIMINAL FINE, PRECLUDES AN AWARD OF PUNITIVE DAMAGES IN THIS MARITIME TORT ACTION.

Plaintiffs are a class of 32,677 commercial and subsistence fishermen and other individuals and businesses whose lives and livelihoods were disrupted, some permanently, when oil spilled from the Exxon Valdez and spoiled a long stretch of Alaska's coast. The harm to fishing resources resulted not only in economic loss to commercial fishermen and others, but also widespread depression and psychological disorder. Native Alaskans for whom subsistence fishing is a way of life, suffered similar serious harms. Pet. App. 151a, 160a-163a.

Petitioners ["Exxon"] were prosecuted for unlawful discharge of a pollutant under the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1), and other criminal offenses. Upon a plea of guilty, Exxon paid a criminal fine of $25 million and was ordered to pay $100 million as restitution. In addition, Exxon agreed to repay the state of Alaska and the United States approximately $900 million over ten years in clean-up and restoration costs. The consent decrees provided that the payments were compensatory and remedial, rather than punitive, and that "nothing in

this agreement, . . . is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." Pet. App. 71a.

Exxon's second Question Presented states:

> 2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law expand the penalties Congress provided by adding a punitive damages remedy?

This question has long been answered and settled.

A. Criminal and Civil Penalties Do Not Preclude Punitive Damages in a Private Civil Action Arising Out of the Same Misconduct.

1. It is well settled that the imposition of criminal fines or civil penalties does not preclude an award of punitive damages.

Punitive damages in private civil actions serve similar purposes of punishment and deterrence as criminal penalties. Nevertheless, every state that permits punitive damages allows them in civil actions to punish and deter conduct that also violates a criminal law. Even if defendant has been convicted and has paid a criminal fine, the universal rule is:

> The same act which exposes a defendant to civil liability and possibly to punitive damages may also expose the defendant to criminal liability.

James D. Ghiardi and John J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE § 5.32 (1989); *see also*

Linda Schlueter & Kenneth Redden, PUNITIVE DAMAGES § 5.4(E) (2d ed. 1989) (similar) (citing authorities).[2] *See also* Restatement (Second) of Torts § 908, cmt. a:

> The awarding of punitive damages is not prevented by a prior criminal conviction for the same act, which is relevant only to the amount of the award; nor does the granting of punitive damages prevent a subsequent criminal conviction.

This Court should not adopt, in the exercise of its admiralty powers, a rule "that is disfavored by a clear majority of the States." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 36 (1990).[3]

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[2] The sole exception, for a time, was Indiana. *Taber v. Hutson,* 5 Ind. 322 (1854), held that punitive damages for conduct that is subject to criminal punishment would amount to double jeopardy. This Court has since made clear that "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties" and do not "preclude[] a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment." *United States v. Halper,* 490 U.S. 435, 451 (1989). The Indiana legislature itself abolished the bar on punitive damages for criminal violations. *See Cheatham v. Pohle,* 789 N.E.2d 467, 472 n.2 (Ind. 2003).

[3] Many of the punitive damage awards reviewed by this Court have involved criminal misconduct. E.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (fraud); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 262 (1984) (criminal violations of Atomic Energy Act); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (criminal libel). Indeed, the Court has deemed statutory penalties relevant, not as a bar to punitive damages, but as an

This Court has similarly rejected the argument advanced by Exxon that statutory civil penalties preclude a punitive damages award. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court upheld an award of punitive damages under state law for harm caused by plutonium contamination at a federally licensed nuclear facility.

> The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. . . . However, the award of punitive damages in the present case does not conflict with that scheme.

Id. at 257. The Court found it not "inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards," including recovery of punitive damages. *Id.* at 258.

No different rule obtains in maritime cases. In *The Amiable Nancy,* 16 U.S. (3 Wheat.) 546, 558 (1818), this Court stated that the vessel's crew, which robbed and plundered a neutral vessel at sea, could be held liable under maritime law "in the shape of exemplary damages, the proper punishment

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indicium of the reprehensibility of the defendant's misconduct. *BMW of North America v. Gore,* 517 U.S. 559, 583 (1996). *See also State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 428 (2003) ("The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action.").

which belongs to such lawless misconduct." 16 U.S. at 558-59. The vessel owner, if involved, might also be subject to punitive damages. *Id.*

Historically, federal courts have imposed punitive damages in maritime actions for conduct punishable under the criminal law. *See, e.g., Ralston v. The States Rights*, 20 F. Cas. 201, 209 (E.D. Pa. 1836) (No. 11,540) (defendants' crew deliberately rammed plaintiff's boat); *McGuire v. The Golden Gate,* 16 F. Cas. 141, 143 (C.C.N.D. Cal. 1856) (No. 8,815) (assault on passengers); *Gallagher v. The Yankee*, 9 F. Cas. 1091 (N.D. Cal.) (No. 5,196), *aff'd,* 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (No. 18,124). (kidnapping). More recently, *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), upheld punitive damages awarded a vessel owner and captain for willful destruction of plaintiff's lobster traps. *See also* David W. Robertson, *Punitive Damages In American Maritime Law*, 28 J. of Mar. L. & Comm. 73 (1997) (compiling and discussing federal cases awarding or indicating the availability of punitive damages under general maritime law).

2. The rationale for the general rule, that punitive damages supplement the criminal law, is applicable in this case.

The general rule is based largely on the recognition that "punitive damages are punishment, not for the improper act in the abstract, or the wrong that the defendant caused to society, but for the legal wrong to the individual plaintiff." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs,* 87 Minn. L. Rev. 583, 622 (2003). The Iowa Supreme Court, for example, concluded that under "the clear weight of authority" punitive damages are

imposed "as a punishment for the wrong done to the individual" and "have no necessary relation to the penalty incurred for the wrong done to the public." *Hendrickson v. Kingsbury,* 21 Iowa 379, 391 (1866).

The Ninth Circuit correctly relied upon this same reasoning, stating that the criminal penalty imposed on Exxon "is for damage to public resources, enforceable by the United States," which is distinct from injury to private interests, such as the losses inflicted on commercial fishermen. Pet. App. 77a. It is well settled, for example, that the criminal fine paid by a driver for driving under the influence does not address the harm addressed by awarding punitive damages to the person injured by the drunk driver. Annot., "Intoxication of Automobile Driver as Basis for Awarding Punitive Damages," 33 A.L.R.5th 303, 345 (1995). *See also Philip Morris v. Williams*, 127 S. Ct. 1057, 1063-64 (2007) (punitive damages punish plaintiff's individual harm, not harm to non-parties or to the general public).

In addition, the availability of punitive damages enlists the involvement of civil juries in the enforcement of the law and the tailoring of punishment to fit the offense. This Court has stated:

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the rights of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in *or not sufficiently punished by the criminal law*.

Haslip, *supra*, at 8 n.4 (emphasis added).

Legislatures must prescribe criminal punishments in advance and in the abstract, anticipating the possible violations and violators. Criminal penalties are "often calculated without regard to the harm the defendant has caused," and may lack "precise deterrent effect." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1987). Consequently, punitive damages have traditionally been viewed as a necessary supplement to criminal penalties. *See* Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1195-98 (1931); Samuel Freifield, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5, 8-9 (1935).

The California court of appeal, upholding a large punitive award against the maker of the Ford Pinto, rejected the argument Exxon makes here:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices.

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

The United States Attorney, at the criminal sentencing stage following Exxon's guilty plea, informed the court that "the government's evidence would have shown, the discharge of nearly 11 million gallons of crude oil was directly related to criminally negligent conduct by Exxon Shipping." Government's Memorandum in Aid of Sentencing, JA 50. Pointing

out that the purpose of criminal sanctions is to send a message deterring similar conduct by defendant and others, the government bluntly stated that imposition of the statutory fines that would apply here "would utterly fail to send that message." *Id.*

In short, this is precisely the case in which an award of punitive damages can serve as a needed supplement to legislatively set criminal penalties.

B. This Court's Decisions According Deference To Congress In Matters Involving Interstate Disputes and Wrongful Death Do Not Warrant Eliminating Punitive Damages In This Case.

Exxon proposes an oil-spill exception to the general rule permitting punitive damages and criminal penalties for the same misconduct. For support, Exxon stitches together statements regarding the judicial role in lawmaking, cribbed from disparate and inapposite opinions of this Court. These relate to: (1) the limited authority of courts under "new federal common law" relating to interstate disputes, and (2) the self-imposed limits on allowing certain types of damages in non-statutory actions for wrongful death that Congress has specifically rejected by statute. Neither set of decisions warrants this Court's departure from the traditional rule permitting punitive damages and criminal penalties for the same conduct.

1. The rule that federal common law is displaced whenever Congress legislates on the same subject applies in the context of interstate disputes, and is inapposite to this maritime case.

Exxon asserts that the second Question Presented in this case implicates "basic separation of powers principles," Exxon Br. at 27, pitting the judicial branch against Congress as to "which branch of the Federal Government is the source of federal law." *Id.* at 29.

The conflict described by Exxon is largely imagined. As Justice Ginsburg has correctly stated, "development of the law in admiralty [is] a shared venture in which 'federal common lawmaking' does not stand still, but 'harmonize[s] with the enactments of Congress in the field.'" *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 821 (2001) (Ginsburg, J., concurring), quoting *American Dredging Co. v. Miller,* 510 U.S. 443, 455 (1994). That "shared venture," as amici discuss in part C, *infra,* is informed by the intent of Congress.

Exxon, however, proposes a "same subject" rule to replace any inquiry into congressional intent. Its view is that the federal courts' lawmaking power "is strictly circumscribed, if not displaced outright, where Congress has already addressed the problem." Exxon Br. at 28. Under such a rule, the intent of Congress to displace judge-made remedies is not relevant at all. *Id.* at 29. Instead, Exxon urges upon the Court a "rule that federal common-law remedies applicable to a given subject are displaced when Congress has addressed the same subject." *Id.* at 34.

For support, Exxon looks to *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Neither is an admiralty case. *City of Milwaukee,* where a state sued a political subdivision of another state to abate water pollution, was governed by "non-maritime

federal common law." *Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). In *Sea Clammers,* plaintiff association brought suit against New York, New Jersey, and federal officials for pollution damage to fishing, based on federal common law.[4]

Neither case represents a typical application by the Court of judge-made remedies. Instead, both cases involve the unique enclave of federal law this Court has called "interstate common law." *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). They typify only the "unique role federal common law plays in resolving disputes between one State and the citizens or government of another." *City of Milwaukee*, 451 U.S. at 334 (Blackmun, J., dissenting).

Following this Court's decision in *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938), "federal common law" has referred to those enclaves of judicial lawmaking serving peculiarly federal interests, including, most notably, interstate disputes where it would be "inappropriate that the law of either state should govern." Henry J. Friendly, *In Praise of Erie – And of*

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[4] Exxon mistakenly characterizes *Sea Clammers* as applicable to maritime tort actions. Exxon Br. at 34. This Court granted certiorari in that case on the limited question: "Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. § 1331." 449 U.S. 917 (1980). Because a claim based on maritime law does not arise under the laws of the United States within the meaning of § 1331 jurisdiction, *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959), the Court was addressing only federal common law.

the New Federal Common Law, 39 N.Y.U.L. Rev. 383, 408 n.119 (1964).

Indeed, the very day Justice Brandeis declared for this Court, "there is no federal general common law," *Erie,* 304 U.S. at 78, the Court issued an opinion, also authored by Justice Brandeis, resolving an interstate dispute over water apportionment, as "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 110 (1938).

With respect to the law governing interstate disputes, "federal common law is 'subject to the paramount authority of Congress.'" *City of Milwaukee*, 451 U.S. at 313-14, quoting *New Jersey v. New York,* 283 U.S. 336, 348 (1931). That paramount authority is called forth by our system of federalism. The States are represented in Congress, not by the judicial branch. *Id.* at 317 n.9. To the extent the Court has any lawmaking role at all, it is as the practical default authority: where Congress has not provided legislation governing an interstate dispute, it falls to the Court to act interstitially. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 & n.9 (1972). When Congress has addressed the subject, "the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee,* 451 U.S. at 314, and "the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 107 n.34 (1981).

In such a case, the Court need not inquire whether Congress specifically intended to displace judge-made law. That law is displaced because

"[t]here is no 'interstice' here to be filled by federal common law." *City of Milwaukee*, 451 U.S. at 323.

The judge-made law governing this case differs from that specialized interstate common law. Maritime law is a "federal corpus of law which is in no sense interstitial." David W. Robertson, ADMIRALTY AND FEDERALISM 140-41 (1970). See also Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 282 (1999) (admiralty law is a "free-standing corpus, rather than a set of interstitial principles intended to flesh out the meaning of a federal statutory scheme."). The Court's role is not one of subservience where Congress has addressed the same subject. Instead, it is more aptly characterized as a "shared venture," as Justice Ginsburg suggested in *Norfolk Shipbuilding, supra*, where the Court seeks to harmonize common-law remedies with the congressional intent expressed in statutory provisions.

Thus, despite the fact that Congress has addressed the subject of maritime wrongful death in the Jones Act, 41 Stat. 1007, as amended, 46 U.S.C. App. § 688, and in the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-67, this Court has acted with respect to the same subject to "supplement these statutory remedies." *Miles,* 498 U.S. at 27; *see also Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978) (same). Thus, in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), the Court created a non-statutory wrongful death remedy under general maritime law.[5]

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[5] Moragne was a longshoreman killed aboard a vessel and treated as a seaman for purposes of the Jones Act under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

To the extent that this Court in *City of Milwaukee* and *Sea Clammers* required that judge-made federal common law give way when Congress has addressed the same subject, those decisions are addressed to the unique specialized role of federal common law in interstate disputes. They have no bearing on maritime law cases such as this one.

2. This Court's deference to statutory restrictions on wrongful death damages when providing for non-statutory actions does not preclude punitive damages under a traditional maritime law remedy.

Exxon relies on *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), for the proposition that, because Congress did not authorize imposing punitive damages on vessel owners under the Clean Water Act, such damages may not be awarded in private causes of action under general maritime law. Exxon also cites *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116 (1998), where the Court held that the beneficiaries of passenger killed in an airline crash, who were entitled under DOHSA to recover only for "pecuniary loss," could not recover under general maritime law for decedent's pain and suffering, because allowing such damages would contradict the expressed will of Congress. *Id.* at 123. Those cases, however, speak to an entirely different issue.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court confirmed that "there is a general maritime cause of action for the wrongful death of a [true] seaman." *Id.* at 30.

Prior to 1970, at common law and in admiralty, there existed no remedy for wrongful death. *The Harrisburg,* 119 U.S. 199 (1886). Congress in 1920 enacted statutory remedies for wrongful death of a seaman in the Jones Act, 41 Stat. 1007, as amended, 46 U.S.C. App. § 688, and for wrongful death outside territorial waters in DOHSA, 46 U.S.C. §§ 761-767 (1976).

This Court has determined that Congress intended that claimants under both statutes be limited to recovery of pecuniary damages. *Miles,* 498 U.S. at 31-32 (Jones Act); *Higginbotham*, 436 U.S. at 622-24 (1978) (DOHSA).

This Court has stated that in situations where plaintiff could bring either a statutory cause of action or a non-statutory one, it would be guided by the limits on the types of damages Congress "has *affirmatively and specifically* enacted." *Id.* at 625 (emphasis added). *See also Miles,* 498 U.S. at 31 (explicit limitation of statutory recovery to "pecuniary" loss forecloses recovery for non-pecuniary loss in non-statutory remedy). Thus, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action . . . than Congress has allowed." *Id.* at 32-33.

This case does not present the Court with such a conflict.

The Clean Water Act does not "affirmatively and specifically" proscribe recovery of punitive damages. Indeed, the Act does not make any provision for any remedy providing any type of damages to private parties for pollution-caused harms. Exxon concedes as much, stating that the CWA "is not addressed to compensation for private

harms, but instead prescribes a comprehensive, calibrated scheme of public enforcement," of effluent standards. Exxon Br. at 40.

Thus, in cases where the statute at hand did *not* provide a remedy for plaintiff's harm, as is the case with the Clean Water Act here, this Court has not limited plaintiff's relief to those types of damages enumerated in the statute. For example, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), involving the death of a longshoreman in territorial waters, plaintiff could not have brought an action under either the Jones Act or DOHSA. Consequently, those statutes had no preclusive effect on the damages available under plaintiff's non-statutory remedy. *See Miles,* 498 U.S. at 31; *see also American Export Lines, Inc. v. Alvez,* 446 U.S. 274 (1980) (allowing damages for loss of society in cases of non-fatal injuries occurring in state territorial waters not provided for in federal statutes); *cf. Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (loss of consortium recoverable in state cause of action for wrongful death of a nonseafarer in state territorial waters for which federal law provides no remedy).

Thus, courts have concluded, where the remedy provided by the general maritime law "has no statutory analogue," there is no statutory constraint or limit on that remedy, including the right to recover punitive damages for breach of a duty created by the general maritime law. *Glynn v. Roy Al Boat Management Corp*., 57 F.3d 1495 (9th Cir. 1995) (allowing punitive damages in a maritime tort action claiming willful failure to pay maintenance and cure); *Breshears v. River Marine Contractors, Inc*., Civ. A. No. 92-1850, 1992 WL 245656, at *2 (E.D. La. Sept. 10, 1992) (actions for

failure to pay maintenance and cure "are grounded in the general maritime law and have no counterpart in the tort provisions of DOHSA and the Jones Act." *Miles* is "therefore, inapposite to the determination of whether punitive damages are available."); *Ridenour v. Holland America Line Westours, Inc.*, 806 F. Supp. 910, 911 (W.D. Wash. 1992) (same).

In this case, the Clean Water Act provides a remedy only for the government to recover its cleanup costs. Plaintiffs' action for negligence causing their commercial losses has no analog or counterpart in the Clean Water Act. *Miles* and *Higginbotham* are therefore inapposite.

Absent an explicit congressional declaration to the contrary, this Court has repeatedly stated that a right under common law or maritime law "is not to be abrogated 'unless it be found that the preexisting right is so repugnant to the statute'" as to "render its provisions nugatory." *Nader v. Allegheny Airlines, Inc.,* 426 U.S. 290, 298 (1976), quoting *Texas & Pacific Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 437 (1907). *See also Silkwood v. Kerr-McGee Corp*., 464 U.S. at 255 ("Congress assumed traditional principles of state tort law would apply with full force" including awards of punitive damages, "unless they were expressly supplanted.").

In this case, the only inference that can be drawn from the absence of any provision in the Clean Water Act for the recovery of punitive damages is that Congress intended such traditional forms of relief to remain available to those harmed by oil spills.

C. Congress Did Not Intend the Clean Water Act to Alter the General Rule

Permitting Punitive Damages Under General Maritime Law.

1. It is Exxon's burden to prove Congress intended the Clean Water Act to preclude relief traditionally available under general maritime law.

Exxon argues that the intent of Congress is irrelevant to answering the second Question Presented. Rather, judge-made law must give way "whenever it can be said that Congress has legislated on the subject." Exxon Br. at 29-30.

Such a position is plainly untenable. Assume for a moment a federal statute that directly addresses the same subject as general maritime law. Yet, the legislation also includes a savings provision that expressly preserves the existing judge-made rule. Under Exxon's proposed rule, the general maritime remedy would be eliminated, despite Congress's expressed contrary intent, under the banner of deference to the legislative branch and separation of powers.

One point of agreement between the majority and dissent in *Sea Clammers* was that the party asserting that the judge-made law is displaced by a statute bears the burden of proving that Congress so intended. Justice Powell stated for the Court, "we do not suggest that the burden is on a plaintiff to demonstrate congressional intent to preserve [other] remedies." 453 U.S. at 21 n.31. The question is "whether Congress intended to withdraw that right of action." *Id.* at 27 n.11 (Stevens, J., dissenting).

Indeed, as this Court has repeatedly stated:

> Statutes which invade the common law or the general maritime law are to be read with

> a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); *United States v. Texas*, 507 U.S. 511, 534 (1993).

Thus, it is Exxon's burden to prove Congress intended to eliminate punitive damage awards to private plaintiffs. In fact, Congress expressly preserved Plaintiffs' right to seek that relief.

2. Congress in the Clean Water Act expressly preserved plaintiffs' private tort actions for harm caused by oil spills, including the availability of punitive damages.

In discerning whether Congress intended the Clean Water Act to eliminate judge-made private rights of action under maritime law for oil spills, including the damages traditionally available under that remedy, "[a]ny terms of the statute explicitly preserving or preempting judge-made law are of course controlling." *Matter of Oswego Barge Corp*., 664 F.2d at 338; *Conner v. Aerovox, Inc.*, 730 F.2d 835, 840 (1st Cir 1984). Punitive damages, as earlier noted, have historically been deemed available in maritime tort actions on proof of willful or reckless misconduct. *See* p. 11, *supra.* In several provisions of the Clean Water Act, Congress has expressly preserved this remedy.

First, 33 U.S.C. § 1365(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.

Exxon argues that § 1365(e) is ineffective because it provides only that nothing in "this section," regarding citizen suits, revokes other remedies, but does not "mean that the Act as a whole does not supplant formerly available federal common-law actions." Exxon Br. at 39, quoting *City of Milwaukee,* 451 U.S. at 328-29.

This argument is in error. In *City of Milwaukee,* the State of Illinois brought a federal common-law action for abatement of a nuisance to halt the city's discharge of sewage into Lake Michigan. This Court held that the CWA "as a whole" provided for comprehensive regulation of such pollution using standards set by EPA, leaving no room for courts to impose their own higher standards. *Id.* at 328.

This case, by contrast, involves a private cause of action for damages. *None* of the provisions of the Act pertains to a remedy seeking damages. Section 1365 is the *only* section that permits a private cause of action, and it expressly preserves the private claimant's right "to seek any other relief." It cannot be argued that the Clean Water Act "as a whole" leaves no room for a private cause of action for damages under other law.

Any uncertainty as to the meaning of the statutory text is removed by the legislative history. The House Report explains that this section "provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected." H.R. Rep. No. 92-911, at 134 (1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 821 (Comm. Print 1973).

The Senate Report states that this section "*would specifically preserve any rights, or remedies under any other law*. Thus, if damages could be shown, other remedies would remain available." S. Rep. No. 92-414, at 81, *reprinted in* 2 A Legislative History, *supra,* at 1499.

Significantly, Congress considered and rejected a proposal to preempt the common law and make citizen suits under § 1365 "the sole and exclusive method [by] which citizens may participate in this kind of litigation." Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., Pt. 1, at 724 & 730-31, *reprinted in* 1 Legislative History, *supra,* at 1071-77.

Second, in the section providing for the enforcement of pollution standards and imposing penalties on vessel owners for non-compliance, Congress has provided:

> Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, . . . under *any provision of law for damages* to any publicly owned or privately owned property resulting from a discharge of any oil.

33 U.S.C. §1321(o)(1) (emphasis added). Contrary to Exxon's contention that this provision preserves only compensatory damages, Exxon Br. at 37, Congress has clearly preserved plaintiffs' maritime cause of action for damages, including all relief traditionally recoverable under that remedy.[6]

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[6] This Court has recognized that common law causes of action constitute "obligations imposed under state law,"

This Court has often stated that the question of what relief is available to plaintiffs under a federal private right of action "is 'analytically distinct' from the issue of whether such a right exists in the first place." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65-66 (1992) (citation omitted). Where plaintiffs have a valid right of action, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," a principle which, the Court stated, "has deep roots in our jurisprudence." *Id.* at 66. That principle requires that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Amici suggest that the same principle extends to non-statutory rights of action.[7]

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992), so that preemption of state requirements "easily encompass[es] obligations that take the form of common-law rules." *Id.* at 521.

[7] Exxon also argues that "provision of law" is limited to clauses in statutes or contracts and does not include common law claims. Exxon Br. at 38 n.14. *See also id.* at 39. In fact, courts often deem "provision of law" to include the common law. *See, e.g., United States v. Szilvagyi*, 398 F. Supp. 2d 842, 846 (E.D. Mich. 2005) ("notwithstanding any other provision of law" encompasses common law doctrine of collateral estoppel); *Jensen v. Sattler*, 696 N.W.2d 582, 588 (Iowa 2005) (savings clause preserving liability "created by another provision of law" includes common-law claims); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1181, 1183 (C.D. Cal. 2003) (where releases are exempt from strict liability under

Despite these express savings provisions, Exxon argues that the Clean Water Act is "comprehensive" legislation that leaves no room for non-statutory remedies. Exxon Br. at 34. The necessary question is: comprehensive as to what domain? Even accepting that the CWA provides a comprehensive regime for effluent discharge permits and providing legal authority for the government to recover its cleanup costs, the statute makes no provision whatever for private claims for harms caused by oil spills or the damages recoverable in such claims. As this Court stated: "Shrimp, clam, oyster and scallop beds may be destroyed, and ruined and the livelihood of fishermen imperiled. The Federal [Clean Water] Act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning up." *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 333-34 (1973).

If Congress intended to eliminate private causes of action for those harms, "its failure even to hint at it is spectacularly odd." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996). As the Court stated in *Silkwood,* "Congress' failure to provide any federal remedy for persons injured" by illegal conduct suggests that Congress did not intend to eliminate judicial recourse. 464 U.S. at 251.

Finally, Exxon asserts that the CWA "involves an explicit balance of Congress's twin goals of protecting the environment and limiting the liability of shipowners and other carriers so as not to impair commerce." Exxon Br. at 32.

CERCLA, plaintiffs "must assert their claims under some other provision of law, including common law").

As the Fifth Circuit has pointed out, Congress struck that balance in a much different manner than Exxon suggests. The legislative history plainly indicates that Congress's aim was "to protect the taxpayers from potential cleanup costs" from oil spills but not unfairly imposing "crushing liability" on vessel owners. *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739-40 (5th Cir. 1980). The compromise reflected in the CWA imposes strict liability for cleanup costs on vessel owners up to limits that Congress deemed insurable, but allows unlimited cleanup liability for oil spills resulting from willful or reckless conduct. *Id.*

This "balanced and comprehensive remedial scheme . . . precludes recovery by the government under additional legal theories." *Id.* at 740. It does *not* preclude recovery by private parties for economic harm caused by oil spills, a subject that was not at all a factor in the legislative balance.

II. MARITIME LAW IMPOSES NO GREATER LIMITS ON PUNITIVE DAMAGES THAN DOES DUE PROCESS

The Third Question Presented asks:

> Was this $2.5 billion award within the limits permitted by federal maritime law?

Exxon's argument that the punitive damages assessed here exceed those permitted under maritime law erroneously treats the issue as a matter of first impression, faulting the court below for failing "to articulate, based on the policies of maritime law, the rules that should govern punitive damages, and to reduce the award accordingly." Exxon Br. at 44. While it is true that there exists no maritime law principle establishing a limited range

of permissible punitive damages, the traditional approach to such a supposed vacuum is not to concoct new principles but to apply such "traditional common-law rules, modifications of those rules, and newly created rules" as can be "[d]rawn from state and federal sources." *East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 864-65 (1986) (footnote omitted).

Exxon does not disagree that punitive damages in maritime cases must be evaluated under the same considerations that govern the common-law review of punitive damages. *See* Exxon Br. at 46. However, the company attempts to articulate new standards that have never governed punitive damage decisions in maritime cases – or any other type of case – before.

The common law decisively rejects Exxon's first argument that public policy precludes *any* punitive damages in maritime cases. Not only have punitive damages long been a "well-established principle of the common law," *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), but were equally well recognized as a matter of maritime law. *See CEH,* 70 F.3d at 699 (collecting cases); *Gamma-10 Plastics, Inc. v. American President Lines Ltd.,* 32 F.3d 1244, 1254 (8th Cir. 1994); David W. Robertson, *Punitive Damages In American Maritime Law*, 28 J. of Mar. L. & Comm. 73 (1997).

This longstanding recognition of punitive damages in maritime law is entitled to great respect. This Court has recognized that its "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California,* 110 U.S. 516, 530 (1884); Still, and quite appropriately, "[t]his Court traditionally has been

hesitant to overrule prior constructions of statutes or *interpretations of common-law rules," absent "countervailing considerations." Monell v. Department of Social Services,* 436 U.S. 658, 708 (1978) (emphasis added). Neither Exxon nor its amici provide this Court with any developments or other rationales that would require reexamination. Instead, all their briefs continue to argue against punitive damages in maritime cases as though the common law were as fungible as the ever-changing dictates of fashion.

Under the common law, there were few restraints on punitive damages. *See* William B. Hale, HANDBOOK ON THE LAW OF DAMAGES § 86, at 212-13 (1896) (it "is the province of the jury to determine whether or not [exemplary] damages should be awarded" and that the "amount of exemplary damages is limited only by the sound discretion of the jury," except where such damages are excessive due to the jury's "passion, prejudices, or corruption"). In other words, the prerogative to assess punitive damages had to be exercised intelligently so as to reflect the "peculiar circumstances of each case." *Day v. Woodworth,* 54 U.S. at 371, *cited with approval in Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 15 (1991). *See also Philadelphia, Wilmington & Baltimore R.R. v. Quigley,* 62 U.S. (21 How.) 202, 213 (1858); *Lake Shore Ry. v. Prentice,* 147 U.S. (40 Davis) 101, 107 (1893); and *Scott v. Donald,* 165 U.S. 58, 86 (1897). In *Smith v. Wade,* 461 U.S. 30, 34 (1983), this Court flatly declared that it "has repeatedly approved that common-law method for assessing punitive awards."

While the jury's prerogative on punitive damages has shifted somewhat more recently, *see*

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001), this Court has adhered to the notion that an individualized assessment of the misconduct must remain the touchstone for a proper punitive damage award. *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003) ("The precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct.").

Contrary to these principles, the standards proposed by Exxon have no anchor in the common law. Instead, Exxon would have this Court variously transfer the authority to determine the size of a punitive damage award in any particular case to unarticulated and fanciful imaginings of congressional preference, Exxon Br. at 51, to the jury's determination of compensatory damages as if that established a common-law maximum,[8] Exxon Br. at 52, to limiting punitive damages to any illicit profit, as if that were the only legitimate consideration, Exxon Br. at 54, as well as prohibiting consideration of a defendant's wealth, Exxon Br. at 55, which has always been a standard consideration under the common law. *See TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 462 n.28 (1993) ("Under well-settled law, however, factors such as these are typically considered in assessing punitive damages.").

Instead of these one-size-fits-all arbitrary approaches, the common law, like the constitutional considerations this Court employs, reflect an

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[8] This Court has categorically rejected any mathematical bright-line limits on punitive damages. *See State Farm,* 538 U.S. at 424-25.

acknowledgement that an appropriate punitive award reflects "'the enormity of the offense.'" *BMW,* 517 U.S. at 575 (1996) (quoting *Day,* 54 U.S. at 371). The Court has found *this* proportionality principle "'deeply rooted and frequently repeated in common law jurisprudence.'" *Id.* at 575 n.24 (citation omitted). Moreover, the compensatory damages awarded here only encompassed certain economic harms. Pet. App. 166a-167a. Because the noneconomic harms visited upon the plaintiffs could not be quantified or valued, *id.*, this Court has recognized that a larger award may be merited. *See State Farm,* 538 U.S. at 425 (justifying larger awards when "the monetary value of noneconomic harm might have been difficult to determine").

For that reason, among others, the careful, repeated analysis of the courts below – involving an enormous record and taking place over a long period of time as this Court refined the due process analysis of punitive damages – should be credited with having sustained a punitive damage assessment that comports with all criteria that can be devised as a function of maritime, common and constitutional law.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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