No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

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 ALASKA LEGISLATIVE COUNCIL, ON BEHALF OF THE ALASKA STATE LEGISLATURE, AND FORMER ALASKA GOVERNORS WALTER HICKEL, ANTHONY KNOWLES, STEVE COWPER, AND WILLIAM SHEFFIELD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Alaska Legislative Council is a permanent committee of the Alaska State Legislature, composed of the President of the Senate, the Speaker of the House of Representatives, and twelve other Representatives and Senators. The Alaska Legislative Council has authority to act on behalf of the Alaska State Legislature when the legislature is not in session. *See* Alaska Stat. § 24.20.010. It submits this brief on behalf of the Alaska State Legislature.

Amici also include four former Governors of the State of Alaska. The Honorable Walter Hickel served as Governor of Alaska from 1966 to 1969 and from 1990 to 1994, and from 1969 to 1970 served as Secretary of the United States Department of the Interior. The Honorable William Sheffield served as Governor of Alaska from 1982 to 1986. The Honorable Steve Cowper served as Governor of Alaska from 1986 to 1990. The Honorable Anthony Knowles served as Alaska Governor from 1994 to 2002.

Amici have a vital interest in this case because it addresses the availability of damages to thousands of Alaska residents as a result of the EXXON VALDEZ oil spill, an unprecedented disaster that occurred in Alaskan waters and greatly disrupted the Alaskan economy. The State of Alaska encouraged the

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

construction of the Trans-Alaska Pipeline based on repeated assurances by the oil industry that the pipeline would be constructed and operated with the highest possible standards of care in order to protect Alaska's natural resources, which form the backbone of the regional economy. In essence, the Trans-Alaska Pipeline resulted from a broad agreement between Alaska and the oil industry, under which Alaska agreed to allow the development of its North Slope oil reserves in return for the oil industry's adherence to the highest possible standards of care to protect Alaska's resources, most especially its marine resources.

INTRODUCTION AND SUMMARY

The validity of the punitive damages award against Exxon for the EXXON VALDEZ oil spill cannot be resolved without carefully examining the history of the Trans-Alaska Pipeline System (TAPS) and the Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. 93-153, 87 Stat. 584, codified in part at 43 U.S.C. §§ 1651-55 (TAPAA).[2] TAPAA specifically addresses the liability of ship owners for spills of oil transported through the Trans-Alaska Pipeline and thereby represents the federal law that specifically governs the EXXON VALDEZ oil spill. Until its partial repeal in 1990, TAPAA imposed strict liability on ship owners for any spills of TAPS oil, while expressly preserving existing remedies under state

[2] In 1990, portions of TAPAA, including the provision addressing ship owners' liability for oil spills, were repealed by the Oil Pollution Act, Pub. L. No. 101-380, 104 Stat. 484, § 8102 (OPA). *See* historical notes following 43 U.S.C. § 1653. This brief cites TAPAA as it existed at the time of the EXXON VALDEZ oil spill. The relevant provisions of TAPAA are set forth in the Appendix.

and federal law. At the time that TAPAA was enacted, punitive damages were a well-recognized remedy under federal maritime law. As a result, TAPAA expressly preserves the availability of punitive damages for spills of TAPS oil.

In its opening brief, Exxon fails to come to terms with the fact that TAPAA establishes the federal law governing the EXXON VALDEZ oil spill. Exxon's entire discussion of TAPAA is contained in two misleading sentences:

> In 1973 Congress passed the Trans-Alaska Pipeline Authorization Act, directing the construction of the Pipeline, 43 U.S.C. §1653(a), and, to deal with the well-known risk of a spill, establishing a special liability regime, the Trans-Alaska Pipeline Liability Fund, to pay prompt and adequate compensation, *id.* § 1653(c). With the firm support of the State of Alaska, Congress thus made the political judgment that the risks of tanker traffic through Prince William Sound were worth taking, for reasons of national security and national energy policy.

Exxon Br. at 2. Exxon makes no attempt to explain why TAPAA, which specifically addresses spills of oil transported through the Trans-Alaska Pipeline and which preserves existing federal and state remedies, does not control the availability of punitive damages. Indeed, the district court in this case held that TAPAA "expressly <u>preserves</u> other remedies," including punitive damages claims. JA 103 (emphasis supplied by the district court). Exxon did not appeal that ruling and cannot challenge it here.

Not only does Exxon neglect to discuss the role that TAPAA should play in resolving the questions it asks this Court to address, Exxon's meager description of TAPAA is deeply flawed. The State of Alaska and Congress did not support construction of the Trans-Alaska Pipeline simply because they concluded that the risks of tanker traffic were worth taking. On the contrary, the State of Alaska and Congress authorized construction of the pipeline because the oil industry had repeatedly vowed to employ the highest possible standards of care to reduce the risk of oil spills, and the oil companies were willing to be subjected to increased damages if a spill occurred. Indeed, TAPAA effectuated a basic agreement, a social compact as it were, between the State of Alaska and the oil industry. Under this social compact, the oil companies were encouraged to develop North Slope oil reserves and construct the Trans-Alaska Pipeline in exchange for their agreement to adhere to heightened standards of care, the imposition of strict liability, and the preservation of existing state and federal remedies.

The basic terms of the social compact underlying TAPAA were aptly described by Representative Morris Udall, a member of the TAPAA Conference Committee:

> [TAPAA] is admittedly forcing a tougher liability standard on Alaskan oil than exists for other oil, but the House has consistently maintained that the environmental risks of transporting this oil were significantly greater. The oil companies have, in turn, consistently promised that both the pipeline and the sea leg were safe. We are doing no more than holding them to this promise.

119 Cong. Rec. 36,606 (Nov. 12, 1973).

By knowingly allowing a relapsed alcoholic to serve as ship master on the EXXON VALDEZ, Exxon violated the social compact it had entered into with the State of Alaska. The catastrophic harm that resulted from Exxon's recklessness was as bad as expected.[3] TAPAA preserves existing state and federal remedies precisely to ensure that damages would be adequate and available for oil spills. Punitive damages are appropriate here because Exxon acted recklessly and violated its solemn vow to the people of Alaska to protect Alaska's marine ecology and marine-based economy. Exxon should not now be heard to challenge the basic terms of the deal under which it and other oil companies were authorized to construct and operate the Trans-Alaska Pipeline and deliver the oil by tankers.

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[3] *See, e.g.,* Plaintiffs Exhibit 2 (to be lodged with the Court) (statement of Exxon U.S.A. President Stevens) (stating that the magnitude of harm from the EXXON VALDEZ spill was "pretty well as much as envisioned").

ARGUMENT

I. TAPAA Authorized Construction of the Trans-Alaska Pipeline While Imposing Strict Standards of Care and Liability to Prevent Oil Spills

The decision to authorize construction of a 789-mile pipeline running from Prudhoe Bay to Valdez involved two competing sets of interests—the interest in developing Alaska's oil reserves and the interest in protecting Alaska's natural resources, most prominently its marine resources and the marine-based economy. In the years following the discovery of major oil reserves in Alaska's North Slope, the State of Alaska and the oil industry supported construction of the Trans-Alaska Pipeline precisely because they agreed that these competing concerns could best be addressed by allowing the oil companies to extract and deliver the oil while imposing strict standards of care to protect the environment to the maximum extent possible. Based on the oil companies' repeated assurances that they would abide by strict controls in the management of oil and would be subject to heightened liability and increased damages, the people of Alaska, through their elected representatives, agreed to support the pipeline. In enacting TAPAA, Congress blessed this basic agreement.

A. Background to TAPAA

In March 1968, the Atlantic Richfield Company (ARCO) and Humble Oil and Refining Company (a predecessor to Exxon Mobil Corp.) announced the discovery of large petroleum reserves on land owned by the State of Alaska in Prudhoe Bay in Alaska's North Slope. Later that year, several oil companies, including ARCO, Exxon, and British Petroleum,

formed an unincorporated agent, the Trans Alaska Pipeline System (TAPS), later incorporated as the Alyeska Pipeline Service Co., to develop plans to transport the oil to markets in the lower 48 states. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 848-849 (D.C. Cir. 1973). Alyeska proposed to construct a 48-inch diameter pipeline to extend 789 miles from Prudhoe Bay to the Port of Valdez. *Id.* at 849. The pipeline would be capable of carrying 2,000,000 barrels of crude oil per day. Oil arriving at Valdez would be loaded onto tankers for shipment to ports in the western United States. *Id.*

In 1969, Alyeska's predecessor submitted a request to the Department of the Interior to obtain rights-of-way to construct the pipeline. *Id.* In May 1972, after numerous hearings and a lengthy investigation, the Secretary of the Interior granted Alyeska's request. The decision was accompanied by a 9-volume Final Environmental Impact Statement.[4] Several environmental groups challenged the Secretary's decision. In February 1973, the United States Court of Appeals for the D.C. Circuit ruled that the Mineral Leasing Act did not authorize the Secretary of the Interior to grant federal rights-of-way of the size needed for the pipeline. *Id.*, 479 F.2d at 847-848. With the D.C. Circuit's ruling, the decision whether to authorize the Trans-Alaska Pipeline moved to Congress.

In 1973, the House and Senate Committees on Interior and Insular Affairs held 17 days of hearings on whether to authorize the proposed Trans-Alaska

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[4] United States Department of the Interior, Final Environmental Impact Statement: Proposed Trans-Alaska Pipeline [hereinafter "FEIS"].

Pipeline.[5] The committees heard from 110 witnesses, including over 20 representatives of the oil industry, as well as many witnesses representing the Department of the Interior, the State of Alaska, environmental groups, Native Alaskans, and fishermen. Four committee reports were issued in support of TAPAA.[6] TAPAA was debated on the floor of the House and Senate over 10 days.[7] The legislative history of TAPAA comprises over 3,500 pages.

In those 3,500 pages of hearings, testimony, committee reports, and floor debates, there is absolutely no suggestion that the oil companies sought protection from punitive damages under federal maritime law or any other source of law. Nor is there the remotest suggestion that Congress intended to offer such protection or even considered

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[5] *See Oil and Natural Gas Pipeline Rights-of-Way*, Hearings Before the Subcomm. on Public Lands of the House Interior and Insular Affairs Comm., 93d Cong., 1st Sess. (1973) [hereinafter "House Hrg."]; *Rights-of-Way Across Federal Lands: Transportation of Alaska's North Slope Oil,* Hearings Before the Sen. Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973) [hereinafter "Sen. Hrg."].

[6] S. Rep. No. 207, 93d Cong., 1st Sess. (1973) [hereinafter "Sen. Comm. Rpt."]; H. Rep. No. 414, 93d Cong., 1st Sess. (1973) [hereinafter "House Comm. Rpt."]; H. Conf. Rep. 617, 93d Cong., 1st Sess. (1973); H. Conf. Rep. 624, 93d Cong., 1st Sess. (1973) [hereinafter "Conf. Comm. Rpt."]

[7] *See* 19 Cong. Rec. 22795-22840 (July 9, 1973); 19 Cong. Rec. 22978-23019 (July 10, 1973); 19 Cong. Rec. 23312-23356 (July 11, 1973); 19 Cong. Rec. 23543-23621 (July 12, 1973); 19 Cong. Rec. 23746-23783, 23801-23801, 23854, 23858-23860, 23863-23864 (July 13, 1973); 19 Cong. Rec. 23873-23894, 23909-23910, 23954-23955 (July 14, 1973); 19 Cong. 24076-24130 (July 16, 1973); 19 Cong. Rec. 24294-24330 (July 17, 1973); 19 Cong. Rec. 27625-27720 (Aug. 2, 1973); 19 Cong. Rec. 36595-36620 (Nov. 12, 1973); 19 Cong. Rec. 36808-36820 (Nov. 13, 1973).

it. On the contrary, the history of TAPAA demonstrates that the oil companies agreed to abide by heightened standards of care in the shipping of oil. TAPAA imposed a heightened standard of care to protect against oil spills and created new remedies, while preserving existing remedies. In short, under TAPAA, the expansion of liability for oil spills was the price the oil companies paid for authorization to construct and operate the Trans-Alaska Pipeline.

B. The Oil Industry Repeatedly Promised to Employ the Strictest Possible Controls to Protect Against Oil Spills

Concerns about the possibility of a catastrophic oil spill played a central role in the debates over whether to authorize the Trans-Alaska Pipeline. The Senate Interior and Insular Affairs Committee identified oil spills as a "major issue" needing to be addressed to authorize the pipeline.[8] Opponents of the pipeline supported an overland route through Canada primarily to avoid the need to have oil transported by supertankers.[9]

Proponents of the pipeline never denied that a large oil spill would cause devastating environmental and economic harms. Indeed, when Congress authorized construction of the Trans-Alaska

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[8] Sen. Comm. Rpt., *supra* note 6, at 18-19.

[9] *Id.* at 19 (proponents of the Canadian pipeline emphasize "the danger of marine pollution stemming from the ocean leg of the oil transportation system"); Sen. Hrg., *supra* note 5, at 10 (Sen. Mondale) ("[A] trans-Alaskan pipeline would mean massive oil spills resulting from the trans-shipment of oil from Valdez to American ports."); House Hrg., *supra* note 5, at 385 (Rep. Aspin) ("The Alaska pipeline crosses a bad zone of earthquakes and necessitates moving oil by tankers . . . enormous ones which, when they run aground there are going to be enormous oil spills.").

Pipeline, it was universally recognized that a large oil spill off the Alaska coast would be devastating to the marine ecology and marine-based economy. As the Department of the Interior declared: "The existing pristine quality of the environment from Valdez through Prince William Sound would be threatened with severe disturbance from the proposed tanker activity. The major threat would come from oil spills which could affect the total biotic relationships of the area."[10] Fisheries were especially threatened by oil spills because "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities."[11] Native Alaskan communities faced even greater risks: "The greatest threat to Native subsistence resources would come from potential oil spillage."[12]

It was well understood, moreover, that effective cleanup would be impossible. The Department of the Interior concluded that, due to the remote location of Prince William Sound, less than 20% of oil spilled from a tanker grounding could be recovered.[13]

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[10] FEIS Vol. 1 at 150 (1972); *see also id.*, Vol. 2 at 216; *id.*, Vol. 4 at 213, 319; JA 1436-41, 1475-94.

[11] FEIS Vol. 3 at 370; *see also id.*, Vol. 2 at 152-153, 400; *id.*, Vol. 3 at 370; *id.*, Vol. 4 at 432-436; JA 1439-43, 1475-82.

[12] *See* FEIS Vol. 1 at 218.

[13] FEIS Vol. 1 at 224-225 ("[S]tate-of-the-art equipment and techniques for containing and recovering spilled oil can recover less than 20 percent of oil spilled."); *see also id.*, Vol. 1 at 174-175; *id.*, Vol. 4 at 303; *id.*, Vol. 4 at 484 ("Large spills in Prince William Sound would be more difficult to contain, clean up, and restore because of the distances from sources of ships and cleanup gear and the generally limited available manpower in the region."); *id.*, Vol. 4 at 581.

The oil companies repeatedly vowed, however, that they would reduce or even eliminate the risk of a catastrophic oil spill by adhering to the highest possible standards of care. Long before the congressional hearings, the oil industry had launched a public relations campaign to assure the American people and their elected representatives that the oil companies would adhere to strict measures to protect the fragile Alaskan environment. In 1970 and 1971, Alyeska placed advertisements in major newspapers touting the pipeline as "[t]he most expensive single project ever undertaken by industry."[14] As one of the ads declared:

> What we have learned about the Arctic leads us to believe that there is nothing inherently dangerous to the environment provided the line is designed, built and operated in a manner that is considerate of and responsible to the environment. . . . On this you have our pledge: the environmental disturbances will be avoided where possible, held to a minimum where unavoidable, and restored to the fullest extent.[15]

Alyeska thus pledged to design, build, and operate the pipeline in the most careful manner possible to protect the Alaskan environment.

In the congressional hearings, witnesses on behalf of Alyeska and the oil industry repeated Alyeska's vow to exercise the highest degree of care to reduce the risks of oil spills. The president of

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[14] Mary Clay Berry, THE ALASKA PIPELINE 145 (Indiana University Press 1975).

[15] *Id.* at 146.

Alyeska testified that, with the exercise of proper care, "the likelihood of tankers grounding or colliding is remote."[16] The president of ARCO likewise testified that "no dollar savings could possibly justify wreaking irretrievable damage on the fragile Alaskan environment. And that is not going to happen. Since the pipeline was originally conceived, its cost has increased by millions of dollars to insure that the stringent challenges of the Alaskan wilderness will be met."[17] Standard Oil Co. submitted a 40-page report, which assured Congress that it had established design standards and imposed standards of care that would "insure that the marine segment of TAPS will have a minimal impact on the environment."[18]

The State of Alaska supported the construction of the pipeline based on the oil industry's repeated promises to employ heightened standards of care to protect the Alaskan environment.[19] Alaska was convinced that the project did not threaten the marine ecology and marine-based economy because the oil companies had promised "unprecedented"

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[16] House Hrg., *supra* note 5, at 1705; *see also* FEIS Vol. 4 at 294 (quoting Alyeska statement) ("[E]nvironmental requirements dictate that the natural scenic beauty of the area and the high water quality standards, which result in sport and commercial fishing and tourism, be maintained . . . Maintaining them would be a responsibility which Alyeska, the tanker owner companies, the State of Alaska, and various federal agencies would have to bear cooperatively.").

[17] Sen. Hrg., *supra* note 5, at 392.

[18] *Id.* at 215; *see also id.* at 219.

[19] *Id.* at 125 ("The State of Alaska wants to make absolutely certain that the environmental aspect of the project, from the standpoint of safety and ecology, environmental safety and the ecology of that area, will be a model for the rest of the Nation and the world itself to look at.").

attention to protecting against oil spills. As Alaska's Governor William Egan concluded: "The navigational safety aids and procedures planned for the tanker segment of the route proposed for transporting Alaska's North Slope oil to the nation are extensive and impressive. Careful and detailed planning is going into this part of the planned operation and I am convinced that attention to environmental protection on the tanker route will be unprecedented."[20] As a result of the unprecedented care promised by the oil companies, Alaska expected the oil companies' practices in Alaska "to be first, not last or average, in world trade in their respect for safety and ecological standards."[21]

As with the State of Alaska, the Department of the Interior supported construction of the pipeline based on the oil companies' assurances "that operation of the maritime leg [would] be safer than any other maritime oil transport system now in operation."[22] As a witness for the U.S. Geological Survey testified, "What we have asked for is something beyond the state of the art, the so called sophisticated stage that can go beyond the state of the art."[23] Alyeska had assured the government that it would meet such high standards.[24]

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[20] Gov. William A. Egan, "Alaska's Oil and Sea – Antipollution Plans," *reprinted in* 119 Cong. Rec. 22828 (July 9, 1973).

[21] JA 1474 (statement of Gov. Egan to the Dept. of the Interior).

[22] House Hrg., *supra* note 5, at 155 (statement of Secretary of the Interior Rogers C.B. Morton).

[23] *Id.* at 1645.

[24] *See id.* at 1648-1649 (statement of Jack Turner, Bureau of Land Management) ("As far as Alyeska, . . . they have either demonstrated or assured us that they will in fact meet these [environmental requirements]."); *id.* at 1651 (statement of

Congress accepted the oil companies' willingness to be subjected to strict standards in transporting the oil. As the Senate Committee on Interior and Insular Affairs concluded, "the risk of environmental damage from development of North Slope oil and its transportation to markets in the 'Lower 48' has been substantially lessened as a result of the stricter environmental stipulations" that the oil companies had accepted as the price for constructing the pipeline.[25] As Senator Henry Jackson, the lead sponsor of TAPAA, declared: "Damage to the ocean environment by the discharge of petroleum products and contaminated sea water need not take place. It can be prevented. Insofar as the movement of needed oil from Alaska to the markets in the United States is concerned, any risk of damage will be prevented or minimized. . . ."[26] Congress was convinced that, with adherence to the strict safety measures and heightened standards of care promised by the oil companies, "the maritime leg of the Alaskan route will be operated more safely than any other marine transport system functioning to date."[27]

Jared Carter, Deputy Undersecretary of the Department of the Interior) ("[W]e have insisted at all times that the burden of establishing the safety and environmental acceptability of the pipeline in accordance with the stipulations is on the company, on Alyeska, and in cases where we have dealt with them in dealing with specific problems, we have found a willingness on their part to go out and get independent expert assistance to meet that burden.").

[25] Sen. Comm. Rpt., *supra* note 6, at 18.

[26] 119 Cong. Rec. 22838 (July 9, 1973).

[27] 119 Cong. Rec. 22810 (July 9, 1973) (Sen. Fannin); *see also* 119 Cong. Rec. 24296 (July 17, 1973) (Sen. Stevens) ("The trans-Alaska pipeline will be constructed and operated in accordance with the strictest safeguards ever developed for any pipeline.").

C. TAPAA Authorized the Trans-Alaska Pipeline While Protecting Against Oil Spills by Imposing Strict Standards and Heightened Liability

TAPAA embodies a basic agreement to allow the development of Alaska's North Slope oil while requiring the protection of Alaska's natural resources, particularly its marine resources. On the one hand, TAPAA specifically directs the Secretary of the Interior to issue all necessary rights-of-ways and any other permits necessary for the construction and operation of the Trans-Alaska Pipeline System. TAPAA § 203(b), 43 U.S.C. § 1652(b). TAPAA also exempts the decision to authorize the pipeline from further review under the National Environmental Policy Act. TAPAA § 203(c), 43 U.S.C. § 1652(c).

On the other hand, TAPAA imposes strong measures to prevent oil spills. TAPAA directs the Secretary of Transportation to adopt standards regarding tanker design and directs the Coast Guard to establish a vessel traffic control system for Prince William Sound. TAPAA §§ 401, 402. TAPAA establishes a new liability scheme applicable only to spills of oil transported through the Trans-Alaska Pipeline. It provides:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) . . . shall be strictly liable without regard to fault in accordance with this subsection for all damages, including clean-up

> costs, sustained by any person or entity. . . as the result of discharges of oil from such vessel.

TAPAA § 204(c)(1), 43 U.S.C. § 1653(c)(1). To pay compensation for damage caused by oil spills, TAPAA establishes a liability fund of $100 million, created out of fees on oil transported through the pipeline. TAPAA § 204(c)(3), 43 U.S.C. § 1653(c)(3). Under TAPAA's strict liability scheme, the owner of any ship that causes damages through the discharge of oil is strictly liable for the first $14 million of any damages claim, and the liability fund is responsible for additional damages, up to a total of $100 million. *Id.* For claims exceeding $100 million, TAPAA expressly preserves state and federal remedies: "The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law." *Id.* In addition to preserving state and federal remedies for claims exceeding $100 million, TAPAA also expressly preserves existing state authority to impose increased liability for oil spills. TAPAA § 204(c)(9), 43 U.S.C. § 1653(c)(9).

II. TAPAA, Not the Clean Water Act, Governs the EXXON VALDEZ Oil Spill

In its brief to this Court, Exxon argues that the Clean Water Act displaces federal maritime law because it "specifically addresses the problem of both negligent and intentional maritime oil spills." Exxon Br. 31. That argument can be rejected out of hand because it fails to acknowledge that TAPAA specifically addresses spills of oil transported through the Trans-Alaska Pipeline, and TAPAA expressly preserves existing federal remedies, including punitive damages under federal common law.

As the courts of appeals have agreed, TAPAA establishes "a comprehensive liability scheme applicable to damages resulting from the transportation of trans-Alaska pipeline oil."[28] While it is surely true that the Clean Water Act specifically addresses maritime oil spills, *see* 33 U.S.C. § 1321, TAPAA even more specifically addresses maritime spills of oil transported on the Trans-Alaska Pipeline.

As this Court has repeatedly recognized, "the specific governs the general."[29] That principle applies most strongly in this context because TAPAA, the more specific statute, is also the more recent statute. As this Court has stated, "a specific policy embodied in a later federal statute should control" over a general policy adopted in an earlier statute.[30]

TAPAA itself makes it perfectly clear that Congress intended TAPAA, not the Clean Water Act, to govern liability for private harm caused by spills of oil pumped through the Trans-Alaska Pipeline. The two statutes impose different standards of liability for oil spills, and TAPAA's standards are

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[28] *In re Glacier Bay*, 944 F.2d 577, 580-581 (9th Cir. 1991); *see also In re Tug Allie-B, Inc.*, 273 F.3d 936, 947 (11th Cir. 2001) ("TAPAA's purpose, in part, was to establish a comprehensive liability scheme applicable to damages to natural resources resulting from the transportation of trans-Alaska pipeline oil.").

[29] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *see also Simpson v. United States*, 435 U.S. 6, 15 (1978).

[30] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *cf.* 2B Norman J. Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51.02, at 186-87 (6th ed. 2000). Indeed, a specific statute governs a later-enacted general one. *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence.").

plainly higher. The Clean Water Act does not establish a private liability scheme for oil spills like that found in TAPAA, which allows recovery in strict liability up to $100 million and preserves existing state and federal remedies for larger claims. As the Ninth Circuit correctly observed, "Congress consciously and purposefully subjected Alaskan oil to tougher liability standards than other oil."[31]

The legislative history of TAPAA confirms that Congress specifically intended to impose a stricter liability standard for oil spills of Alaskan oil than oil covered only by the Clean Water Act. As the Conference Committee Report explains, TAPAA "provides, for vessels that transport North Slope oil in the coastal trade, liability standards that are much stricter than those that apply to vessels that transport other oil in the coastal or foreign trade."[32]

Moreover, the district court in this case specifically addressed the central role played by TAPAA and Exxon chose not to appeal that ruling. The district court recognized that TAPAA "is certainly a comprehensive, remedial statute." JA 103. In the district court, Exxon moved to dismiss the punitive damages claim on the ground that TAPAA displaces federal common law remedies. JA 60. The district court rejected Exxon's motion, ruling that TAPAA "expressly preserves" existing federal remedies, including punitive damages under federal maritime law. JA 103 (emphasis supplied by the district court). Having chosen not to appeal the

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[31] *Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992).

[32] Conf. Comm. Rpt., *supra* note 6, at 28, *reprinted in* 1973 U.S.C.C.A.N. 2417, 2523, 2530.

district court's ruling that TAPAA is the controlling federal statute and that TAPAA expressly preserves a federal common law punitive damages remedy, Exxon cannot challenge it here. Pet. App. 73a.

III. TAPAA Preserves Existing Remedies for Oil Spills, Including Punitive Damages Under Federal Common Law

While TAPAA establishes the federal statute that governs the EXXON VALDEZ oil spill, it preserves rather than displaces federal common law remedies, including punitive damages. *See* TAPAA § 204(c), 43 U.S.C. § 1653(c). As the text and legislative history of TAPAA make clear, Congress intended TAPAA to expand ship owners' liability for oil spills without in any way limiting that liability. The district court's unappealed ruling that TAPAA preserves the availability of punitive damages is plainly correct and fatally undermines Exxon's argument that the Clean Water Act displaces punitive damages.

A. When TAPAA Was Enacted, Punitive Damages Were a Well-Established Remedy Under Federal Maritime Law

When Congress enacted TAPAA in 1973, punitive damages had long been available as a matter of federal maritime law. As the First Circuit has explained, "[a]lthough rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others."[33] Punitive damages were plainly

[33] *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995) (listing cases).

available when ship owners recklessly hired incompetent ship masters. As the Sixth Circuit stated in 1969: "Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him."[34] Congress, of course, must be presumed to know this common law background against which it enacted TAPAA.[35]

B. In Enacting TAPAA, Congress Concluded that Existing Compensatory Damages Provided Inadequate Compensation for Oil Spills Off the Alaska Coast

In 3,500 pages of congressional hearings and debates leading to the enactment of TAPAA, there are precisely zero references suggesting that oil companies should be immunized against punitive damages for oil spills under federal maritime law. On the contrary, Congress was gravely concerned about the possibility of oil spills and sought to increase the standard of care applicable to the shipment of oil and to increase liabilities for oil spills. Congress did so by imposing strict liability against oil companies for oil spills, while preserving existing remedies under state and federal law for

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[34] *U.S. Steel Corp v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

[35] *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law . . . principles."); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."); *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

claims exceeding $100 million. TAPAA § 204(c), 43 U.S.C. § 1653(c).

Congress imposed strict liability for oil spill damages because it concluded that maritime law might not ensure the availability of compensatory damages. As the Conference Report declared: "The Conferees concluded that existing maritime law would not provide adequate compensation to all victims . . . in the event of the kind of catastrophe which might occur. Consequently, the Conferees established a rule of strict liability for damages from discharges of the oil transported through the trans-Alaska Pipeline up to $100,000,000."[36] Specifically, Congress was concerned that, under maritime law, compensatory damages might be limited to the value of the ship and its cargo.[37] Limitations on compensatory damages might render them insufficient for a catastrophe resulting from an oil tanker spill. As the Conference Committee explained, "Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area."[38]

To ensure that sufficient damages would be available for persons injured by oil spills, TAPAA imposes liability without fault for any oil spills

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[36] Conf. Comm. Rpt., *supra* note 6, at 28, *reprinted in* 1973 U.S.C.C.A.N. at 2530.

[37] *See* 119 Cong. Rec. 24296 (July 17, 1973) (Sen. Hathaway) (describing the need "to revise existing laws limiting the liability of the owner of a vessel to the value of the vessel and cargo at the time of the accident").

[38] Conf. Comm. Rpt., *supra* note 6, at 28, reprinted in 1973 U.S.C.C.A.N. at 2530.

involving oil transported on the Trans-Alaska pipeline. TAPAA § 204(c)(1), 43 U.S.C. § 1653(c)(1). That standard is tougher than the common law standard.[39] As Congress concluded, the liability regime established by TAPAA, which imposes strict liability with existing federal and state law serving as a backup, "would provide an incentive to the owner or operator to operate the vessel with due care."[40]

C. TAPAA Preserves Existing Remedies, Including Punitive Damages Under Federal Maritime Law

By its express terms, TAPAA expands the availability of compensatory damages for oil spills while preserving existing remedies under state and federal law. Section 204(c) provides that claims not paid by the $100 million liability fund "may be asserted and adjudicated under applicable Federal or state law." TAPAA § 204(c)(3), 43 U.S.C. § 1653 (c). TAPAA further expressly preserves state authority to impose "additional requirements." *Id.* § 204(c)(9), 43 U.S.C. § 1653(c)(9).

Notwithstanding the plain language of TAPAA, Exxon argued in the district court that TAPAA establishes a comprehensive regulatory scheme that should be construed to extinguish common law remedies, including punitive damages under federal

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[39] *See Slaven v. BP America, Inc.*, 973 F.2d 1468, 1474 (9th Cir. 1992) ("Congress consciously and purposefully subjected Alaskan oil to tougher liability standards than other oil."); *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991) ("This strict liability provision ensures that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation.").

[40] Conf. Comm. Rpt., *supra* note 6, at 29.

maritime law. JA 60-93. The district court correctly ruled that the text of TAPAA "expressly preserves," rather than displaces, the availability of punitive damages under federal maritime law: "TAPAA is not intended to occupy the entire field of trans-Alaskan oil spills. TAPAA is certainly a comprehensive, remedial statute. However, TAPAA was intended to provide plaintiffs with a new strict liability remedy." JA 103 (citations omitted).[41]

As the district court correctly found, oil spills were a primary environmental concern Congress sought to address in enacting TAPAA. It would make little sense to read TAPAA to preclude existing common law remedies for oil spills, given the clear congressional intent to expand existing. As the district court explained: "Congress, in enacting TAPAA, was expanding recovery, not restricting recovery. . . . Congress dispensed with fault, but Congress did not intend to limit the liability of vessel owners and operators." JA 105 (citations omitted). The legislative history clearly bears this out.[42]

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[41] *See also In re Glacier Bay*, 741 F. Supp. 800, 804 (D. Alaska 1990), *aff'd*, 944 F.2d 577 (9th Cir. 1991) ("Congress was concerned with the source of funding for oil spill damage claim compensation, rather than with limiting the liability of vessel owners and operators.").

[42] *See, e.g.,* 119 Cong. Rec. 26821 (Nov. 13, 1973) (Sen. Magnuson) ("Section 204(c) should considerably enhance the availability of compensation to injuries parties *without disrupting existing Federal law, State law, or international treaties*.") (emphasis added). TAPAA thus also refutes the claims of certain of Exxon's *amici* that congressional maritime policy uniformly favors the limitation of ship owners' liability. *See* Brief of Amici Curiae Transportation Institute at 13-19. TAPAA expanded (rather than limited) ship owners' liability due to the grave threat that oil spills posed to Alaska's rich marine environment.

Exxon chose not to appeal the district court's ruling that the plain text of TAPAA preserves punitive damages. Pet. App. 73a. Exxon cannot challenge it here.

IV. The Jury's Award of Punitive Damages Is Appropriate Because Exxon's Recklessness Violated the Fundamental Terms of the Social Compact Embodied in TAPAA

The oil companies gained authority to develop Alaska's oil reserves based on their repeated promises to the people of Alaska that they would take every possible precaution to protect against oil spills. Those vows were a central trade-off in the social compact embodied in TAPAA, which expressly preserves existing remedies, including punitive damages.

It is clear that Exxon breached its promise. Far from taking every possible precaution against oil spills, Exxon recklessly gave command of a loaded oil tanker to a known, relapsed alcoholic. As the Ninth Circuit explained:

> Here the jury found that the corporation, not just the employee, was reckless. The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies.

Pet. App. 83a. Furthermore:

> There was substantial evidence . . . 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. 89a.[43]

Punitive damages are appropriate in these circumstances. As has long been established, "punitive damages may be awarded in maritime tort actions where defendant's actions were intentional, deliberate or so wanton and reckless as to demonstrate a conscious disregard of the rights of others."[44] Punitive damages are warranted against a corporation where harm occurs as a result of its reckless hiring. As the New York Court of Appeals declared well over a century ago:

> If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages.[45]

This Court quoted that language with approval in *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101, 116 (1893), and it remains good law today.

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[43] *See also* Pet App. 29a, 64a, 121a-122a, 154a-157a.

[44] *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988).

[45] *Cleghorn v. New York Central & Hudson River R.R. Co.*, 56 N.Y. 44, 47-48 (1874).

Punitive damages are appropriate here because Exxon recklessly put at risk Alaska's marine resources and marine-based economy after it and the other oil companies solemnly vowed to protect them. Having profited from the terms of the social compact underlying TAPAA, Exxon should not be heard to challenge those terms.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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APPENDIX

Selected Provisions of the Trans-Alaska Pipeline Authorization Act of 1973, Pub. L. 93-153, 87 Stat. 584, codified in part in Title 43 of the United States Code

Sec. 202, codified at 43 U.S.C. § 1651

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country.

Section 203, codified at 43 U.S.C. § 1652

(a) **Congressional declaration of purpose**

The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) Issuance, administration, and enforcement of rights-of-way, permits, leases, and other authorizations

The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection.

* * *

Section 204, codified at 43 U.S.C. § 1653, repealed by the Oil Pollution Act of 1990

* * *

(c)(1) Notwithstanding the provisions of any other law, if oil that has been transported through

the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations

prescribed by the Secretary. The fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.