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 *AMICUS CURIAE* OF THE NATIONAL FISHERIES INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus National Fisheries Institute ("NFI") is the nation's leading seafood industry advocacy organization. It is committed to both the sustainable management of the nation's fisheries and the responsible stewardship of the marine environment. The NFI's nearly 400 members come from the East Coast, West Coast, and Gulf Coast, as well as Alaska and Hawai'i. They range from small, family-owned fishing vessels to large, nationally traded corporations, and include such diverse representatives of business, education and government as Wal-Mart Stores, Bumble Bee Foods, Gorton's Seafoods, Seattle Fish Co., Kona Bluewater Farms, Chesapeake Fish Co., Trident Seafoods Corp., Outback Steakhouse, Long John Silvers, The University of Florida, The Oregon State University Seafood Lab, the California Fisheries and Seafood Institute, the New York Sea Grant, the North Carolina State Department of Agriculture, the Gulf Oyster Industry Council, the University of Maryland, the Virginia Polytechnic Institute, the Alaska Sea Grant College Program, the Northwest Fisheries Organization, and the U.S. Department of Commerce.

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[1] This brief is being submitted with the consent of the parties. It was prepared on behalf of the NFI by its undersigned counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than the NFI, or its counsel, made a monetary contribution to the preparation or submission of the brief.

The seafood handled by NFI members is caught throughout U.S. territorial waters and out on the high seas. Initial processing typically occurs offshore, either aboard the fishing vessel that made the catch, or upon sea-going tenders that sail with the fleet. Secondary processing generally occurs in shoreside plants. Wholesalers and distributors collect the processed seafood, and share it out to stores, restaurants, fish mongers and other retailers all over the country. Those retailers, in turn, sell their allotments directly to the consuming public. The NFI represents members from every link in that chain. This water-to-table diversity gives it an unusual perspective on all three questions for *certiorari*, but enables it to speak with particular authority on question No. 3. That is the question to which this brief will primarily address itself. The NFI would specifically like to answer Petitioners Exxon Shipping Co.'s and Exxon Mobil Corp.'s (collectively referred to as "Exxon") argument that this Court will not serve the "'fundamental interest giving rise to maritime jurisdiction'" – "'the protection of maritime commerce'"[2] – unless it further reduces the punitive damage award which the Ninth Circuit has already halved.

[2] *Brief of Petitioners* at 46 quoting *Norfolk Southern Ry. Co. v. Kirby,* 543 U.S. 14, 25 (2004).

SUMMARY OF ARGUMENT

This brief will argue four main points.

1. The general maritime law sets no special limits on punitive awards. Although punitive damages are no more common in admiralty than they are outside it, they have historically been available in any case involving actual malice, criminal indifference, a reckless disregard for the rights of others, or gross negligence.

2. "Smart," "vindictive," or "exemplary" damages were used to *compensate* intangible injuries until well into the 19th century, but today punitive awards generally serve the same two interests in admiralty as they do at common law; they are levied to punish past wrongs and deter future wrongdoing. In pollution cases like the one at bar, moreover, they are specifically imposed to protect the marine environment and preserve its bounty for everyone.

3. To achieve those objectives in this case, and to serve the fundamental purpose of protecting maritime commerce, this Court should consider whether the traditional tenets of admiralty law have allowed Exxon to escape liability for much of the far flung economic harm which the *Exxon Valdez* oil spill caused. Where the governing compensatory regime allows corporate wrongdoers like Exxon to escape full liability for all the damages its egregious conduct has caused, under-deterrence will result, undesirable conduct may be encouraged, maritime commerce will

be damaged, and the environment will not be fully protected.

4. Under-deterrence will result unless the Court affirms the punitive award in this case because, with very narrow exceptions, the well-settled maritime rule in *Robins Dry Dock*[3] permitted Exxon to escape liability for any economic damages that did not flow from direct physical contact with the oil it spilled onto Prince William Sound.

ARGUMENT

I. The General Maritime Law Sets No Special Limits on Punitive Damages

The long and storied history of punitive remedies in American maritime law has been told well and in great detail elsewhere – particularly in University of Texas Law Professor David Robertson's exhaustive monograph on the subject, "Punitive Damages in American Maritime Law," 28 J. MAR. L. & COM. 73 (1997). As this Court has repeatedly pointed out, "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to do so by established and inflexible rules." *Moragne v. United States Lines, Inc.,* 398 U.S. 375, 387 (1970), quoting *The Sea Gull*,

[3] *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927).

21 F. Cas. 909, 910 (C. C. Md. 1865); see also *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 585 (1974). Far from establishing any special rules prohibiting or limiting "punitive," "exemplary," or "vindictive" damages, the general maritime law of the United States has, as Professor Robertson put it, "firmly recognized" the availability of such damages whenever "the defendant was guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct."[4] *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2nd Cir. 1972); see also *Gamma-10 Plastics, Inc. v. American President Lines*, 32 F.3d 1244, 1254 (8th Cir. 1994) ("Under maritime law, punitive damages are warranted where the defendant has acted with 'reckless or callous disregard for the rights of others or for conduct which shows gross negligence or actual malice or criminal indifference.'").[5]

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[4] Robertson, 28 J. MAR. L. & COM. at 98.

[5] E.g. *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 701 (1st Cir. 1995) (intentional destruction of property); *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988) (intentional infliction of emotional distress); *Churchill v. F/V Fjord*, 892 F.2d 763, 772 (9th Cir. 1988), cert. denied, 497 U.S. 1025 (1990) (collision caused by intoxication); *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379, 1385 (9th Cir. 1985) (intentional destruction of property); *Pino v. Protection Maritime Ins. Co.*, 490 F. Supp. 277, 281 (D. Mass. 1980) (tortious interference with employment rights); *The Ludlow*, 280 F. 162, 163 (N.D. Fla. 1922) (malicious and unlawful arrest); *The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909) (intentional

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In short, if there is anything inherently distinctive about the use of punitive damages under judge-made maritime law, it is the long history which such damages have enjoyed in that body of jurisprudence. Exxon hopes to hide from that history behind this Court's ruling in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 36 (1990). Arguing that Congress itemized and codified all the federal remedies available in marine pollution cases when it passed the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, Exxon cites *Miles* for the proposition that, when an Act of "Congress has spoken directly" to the question of what damages are recoverable in a particular maritime context, "'the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.'" 498 U.S. at 31, quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

But as the Louisiana State Court of Appeal summed up when it rejected an argument identical to the one Exxon is making here, "*Miles* . . . does not . . . signify a call for universal uniformity of maritime tort

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property damage); *Ralston v. The States Rights*, 20 F. Cas. 201, 210 (E.D. Pa. 1836) (reckless steamboat racing); *Steamboat Co. v. Whilldin*, 4 Har. 228, 233 (Del. 1845) (grossly negligent collision). One admiralty court has awarded punitive damages for "a clear breach of contract caused either by the grossest carelessness, or by reckless cupidity." *Morrison v. The John L. Stephens*, 17 F. Cas. 838, 840 (N.D. Cal. 1861) (in which the owners of a steamship forced a married couple to berth with a stranger in a stateroom for which the couple had paid extra to reserve solely for themselves).

remedy, but rather emphasizes the importance of uniformity in the face of applicable *relevant* legislation." *Poe v. PPG Industries*, 782 So. 2d 1168, 1173 (La. App. 2001) (original emphasis). To borrow a pertinent quote from this Court's decision in *Yamaha Motor Corp. v. Calhoun,* which permitted a "nonseafarer" to pursue a state wrongful death remedy for a fatality which occurred on navigable, territorial waters, it is only when "Congress has prescribed a comprehensive tort recovery regime" that there is "no cause for enlargement of the damages statutorily provided." 516 U.S. 199, 215 (1996). Whatever Exxon might suggest, neither the CWA nor any other Federal statute prescribes such a regime here.[6]

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[6] Since Exxon's misuse of *Miles* bears on the second question for certiorari, and threatens to distract us from the third question – which is the focus of this brief – we will not belabor it, except to note that this Court did not address the issue of punitive damages in *Miles*. To quote the Louisiana State Court of Appeal's decision in *Poe* once again:

> The Supreme Court in *Miles* expressly stated that it was granting certiorari on only two issues, whether or not a non-dependent parent or a deceased seaman can recover for loss of society under the general maritime law, and whether the estate of a decedent is entitled to recover for the future lost earnings of a seaman. The Court's decision did not address the denial of the right of the seaman's mother to recover non compensatory punitive damages. The Supreme Court in *Miles* did deny recovery for loss of society, which is a form of nonpecuniary relief. The Court was trying to ensure a uniform scheme of recovery regardless of whether a wrongful death action was brought under the Death on the High Seas Act, 46 U.S.C. § 761, [currently codified

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> as 46 U.S.C.S. §§ 30301 *et seq.*], the Jones Act [currently codified as 46 U.S.C.S. § 30104] or general maritime law. Those statutes provide only for pecuniary relief.

Poe v. PPG Industries, 782 So. 2d 1168, 1172 (La. App. 2001).

The holding in *Miles* has produced some confusion among the lower courts. Cantilevering their decisions on what they describe as this Court's "analytical framework," a feat which Professor Robertson has called "something akin to sleight of hand," 28 J. MAR. L. & COM. at 164, the Fifth, Sixth, and Ninth Circuits have extended the holding in *Miles* to deny punitive recovery to seamen killed or injured in the course of their employment. See, e.g., *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993) (Jones Act case); *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), reversed in part on reh'g, 59 F.3d 1496 (1995) (maintenance and cure case); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995) (same); see also *Wahlstrom v. Kawasaki Heavy Inds., Ltd.*, 4 F.3d 1084 (2nd Cir. 1993) (general maritime wrongful death case); *In re Amtrack etc. v. Warrior & Gulf Nav. Co.,* 121 F.3d 1421 (11th Cir. 1997) (same). These are the lower-court holdings on which Exxon's *Miles* argument are built.

But as Professor Robertson explained, the rickety analytical bridge which these decisions hammered together hangs from "unexamined lower-court assumptions that punitive damages are 'non-pecuniary' and that all non-pecuniary damages issues in seamen's Jones Act and unseaworthiness cases demand like treatment." 28 J. MAR. L. & COM. at 163. Seamen, after all, are the peculiar wards of admiralty. E.g., *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962).

> No one has suggested a justification in policy or principle for treating seamen worse than other maritime plaintiffs. Nor has anyone argued that it makes sense for the maritime law to be more restrictive of punitive liability than the prevailing land-based law.

Robertson, 28 J. MAR. L. & COM. at 164; see also Force, "The Curse of *Miles v. Apex Marine Corp.*: The Mischief of Seeking 'Uniformity' and 'Legislative Intent' in Maritime Personal Injury

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II. Punitive Awards Serve the Same Interests in Admiralty as They Do at Law – Punishment and Deterrence

Admiralty "courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." *Lake Shore & S.M. Ry. v. Prentice*, 147 U.S. 101, 107 (1902). "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001). But today, punitive damages in admiralty primarily "serve the purpose 'of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.'" *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767

Cases," 55 LA. L. REV. 745 (1995). As a consequence, the Eleventh Circuit recently rejected the unexamined lower-court assumptions on which Exxon cantilevers its arguments, and stood by its traditional holding that punitive damages are fully available in seamen's cases. *Atlantic Sounding Co. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007). There are pre-*Miles* State court decisions to the same effect still standing. See, e.g., *Baptiste v. Superior Court*, 106 Cal. App. 3d 87, 95-104, 164 Cal. Rptr. 789, 792-98 (Cal.App. 1980), cert. denied sub nom. *Chevron Shipping Co. v. Baptiste*, 449 U.S. 1124 (1981); *Weason v. Harville,* 706 P.2d 306, 310 (Ak.Sup.Ct. 1985). The cases are thus in conflict. The decision in this case could help resolve that conflict by rejecting Exxon's arguments and underscoring the limited scope of the holding in *Miles*.

F.2d 1379, 1385 (9th Cir. 1985); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); see gen. Robertson, 28 J. MAR. L. & COM. at 74-75; 1 Schoenbaum, *The Law of Admiralty,* § 5-17, p.243 (4th ed. 2001).

It follows that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America v. Gore,* 517 U.S. 559, 575 (1996). Subject, of course, to the limitations imposed by constitutional due process, a punitive award "should reflect 'the enormity of his offense.'" *Id.* quoting *Day v. Woodworth*, 54 U.S. 363, 13 How. 363, 371, 14 L. Ed. 181 (1852). This, in turn, requires a careful consideration of the harm the defendant has caused.

III. To Determine Whether the Punitive Award in this Case Protected Maritime Commerce and Served the Traditional Purposes of Punishment and Deterrence, the Court Should Consider Whether Exxon Was Required to Pay for All of the Far-Flung Harm its Misconduct Caused

Since the Briefs of the Petitioners and Respondents have thoroughly addressed the "guideposts" which this Court has developed for assessing punitive awards, we will not revisit those guideposts here. It is enough for our purposes to note that:

> [B]oth State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 442, 460 (1993) (original emphasis); see also *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 581 (1996) ("the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and the *harm likely to result* from the defendant's conduct as well as the harm that actually has occurred' ") (original emphasis). This principle is especially important in the case at bar.

In a 1998 study underwritten by Exxon, Stanford Law and Economics Professor A. Mitchell Polinsky, and Harvard Law Professor Steven Shavell used economic reasoning to provide a relatively simple set of principles for determining how and when punitive awards will best meet their objectives of punishing past wrongdoers and deterring future wrongdoing. Polinsky and Shavell, "Punitive Damages: An Economic Analysis," 111 HARV. L. REV. 869 (1998). Their study concluded, *inter alia,* that:

> [A] crucial question for consideration is whether injurers sometimes escape liability for harms for which they are responsible. If they do, the level of liability imposed on them when they are found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause. This excess liability can be labeled 'punitive damages,' and failure to impose it would result in inadequate deterrence.

Id. at 873-74. We respectfully urge the Court to consider that question in this case.

IV. Under-Deterrence Will Occur in this Case Unless the Court Affirms the Award of Punitive Damages

In *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), this Court laid down "a bright-line rule of limitation which discards traditional precepts of foreseeability and . . . relies instead on whether the alleged pecuniary loss resulted from physical harm arising from the defendant's negligence." *In re Oriental Republic of Uraguay,* 821 F.Supp. 934, 939 (D. Del. 1993). This rule, in turn, has been generally applied to marine pollution cases, *id.*; see also, *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc), and was specifically applied by the district court to the case at bar. See, e.g., JA 132.

The clarity provided by the *Robins* rule has not come without a price:

> The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses.

People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 254 (1985); see also *Pruitt v. Allied Chemical*, 523 F.Supp. 975, 982 (E.D. Va. 1991). That was certainly the case here. See *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997) (refusing to reinstate claims for various economic injuries and emotional damages on ground they were too remote); see also Pet. App. 115a-16a; JA 118-16, 1384-90.

Admiralty courts faced with the widespread ruin which inevitably flows from a dramatic marine spill like this one have recognized a narrow and well-defined exception to the *Robins* Rule, for commercial fishermen, in deference to "the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries." *Union Oil Co. v. Oppen,* 501 F.2d 558, 569 (9th Cir. 1974). But that exception is *sui generis,* and does not extend to many other maritime plaintiffs – indeed, it does not even extend very far along the water-to-table processing chain that binds together the members of the NFI in particular, and the seafood industry in general. See, e.g., *In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 378-80 (5th Cir. 2006); *Nautilus Marine,*

Inc. v. Niemela, 170 F.3d 1195, 1196-97 (9th Cir. 1999); *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*, 638 F.2d 700, 702 (4th Cir. 1981); *Slaven v. B.P. America, Inc.*, 786 F. Supp. 853, 861 (C.D. Cal. 1992); *In re Glacier Bay*, 865 F. Supp. 629, 638 (D. Alaska 1991); *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975, 979-80 (E.D. Va. 1981).

As *In re Oriental Republic of Uruguay* lamented, when it pondered the effect of the *Robins* Rule in a Shipowners' Limitation case arising out of a marine oil spill in Delaware: "Obviously the number and variety of different forms of economic harm arguably resulting from [the] negligent discharge of oil into the Delaware River are limited only by the boundaries of human imagination." 821 F.Supp. at 939. That lament is truer and more poignant still in this case. It may thus not go too far to suggest that the *Robins* Rule has enabled Exxon to escape liability for the lion's share of the harm this spill caused.

It necessarily follows that the well-settled deterrence objective of punitive awards in admiralty will not be served unless this Court upholds the award which the Ninth Circuit has already halved.

CONCLUSION

"[T]he fishing industry is clearly part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime

history." *Oppen*, 501 F.2d at 561. Yet Exxon's reprehensible conduct put hundreds of maritime businesses into bankruptcy or dire financial straits. Many of those businesses had no right to compensatory damages under *Robins*, and will have no indication that the law either recognizes their predicament or intends to deter future such calamities unless Exxon is punished for this spill. Exxon, by contrast, has assured the district court that paying even the $5 billion jury verdict "would not have a material impact on the corporation." SJA 334 sa. The special principles of admiralty law, and that law's well-established interest in protecting maritime commerce, call upon this Court to reject Exxon's arguments and affirm the decision of the Court of Appeals.

Respectfully submitted,

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