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No. 07-219

In The
Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

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

BRIEF OF AMERICAN COMMERCIAL LINES INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

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 (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

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INTEREST OF THE *AMICUS* CURIAE

American Commercial Lines Inc. ("ACL") is one of the largest and most diversified marine transportation and service companies in the United States.[1] ACL and its subsidiaries provide barge transportation and related services under the provisions of the Jones Act (current version at 46 U.S.C. § 55102 *et seq.*, previously 46 U.S.C. app. § 883) and manufacture barges, towboats and other vessels, including ocean-going liquid tank barges. ACL is regulated by general maritime rules and regulations, federal, state and local laws. Decisions relating to punitive damages under statutes affecting water trade and commerce, such as the Clean Water Act, or under the principles of maritime law, have a direct impact on ACL. As a result, ACL is submitting this brief to assist the Court in understanding the position of marine operators within the inland marine industry.

The inland marine industry operates on approximately 11,000 miles of commercially significant navigable waterways in the United States. U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook '92* at 40-20 (1992). More than 4,000 towing vessels, pushing a collection of 27,000 unmanned and unpowered barges carrying cargoes, operate on these waterways. *See* American Waterways Operators, *Value to the Nation*, *available at* http://www.americanwaterways.com/about_industry/value.pdf. These barges carry 617

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[1] Pursuant to Rule 37.6, no counsel for a party to this case authored any part of this brief, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this *amicus curiae* brief, and their consent letters are on file with the Clerk of the Court.

million tons of materials and products that power the American economy, including coal, grain, petroleum products, petrochemicals, fertilizers, sand, gravel, metallurgic products, and much more. David V. Grier, *Locks and Dams, Proceedings of the Marine Safety & Security Council, the Coast Guard Journal of Safety at Sea, Summer 2007 at 56 (citing U.S. Army Corps of Engineers, Institute for Water Resources, Inland Navigation, Value to the Nation (2000, unpublished update 2005))*. The inland marine industry transports approximately 300 billion ton-miles of cargo annually. *Id.* These ton miles comprise up to 20 percent of all domestic waterborne cargo movements. *U.S. Industrial Outlook '92* at 40-20.

In contrast to the facts of the present case, in which the oil spill at issue occurred in a remote and sparsely populated area, inland marine companies operate through a number of major metropolitan areas along the inland and intracoastal waterways, including St. Louis, Missouri; Minneapolis/St. Paul, Minnesota; Chicago, Illinois; Cincinnati, Ohio; Louisville, Kentucky; Memphis, Tennessee; New Orleans, Louisiana; and Houston, Texas. The inland river industry works with federal, state and local regulators to ensure that its operations have the safety of life and limb and the protection of the marine environment as top priorities.

Transportation by barge is environmentally advantageous when compared to other modes of transportation, such as truck or rail car. For example, one large inland towing vessel can push 40 barges that have the same cargo capacity as approximately 2,400 trucks that burn one gallon of fuel to transport the equivalent of 70 ton miles, as compared to 530 ton miles by barge. Grier, *supra* at 56.

No company dominates or controls the inland river industry. The inland river industry consists of approximately 750 companies. Forty-five percent of the total capacity is spread amongst nine different operators. U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook 1993* at 40-19 (1993). In recent years, the inland river industry has weathered economic downturns that have hurt the profitability and development of some smaller operators. None could withstand the imposition of punitive damages approaching the scale assessed in this case. Moreover, to expose the industry to vicarious punitive damages in circumstances similar to this case would mean the financial ruin of the alleged wrongdoer, would do nothing to prevent any "reckless" conduct of its employees, and would negatively impact the vital security role newly assigned to the industry by the Marine Transportation Security Act of 2002 ("MTSA") and the regulations implementing that statute. *See* Marine Transportation Security Act of 2002, 46 U.S.C.A. § 70101 *et seq.*, as implemented by the provisions of the Maritime Security regulations, 33 C.F.R. § 101.100 *et seq.* Additionally, this decision is openly contrary to this Court's longstanding precedent precluding the imposition of vicarious punitive damages against vessel owners, and this Court's more recent decisions limiting the reach of judicially-created remedies beyond those provided by statute.

ARGUMENT

1. The Extension Of Punitive Damages To The Clean Water Act Raises The Significant Likelihood That Other Courts Will Impose Punitive Damages Under Other Statutes Which By Their Terms Do Not Provide For Such Damages

The maritime industry, including the inland river industry, is subject to numerous regulatory statutes, both those specifically directed at the maritime industry and those with a broader reach, such as the Clean Water Act ("CWA"), 33 U.S.C. § 1311 *et seq.* Many of those statutes impose penalties for their violation. Although the CWA has express criminal and civil penalties for the violation of its provisions — and no provision allows the award of punitive damages — the Ninth Circuit decided that punitive damages could be awarded under the Act as a "supplement" to the statutory remedies. The notion that courts may expand upon express statutory remedies by creating punitive damage liability — where Congress has not — exposes the inland river industry to the potential for substantial additional liabilities.

It is chilling to consider the detrimental impact if this principle is extended to other statutes affecting ACL and other operators in the inland river industry. It would create an exposure to punitive damages that would be inconsistent with the Court's prior decisions — decisions on which the industry has relied for nearly two centuries. A particularly troubling aspect of the Ninth Circuit's decision, from the standpoint of an inland river towing company like ACL, is the possibility that punitive damages could be imposed under the Jones Act, 46 U.S.C. § 30104 *et seq.*, by a court or jury when such damages are not permitted by long-standing precedent.

Under that Act, "seamen" (the vast majority of ACL's workforce) are not subject to state workers' compensation statutes. Rather, their exclusive remedy for a job-related injury is an action for negligence under the Jones Act, which incorporates by reference the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* Unlike workers' compensation statutes that have scheduled amounts of recovery for particular classes of injuries, there is no limit on the amount of damages which may be awarded by the finder of fact under the Jones Act. Damages for pain and suffering often constitute a significant part of such claims. For serious injuries, it is not unusual for verdicts in Jones Act cases to exceed a million dollars.[2]

Unlike cases under the FELA, a seaman's personal injury action typically includes not only a negligence count under the Jones Act, but also a count under the general maritime law for "unseaworthiness" and a count for "maintenance and cure." Both of the latter claims are essentially forms of strict liability for an accident or illness. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 207-08 (1996); *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs, U. S. Dept. of Labor*, 540 F.2d 629, 636 (3d Cir. 1976).

At least to this point, defendants in actions by seamen were not thought to be subject to punitive damages. Indeed, that issue appeared to have been settled in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). This Court in *Miles*

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[2] Among the damages which a seaman may recover under the Jones Act are past and future lost wages, past and future medical expenses, pain and suffering damages, and damages for loss of life's enjoyments. *See generally* Robert Force & Martin J. Norris, *The Law of Seamen* §§ 30:53-60 (5th ed. 2003).

explained that only pecuniary damages could be awarded under the Jones Act and therefore, there could be no recovery for loss of society in a seaman death case under the general maritime law. The Court concluded that it "would be inconsistent with [its] place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33.

Although *Miles* did not expressly deal with punitive damages, a number of the lower courts have concluded that such damages are not available under the Jones Act. For the same reasons articulated in *Miles*, these courts also held that punitive damages were not recoverable in actions for unseaworthiness or maintenance and cure. *See, e.g.*, *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1454-59 (6th Cir. 1993) (punitive damages may not be awarded to survivors of Jones Act seamen in maritime wrongful death claim); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (punitive damages may not be awarded under unseaworthiness claim); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1500-13 (5th Cir. 1995) (*en banc*) (punitive damages may not be awarded for failure to pay maintenance and cure).

The Ninth Circuit's decision in this case is inconsistent with this line of cases. This is not idle speculation or a false jeremiad. Scarcely a month ago, the Eleventh Circuit held that punitive damages *could* be awarded in connection with a seaman's maintenance and cure claim. *See Atlantic Sounding Co., Inc. v. Townsend*, No. 06-13204, 2007 WL 2385928, *3 (11th Cir. Aug. 23, 2007). In so holding, the court concluded that its prior decision in *Hines v. J.L. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987), which had permitted an award of

punitive damages in connection with maintenance and cure, was not abrogated by *Miles*. *Atlantic Sounding* at **1-3.

The appellant argued that, under *Miles*, the seaman could not "recover punitive damages for a general maritime maintenance and cure cause of action because he would not be able to recover punitive damages--which are non-pecuniary in nature--under the Jones Act." *Id.* at *3. "But this argument," according to the court, "can only be based on the *reasoning* of the *Miles opinion*, not on the *Miles* decision: its holding. *Miles* says and--more important--decides nothing about maintenance and cure actions or punitive damages." *Id.* (emphasis added).

The rationale of the Ninth and Eleventh Circuits invites courts to expand on existing remedies provided by statute to include punitive damages. The Ninth Circuit's opinion relies on the proposition that the law governing the maritime industry needs to be "updated" so that companies that carry on maritime activities have the same exposure as "modern" corporations. But "modern" corporations' exposure to their employees' claims for injuries is limited by workers' compensation acts which do not provide for punitive damages under their statutory schemes. *See* 6 Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* § 100.03[8] (2007). The inland river industry has no such protection. Indeed, in this area a Jones Act employer is already exposed to a compensatory damages liability that far exceeds any claim that might be made by an employee in other industries. To further expose Jones Act employers to claims for punitive damages, under the Jones Act or the general maritime law doctrines of unseaworthiness or maintenance and cure, could have a devastating impact on the industry.

2. The Imposition Of Vicarious Punitive Damages Under Maritime Law Is A Matter Of Vital Interest To The Nation's Maritime Shippers And The Nation's Commerce Which Relies On Those Maritime Shippers

In permitting the imposition of vicarious punitive damages, the Ninth Circuit has acted contrary to nearly two centuries of well-settled law. As noted in Judge Kozinski's dissent, this Court addressed this very issue in 1818 in *The Amiable Nancy*, 16 U.S. 546 (1818), reaching the opposite result. The Ninth Circuit's decision also conflicts with decisions of other circuits that continue to rely on *The Amiable Nancy*, in holding that, under maritime law, vicarious punitive damages may not be awarded. *See, e.g.*, *In re P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989); *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). There is little doubt that this decision creates a conflict among the circuits. Judge Kozinski noted that the decision below puts the Ninth Circuit "at loggerheads with every other circuit that has considered this issue." Pet. App. 289a. *See also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-17 (4th ed. 2004) ("admiralty cases deny punitive damages in cases of imputed fault, holding that a principal or master cannot be liable for an agent or servant's wanton or willful misconduct unless it participated in or ratified the wrongful conduct").

"Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability." *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 297 (1968) (Douglas, J., dissenting in part). The Court also observed in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 270 (1972) that the "long experience [of] the law of the sea . . . is concerned with . . . limitation of liability

. . . ." Numerous federal statutes implement that policy by directly limiting the liability of vessel operators, in various contexts, including the carriage of goods (Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), *reprinted in* note following 46 U.S.C. § 30701, previously codified at 46 U.S.C. app. § 1300 *et seq.*); (Harter Act, 46 U.S.C. § 30701 *et seq.*) and pollution (Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*).

The broadest, and perhaps the most important statute in this regard is the Limitation of Shipowners' Liability Act, 46 U.S.C. § 30501 *et seq.* The Limitation Act "allows a vessel owner to limit liability for damage or injury, occasioned *without the owner's privity or knowledge*, to the value of the vessel or the owner's interest in the vessel." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001) (emphasis added). Numerous cases under the Act make clear that "'[p]rivity or knowledge' *implies some sort of 'complicity* in the fault that caused the accident.'" *See Brister v. A.W.I., Inc.*, 946 F.2d 350, 355 (5th Cir. 1991) (emphasis added). In other words, the vessel owner lacks privity or knowledge when it is not complicit in the conduct that caused the accident, and thus it may limit its liability under the Act to the value of its interest in the vessel plus the value of the pending freight in the transportation movement. *See* 46 U.S.C. § 30505.

The federal courts have not imputed privity or knowledge to a shipowner under the Limitation Act simply because the captain made errors in navigation resulting in a particular loss when the ship owner had no reason to know of the impending error in judgment. As explained in *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977), "[i]n the typical situation of a corporate owned ocean vessel the privity and knowledge scrutiny focuses in on whether the shore-based high-level[]

management is aware (or should have been) of the likelihood of the occurrence happening after the ship is underweigh." *See also Coryell v. Phipps*, 317 U.S. 406, 412 (1943) ("One who selects competent men . . . and who is not on notice . . . cannot be denied the benefit of . . . limitation . . . ."). Thus, this Court long ago held that, when the owner is a corporation, "the privity or knowledge must be that of the managing officers of the corporation." *Craig v. Cont'l*, 141 U.S. 638, 646 (1891). Further, a managing officer is "anyone to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business . . . ." *Cont'l Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (quoting *The Erie Lighter 108*, 250 F. 490, 494 (D.N.J. 1918)). As one treatise notes, "[i]n general, the men who actually go to sea in the ships, and the shore staff who are of less than managerial ranks, are persons whose knowledge or privity does not affect a corporate shipowner" for the purposes of the Limitation Act. 3 Benedict on Admiralty § 42 (2005).

Moreover, it is difficult, indeed impossible, to justify the imposition of vicarious punitive damages in circumstances such as in this case. The dual purposes of punitive damages are to punish the conduct of the wrongdoer and to deter others from engaging in such conduct. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' . . . By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution."). The imposition of vicarious punitive damages in this case serves neither purpose.

By definition, when *vicarious* punitive damages are imposed, as in this matter, a vessel owner is punished not for its own wrongful conduct, but instead for the wrongful conduct of its agent, even though such conduct was directly contrary to the policies of the vessel owner. As the Fifth Circuit explained in *P & E Boat Rentals*, "[t]here would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty." 872 F.2d at 652 (quoting C.T. McCormick, *Handbook on the Law of Damages* § 80 at 282 (1935)). As a number of the decisions addressing this issue have noted, the situation is obviously different when the vessel owner had some complicity in the wrongful act, *i.e.*, it was also to blame for the harm which resulted, such as when "the acts complained of were those of an unfit master and the owner was reckless in employing him." *U.S. Steel Corp.*, 407 F.2d at 1148.

But when the vessel owner took no part in, and had no reason to expect, the reckless or other wrongful acts complained of, the assessment of punitive damages would be little more than an arbitrary rule. Certainly, it offends traditional notions of fairness that require the punishment to be relative to fault. In the circumstances of this case, the vessel owner did nothing to warrant such punishment. Indeed, it took steps to prevent just such conduct that violated its specific rules. Moreover, awarding of vicarious punitive damages can hardly have any effect as a deterrent because the acts giving rise to the award were not those of the vessel owner in the first place. If the captain failed to follow the owner's express directives, exactly what conduct of this or other vessel owners would be deterred?

The Ninth Circuit's decision has further serious implications for vessel owners in planning their business operations because it casts doubt on an owner's ability to

effectively insure against the risk of vicarious punitive damages. As one admiralty treatise explains, "[i]n the modern world of insurance reimbursement for losses, open ended liability would make the efficient administration of a system of third party liability insurance virtually impossible." Schoenbaum, *supra* at § 14-7. Whether punitive damages may even be insured against is governed by state law because there is no general maritime rule addressing this issue. *See Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 668 (5th Cir. 1992) (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)). To be sure there is considerable variation among the states as to whether punitive damages are even insurable and under what circumstances. A number of states prohibit insurance against punitive damages as against public policy. *See* 7 Couch on Insurance 3d at § 101:28 (2006). Thus, the Ninth Circuit's decision presents vessel owners with a dilemma. On the one hand, they may be held liable for punitive damages for the wrongful conduct of an employee undertaken without the vessel owner's complicity and even contrary to the vessel owner's well-enforced policies (at least in the Ninth Circuit). On the other hand, the vessel owner, which likely operates in multiple jurisdictions, may not be able to obtain insurance for such losses.

Even if public policy in a particular state allowed insurance coverage for vicarious punitive damages, it may be difficult, if not impossible, to obtain such coverage at a reasonable price. Given the open-ended nature of such liability, the only standard that one can say with assurance applies in each state is the limit imposed by the Due Process Clause. That provision is hardly subject to informed underwriting. It is doubtful that insurers would have any rational basis on which to set a fair premium.

There may be public policy reasons to say that vessel owners should not be allowed to insure against their own wrongful conduct, and must instead face the consequences of such actions, even bankruptcy. But those policy reasons clearly do not apply in the context of vicarious punitive damages.

The Ninth Circuit's decision approving the imposition of vicarious punitive damages under maritime law raises serious issues for ACL and other companies that operate vessels in commerce on the nation's inland waterways. The Ninth Circuit itself acknowledged that its ruling is contrary to decisions of the other circuits to address the issue of vicarious punitive damages.

One of the hallmarks of this Court's admiralty jurisprudence is to establish a uniform body of admiralty law. *See, e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Obviously, there is no uniformity if the imposition of vicarious punitive damages depends on where the accident happened, with a vessel sailing into and out of jurisdictions where vicarious punitive damages are allowed. Even more troubling, the broad venue provisions applicable to claims in admiralty means that the availability of vicarious punitive damages may depend more on where the plaintiff chooses to file suit than where the events giving rise to the claim occurred. The imposition of vicarious punitive damages should not turn on the fortuities of geography.

3. Allowing Punitive Damages To Be Assessed Against The Inland Marine Transportation Industry Would Violate Public Policy By Threatening To Weaken The Role Of That Industry In Matters Of National Security

Historically, Congress and the Court have adopted measures designed to encourage maritime commerce for both economic and national security reasons. Thus, legislation such as the Limitation of Shipowners' Liability Act and decisions such as *Miles* have treated the maritime industry in a manner distinct from other industries, imposing both burdens and benefits unique to the maritime industry. The Ninth Circuit's decision suggests that these considerations are quaint relics of the nineteenth century that are no longer appropriate for "modern" corporations engaged in maritime commerce.

But Congress has not seen fit to withdraw its support of the industry for national defense reasons. Indeed, as part of the legislative response to the war on terror, Congress has imposed *new* duties on the maritime industry. The unfettered ability of courts to "supplement" statutory remedies by imposing vicarious liability for punitive damages threatens the ability of the maritime industry to meet these national security responsibilities.

The Marine Transportation Security Act of 2002 ("MTSA"), 46 U.S.C.A. § 70101 *et seq.*, as implemented by the provisions of the Maritime Security regulations, 33 C.F.R. § 101.100 *et seq.*, requires ACL and other inland marine transportation operators to assist the U.S. Coast Guard in national maritime security and the protection of the country's inland waterways, marine terminals, barge fleeting facilities, and vessels, including towboats and barges, from the threat of terrorism. The overall objective of the U.S. Marine Transportation System, of which these inland facilities

and vessels comprise a large part, is the "safe, secure, environmentally sound movement of goods, people, and military assets in the most efficient and economically effective manner possible." Subcommittee on Coast Guard and Maritime Transportation, *Hearing on Implementation of the Maritime Transportation Security Act*, http:www.house/gov/transportation/cgmt/06-09-04/06-09-04memo.html (last visited June 25, 2004).

The provisions of the Act support this objective in connection with the U.S. Coast Guard's security mission, which is "to protect the U.S. maritime domain and the U.S. Marine Transportation System and deny their use and exploitation by terrorists as a means for attacks on U.S. territory, population, and critical infrastructure." *Id.* Toward the accomplishment of this mission, the Act requires, *inter alia*, that owners and operators who are subject to the Act give notice of suspicious activity,[3] breaches of security and the occurrence of transportation security incidents, which are defined as those "resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area." 33 C.F.R. § 101.105. Specifically, these owners and operators, which

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[3] Through its America's Waterway Watch program, the Coast Guard requests that all who use our country's waterways, specifically including towboat operators, watch for and report suspicious activity. Activities which the Coast Guard specifies as being suspicious include, but are not limited to, the following: People who appear to be engaged in surveillance of any kind, such as taking photos or asking questions; lights flashing between boats; unusual night operations; unattended vessels or vehicles in unusual locations; transfer of people or things between boats or between boat and shore; unusual number of people on board a vessel. *See* www.americaswaterwaywatch.org (last visited Sept. 16, 2007).

include ACL and other inland marine transportation operators, are required "without delay" to report even "activities that *may* result in a transportation security incident." 33 C.F.R. § 101.305(a) (emphasis added). These obligations to be vigilant with regard to suspicious activities, breaches of security and transportation security incidents place ACL and other inland marine transportation operators in the position of being the "eyes and ears" of the U.S. Coast Guard and this country.[4]

In general, the Act, through its regulations, requires certain segments of the maritime industry "to take significant measures to increase the security of vessels [and] shore-side facilities . . . ." Subcommittee on Coast Guard and Maritime Transportation, *supra*. In particular, those regulations impose specific requirements, such as designating and using security personnel; implementing drill and exercise procedures; maintaining certain records; conducting security training of personnel; employing security measures applying to MARSEC levels; using certain security systems and equipment; devising plans for responding to transportation security incidents; implementing security protocols for controlling access, handling cargo and monitoring security procedures; and preparing and implementing vessel and facility security plans. *See generally* 33 C.F.R. § 104.100 *et seq*. (Maritime Security: Vessels) and § 105.100 *et seq*. (Maritime Security: Facilities).

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[4] In acknowledging this important role of the maritime industry, Rear Admiral R.F. Duncan of the Coast Guard has requested members of the industry to remain vigilant and to let their employees know "they are leading the fight in hardening our ports and the United States against terrorist activities." U.S. Coast Guard Eighth District, *Port Security Bulletin* (May 28, 2004).

Barge fleeting facilities, which form an integral part of the inland marine transportation industry, are subject to these security measures and are singled out in the regulations as, at their own expense, having to meet additional security requirements, depending upon the particular MARSEC level. For example, at MARSEC Level 1,[5] a barge fleeting facility must designate one or more restricted areas for segregating barges containing certain dangerous cargoes from all other barges at the facility, maintain a list of vessels and cargoes within the designated area, and ensure that a minimum of one towing vessel for every 100 barges is available to service the fleeting facility. 33 C.F.R. § 105.296(a)(1)-(3). At MARSEC Level 2, all Level 1 requirements must be met, plus security personnel must be assigned to monitor or patrol the designated restricted area within the barge fleeting facility. 33 C.F.R. § 105.296(b). At MARSEC Level 3, the requirements for Levels 1 and 2 must be met, plus the facility must ensure that both land and waterside perimeters of the designated restricted area within the barge fleeting facility are continuously monitored or patrolled. 33 C.F.R. § 105.296(c).

In addition, the Department of Homeland Security, in connection with the U.S. Coast Guard, has now promulgated in final form the Guidance and Implementation Measures for the new Transportation Worker Identification Credential ("TWIC") Program. Once implemented, anticipated to be no later than September 25, 2008, the maritime industry will have to absorb even more exacting duties and higher costs. The specific purpose of the TWIC rule is to "reduce risk and mitigate the effects of a transportation security incident

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[5] Unless otherwise directed, each facility and vessel subject to the Act is required to operate at MARSEC Level 1. 33 C.F.R. § 101.200(b).

(TSI)." United States Coast Guard Navigation and Vessel Inspection Circular No. 03-07 at § 4b (July 2007), *available at* http://www.americanwaterways.com/security/finaltwicnvic 07-02-07.pdf.

Marine employers will be required to have all vessel personnel and employees needing unescorted access screened for compliance with the standards imposed by the new regulations. Then, the marine industry will have to be certain that all of its employees, as well as third party entrants, who need unescorted access to secured areas, have the proper credentials. If not, the Act requires a personal escort with the means to respond if the allowed individual is observed to be engaged in unauthorized activities. Finally, the maritime industry will have to be certain that all of its employees are trained and knowledgeable about each aspect of this new process. ACL presently estimates that it will incur costs in excess of $1.2 million to comply with these requirements at the outset. Once again, this is a vital link in the Homeland Security Plan and one that has expensive and expansive requirements placed on the maritime community.

By complying with the Act, inland marine transportation owners and operators become valuable participants in homeland security in furtherance of the Coast Guard's security mission. This comes at a great burden to each of the companies in this industry. Time and money has to be expended every year to comply with not only the security measures themselves, but also on the training of every single maritime employee regarding the requirements. Without the involvement of this industry, a significant measure of U.S. population and environmental interests all along the inland waterways of this country would be more vulnerable to terrorist attack.

The effective participation of the inland marine transportation industry in the security of the nation's inland waterways could be seriously limited, however, by the imposition, or even the threat, of vicarious punitive damages being awarded by courts or juries in maritime cases. The inland marine industry, which, as noted above, is generally comprised of relatively small operators with limited resources, is financially vulnerable to large assessments.

For example, the two largest liquid cargo barge operators in the inland marine industry are ACL and Kirby Corporation. Informa Economics, Inc., *Barge Fleet Profile, Inland River Barges for the Mississippi River System and Connecting Waterways* 12 (March 2007). Punitive damages such as those being challenged here by Exxon in the amount of $2.5 billion would exceed the market capitalization of either of these two operators.[6] And, because insurance to cover punitive damages is likely not available (*see supra* at 10), even the assessment of punitive damages with a cap would financially harm industry owners or operators, perhaps driving those affected into bankruptcy or out of business.

The unpredictable nature of punitive damages could discourage the participation of new businesses in the industry or discourage current participants from investing in the growth of their own businesses. When the number of inland

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[6] According to the most recent 10-Q filed by ACL (for the period ended June 30, 2007) the company had 54,373,252 shares issued and outstanding as of July 20, 2007, when its stock closed at $23.19 per share, for a market capitalization of $1.26 billion. Kirby Corporation's most recent 10-Q (also for the period ended June 30, 2007) states that it had 53,380,000 shares outstanding as of August 2, 2007 when its stock closed at $41.52 per share, for a market capitalization of $2.21 billion.

marine transportation owners and operators could be reduced through financial devastation, the harm which punitive damages would impose on the inland river industry would limit the industry's involvement, and therefore its effectiveness, in being the "eyes and ears" of the Coast Guard in support of U.S. inland maritime security. Consequently, allowing vicarious punitive damages to be assessed against the inland marine transportation industry would be out of step with both historic and present public policy by threatening to weaken the role of that industry in matters of national security.

CONCLUSION

The Ninth Circuit's decision raises issues of national significance to companies operating in the inland marine industry, such as ACL. Allowing judicially created "supplemental" remedies for statutory violations and the imposition of vicarious punitive damages in this maritime context is directly at odds with prior decisions of this Court, as well as the Ninth Circuit's sister courts. ACL respectfully requests that, given the significance of these issues and the need for uniformity in the maritime law, the Court grant the petition for a writ of certiorari.

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