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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF KEYSTONE SHIPPING CO. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Keystone Shipping Co., states that it is a privately held Delaware corporation. None of its shares is held by a publicly traded company.

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BRIEF OF KEYSTONE SHIPPING CO. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Keystone Shipping Co. ("Keystone") respectfully submits this brief as *amicus curiae* in support of the petition of Exxon Shipping Company and Exxon Mobil Corporation (hereinafter collectively "Exxon") for a writ of *certiorari*.

STATEMENT OF INTEREST[1]

Keystone is a privately held American company which currently owns, operates or participates in joint ventures involving twenty-nine vessels in the global transport of bulk cargos. Keystone's shipping business started in 1909 in Philadelphia. Its current leadership includes the grandson of the company's founder, Charles Kurz. The company is now based in the suburbs of Philadelphia with five additional offices throughout the United States, and employs approximately eighty shore-side and two thousand seagoing personnel, all of whom are American citizens. The

[1] Pursuant to Supreme Court Rule 37.6, undersigned counsel represent that no counsel for any party authored this brief, in whole or in part, and that no person or entity other than Keystone has made any monetary contribution to its preparation or submission. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

operation of its fleet, one of the largest still flying the U.S. flag today and engaging in the U.S. coastwise trade, contributes to this nation's economy and indirectly creates or supports thousands of American jobs each year.

Keystone's tank vessels carry crude oil, liquid chemicals and refined petroleum products. The company participates in a joint venture which transports crude oil in the Alaskan trade. Keystone also operates bulk carriers which carry stone, aggregate and other dry cargos. Its vessels ply the waters of the United States including both coasts, Alaska, the Gulf of Mexico and the Great Lakes. Several of the company's ships are involved in the Ready Reserve Fleet program of the U.S. Maritime Administration which provides support to our troops in Iraq and elsewhere around the world by transporting tanks, humvees, and other military equipment as directed by our armed forces. Keystone also operates three strategic vessels for the U.S. Navy's Military Sealift Command which carry Special Forces and highly sensitive military equipment. Keystone routinely participates in worldwide humanitarian relief efforts such as assistance for tsunami and hurricane victims.

During the last fifty years, the size of the American merchant marine has been shrinking at an alarming pace. Third world countries produce seamen who are willing to work for a fraction of the pay to which American mariners are entitled. The preservation of the U.S. merchant marine is vital not only to U.S. trade but primarily to our military. The merchant

marine is considered the sixth military arm supporting the Army, Marine Corps, Navy, Air Force and Coast Guard. For more than two centuries, Congress has supported our shipping industry by requiring that vessels engaged in "coastwise" trade (i.e. carrying merchandise or passengers from one U.S. port to another) must be built, owned and operated by U.S. entities and manned by American citizens. The protection of this fleet and maritime commerce in general has been of paramount importance to this country, as demonstrated by our laws and the creation of admiralty jurisdiction to ensure that the rules which govern the trade will be uniform.

The very nature of shipping dictates that the commercial vessels which carry goods and passengers are continually passing through and into the waters of different states, and indeed different federal circuits. Both Congress and this Court have emphasized the need for the uniform application of maritime law to ensure that the consequences which flow from an accident on the West Coast will be no different than if that same accident occurred in the Gulf of Mexico, New York Harbor, or in one of the Great Lakes. Maritime trade and commerce depend upon the ability of the participants to foresee those consequences in the best and worst case scenarios.

The events of the last two decades have shown that the interests of national security and consumer prices are also impacted by the continued vitality of a U.S. fleet, both in times of war and times of peace. The circumstances surrounding any maritime accident

must be evaluated, and any damages assessed, in a uniform manner, irrespective of the fortuitous location of the incident.

This is not just a Ninth Circuit issue. This is not just a "big oil" issue, or a tanker issue. This Petition and the resolution of the issues it raises are at the very heart of what U.S. businesses such as Keystone need for their continued existence. The threat of insurmountable, uninsurable, astronomical punitive damages in addition to the fines, penalties and compensatory damages under statutory schemes could conceivably cause companies such as Keystone to disappear. This would leave the U.S. government without a competent merchant marine to meet the logistical needs of our worldwide military forces. In order to plan for the worst case scenario, Keystone needs to know what to expect. Keystone and others in the trade need to know that uniform laws will be applied, without regard to the identity of the circuit into whose waters their ships may be sailing.

Keystone recognizes that maritime safety is paramount, and is committed to a strong environmental and safety program in the operation of its ships. It simply needs to know whether or not it will be exposed to punitive damages in the event of a pollution or other major incident, even though management has taken every precaution to prevent it.

SUMMARY OF ARGUMENT

Keystone urges this honorable Court to grant *certiorari* in order to clarify a particularly murky area of maritime law – the availability of punitive damages in pollution cases. This Court's guidance is needed on two critical issues:

1. Should a vessel owner's vicarious liability for the master's misconduct be extended to liability for punitive damages in the event of a pollution incident?

2. Are punitive damages precluded by a federal statutory scheme which already addresses the remedy for pollution caused by willful misconduct or gross negligence, but does not provide for punitive damages?

This case has been before the Ninth Circuit on numerous occasions, however, the punitive damage determinations can be found within two appellate court decisions, which will henceforth be referred to as "*Valdez I*" and "*Valdez II*."[2] In each of these opinions, the Ninth Circuit expressed doubts about its resolution of the very issues raised above. In the most recent decision, Judge Kozinski's dissent highlights the conflict among the circuits on the imposition of punitive damages on the vessel owner who neither ratifies nor authorizes the actions of the master and crew at sea. *Valdez II,* Pet. App. 289a. In *Valdez I*, the

[2] Throughout this brief, citations to *Valdez I* and *Valdez II* refer to the Appendix filed with Exxon's Petition.

majority identified the question of the statutory preemption of punitive damages in pollution cases as "close" and "not without doubt." Pet. App. 75a, 77a.

At the heart of this petition lies the uniformity of maritime law, a concept which has traditionally merited careful consideration by this honorable Court. *See, e.g., Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004); *United States v. Locke*, 529 U.S. 89, 108-111 (2000); *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 211 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970). Because the Ninth's Circuit's opinions have created confusion and conflict, this Court should grant *certiorari* so that the lower courts can uniformly apply the law of punitive damages to this and future pollution incidents, and those in the industry who send vessels to sea can do so with a clear understanding of the ramifications of any pollution incident.

ARGUMENT

A. VICARIOUS LIABILITY AND THE SCUTTLING OF *THE AMIABLE NANCY* DECISION

As far as punitive damages are concerned, the Ninth Circuit's imposition of vicarious liability upon a shipowner for the acts of the vessel's master is a departure from the sound decisions of this Court and other circuits. Given the seriousness of this deviation

from the course set by this Court in *The Amiable Nancy, certiorari* should be granted in order to bring this decision back on course or to set a new heading for the future. 16 U.S. 546 (1818).

In evaluating this question, the Court should be mindful that most accidental spills of oil or other hazardous substances are the result of navigational error or other negligence on the part of a vessel's crew while the ship is at sea, and not under the direct control of her owner. When it comes to navigational decisions, the vessel is under the authority of the ship's captain, whose autonomy is absolute. *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1147 (6th Cir. 1969). For centuries, maritime law has therefore made a distinction between the negligence of the captain and that of shore-side management, especially when deciding whether to impose limitations on the damages for which the vessel owner should be responsible.[3] The Ninth Circuit ignored this precedent, and found that punitive damages could be

[3] *See, e.g., Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 952 (3d Cir. 1985) (*citing Complaint of Bankers Trust Co.*, 651 F.2d 160, 169 (3d Cir. 1981) (discussing the focus on "shore-based, high level management" rather than the captain and crew in a limitation of liability context)); *See also Union Oil Co. of California v. M/V Point Dover*, 756 F.2d 1223 (5th Cir. 1985) (distinguishing between corporate officers and vessel's master/crew in various scenarios); *Tittle v. Aldacoste*, 544 F.2d 752, 756 (11th Cir. 1977) (affording protection to "the physically remote owner who, after the ship breaks ground, has no effective control over his water-borne servants").

imposed against Exxon for the reckless conduct of the vessel's master.

This Court specifically rejected such vicarious liability almost two hundred years ago in *The Amiable Nancy*, 16 U.S. 546 (1818). In that case, the owner of a vessel besieged by privateers sought compensatory and punitive damages from the rogue vessel's owner. *Id.* In a unanimous decision, this Court found that exemplary damages could not be awarded for the outrageous conduct of the vessel's crew against an owner who "neither directed it, nor countenanced it, nor participated in" such behavior. *Id.* at 559. This precedent has been faithfully followed throughout the nineteenth and twentieth centuries. *See, e.g., Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652-653 (5th Cir. 1989); *Fuhrman*, 407 F.2d at 1148; *Pacific Packing & Navigation Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905).

Without specifically overruling its own opinion in *Pacific Packing*, the Ninth Circuit expanded the vicarious liability of a corporation to include the acts of a managerial employee in a maritime case. *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985). This decision was based on § 909(c) of the *Restatement (Second) of Torts* (1979) which limits the vicarious liability for punitive damages to situations in which, *inter alia*, the wrongdoer was employed in a managerial capacity and was acting within the scope of his or her employment. In *Protectus*, however, the employee

in question was a **shore-side** employee and not the master of a vessel at sea. 767 F.2d at 1381.

Whatever the validity of the imposition of punitive damages under maritime law for the acts of a managerial employee under the *Restatement*, such vicarious liability has rarely been imposed for the acts of a ship's captain. *Matter of P&E Boat Rentals,* 872 F.2d at 652 (specifically rejecting *Protectus* as an aberration and contrary to this Court's rulings in *The Amiable Nancy, supra* and *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893)); *Fuhrman*, 407 F.2d at 1148 (declining to impose punitive damages vicariously or to require a corporate shipowner to second guess the master's navigational decisions at sea); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (confirming that shipowner is liable for compensatory, but not punitive, damages for injuries caused by the misconduct or negligence of the master). As the Sixth Circuit suggested in *Fuhrman*, "the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." 407 F.2d at 1148; *See also Matter of P&E Boat Rentals*, 872 F.2d at 651-652.

This approach is compatible with the general maritime principle that distinguishes between the acts of shore-based management and those of the master of a vessel at sea. *See, e.g., Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 952 (3d Cir. 1985) (*citing Complaint of Bankers Trust Co.*, 651

F.2d 160, 169 (3d Cir. 1981)); *See also Union Oil Co. of California v. M/V Point Dover*, 756 F.2d 1223 (5th Cir. 1985).

Until the Ninth Circuit's decision in *Valdez I*, the only case which arguably imposed punitive damages on the owner for the actions of the captain was *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694 (1st Cir. 1995). In that case, the owner of a small fleet of fishing vessels was held responsible for both compensatory and punitive damages as a result of the reckless destruction of another fisherman's lobster traps by one of his captains during a trawling operation. *Id.* In reaching its decision, however, the First Circuit required at least **some** level of culpability on the part of the employer.

> Our approach today falls short of wholesale adoption of the *Restatement* because section 909(c), read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal. Because this is not such a case, however, we need not resolve whether the *Restatement*'s vicarious liability principle would in fact reach so far.

Id. at 705.

As noted by Judge Kozinski in his dissent from the denial of rehearing in *Valdez II*, the Ninth Circuit completely jettisoned *The Amiable Nancy* in favor of § 909(c) of *the Restatement (Second) of Torts* (1979). Pet. App. at 288a. In *Valdez I*, the Ninth Circuit attempts to avoid this rejection of two hundred years

of precedent by resting the imposition of punitive damages on the recklessness of Exxon itself, and not on the actions of Captain Hazelwood alone. Pet. App. at 83a. However, the dissent to *Valdez II* correctly challenges that rationalization, and in fact supports Exxon's argument that the jury instructions did not require, or even allow, the jury to make that determination.[4] The relevant jury instructions took the decision concerning Exxon's independent conduct out of the hands of the jury. Jury Instruction 33 stated that "[t]he reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." Pet. App. at 301a. The subsequent instruction forced the jury to find that Captain Hazelwood was employed in a managerial capacity, since it defined a managerial employee as one who "supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." *Id.* Finally, the third instruction in this series directed the jury to attribute the conduct of any managerial employee to the employer, irrespective of whether the conduct was contrary to company policy. *Id.* at 302a. It is clear, therefore, that the jury was never asked to determine whether Exxon's own conduct should be characterized as reckless.

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[4] *See* Exxon Petition at 12-13.

The Ninth Circuit reaffirmed its commitment to *Protectus* when it upheld the punitive damage award, despite its acknowledgement that other circuit courts were in strong disagreement with its reasoning. Pet. App. at 85a, n. 84. As even the majority opinion recognized in *Valdez I*, any challenge to this extension of punitive damages should have been left to either an *en banc* review or to the judgment of this honorable Court. Pet. App. at 85a, n. 84.

In lamenting the denial of a rehearing *en banc*, the dissent in *Valdez II* notes that the majority's decision "puts us at loggerheads with every other circuit that has considered the case," and is also "contrary to the modern drift of maritime law." Pet. App. at 289a-290a. Given the significance of the issue, this Court should grant *certiorari* in order to settle, once and for all, the question of whether the actions of the master at sea can lead to the imposition of punitive damages against the owner of the vessel which he commands.

It is one thing to hold the shipowner responsible for compensatory damages based on the actions of the captain and crew, or to impose punitive damages based on its failure to properly hire, train and supervise those who navigate its vessels through both calm and stormy seas. It is quite another to make that owner liable for punitive damages solely on the basis of reckless or wanton behavior of a captain who was, at that moment, in complete charge of the vessel and all of those onboard. It was this Court who first proclaimed that such vicarious liability is too onerous

a burden to place on the vessel owner, and the Ninth Circuit was not free to simply jettison this time honored principal in favor of the land-based doctrine of the *Restatement*. Vicarious liability in maritime cases should only be expanded, if at all, by this honorable Court, who is respectfully urged to grant Exxon's petition for a writ of *certiorari*.

B. PREEMPTION BY FEDERAL POLLUTION STATUTES

Whether or not Captain Hazelwood's conduct is imputed to Exxon, or its own conduct deemed worthy of punishment, Congress has already provided a framework of fines and penalties designed to address gross negligence or willful misconduct which results in the pollution of our nation's waters. Clean Water Act, 33 U.S.C. § 1321(b)(7)(D) [hereinafter "CWA"]. The CWA, together with other federal pollution legislation, forms a statutory scheme that lays out the factors to be considered in determining the basis for and amount of the penalty, including the wrongdoer's degree of culpability, history of prior violations and the extent to which any mitigation efforts have been successful. 33 U.S.C. § 1321(b)(8). The Ninth Circuit's evaluation of the relevant conduct and the amount of punitive damages at common law was based on the same principles. *See Valdez I*, Pet. App. at 22a-30a. Because Congress has already legislated the consequences of willful and grossly negligent conduct in a pollution context, the availability of **any** punitive damages under general maritime law presents

a question which even the Ninth Circuit admits is "serious" and "not without doubt." *Valdez I*, Pet. App. at 75a. Given the "massive significance"[5] of the issue to all of those impacted by a serious pollution incident, this Court should grant *certiorari* in order to dispel that doubt.

This Court's decision in *Mobil Oil Co. v. Higginbotham* established that federal courts should not, and indeed cannot, expand maritime law remedies beyond those created by Congress in any applicable statute. 436 U.S. 618 (1978). Since *Miles v. Apex Marine Corp.*,[6] however, federal courts have struggled to determine the extent to which the damages available under general maritime law are limited by any relevant statutory scheme that addresses the situation or context of the underlying claim, but is not directly applicable to the cause of action at issue. *Miles* involved the death of a seaman, a situation addressed by the Jones Act, which governs a seaman's cause of action for negligence, and limits his recovery to pecuniary damages. 46 U.S.C. § 30104, *et seq*. The seaman's family, however, brought survival and wrongful death actions under general maritime law in which they sought non-pecuniary damages as well. *Miles,* 498 U.S. at 19. After careful analysis, this Court refused to sanction more expansive remedies under maritime common law than Congress had

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[5] *Valdez I*, Pet. App. at 74a.

[6] 498 U.S. 19 (1990).

created in the statutory scheme which addressed the underlying factual scenario (the death of a seaman during the course of his employment). *Id.* at 32-33. To the extent that courts have applied its rationale, the holding in *Miles* has since been extended to punitive damages, which are generally considered to be non-pecuniary in nature. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1997); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506 (5th Cir. 1995); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984). The application of *Miles*, however, has been anything but uniform.

If the cause of action in question is **directly** addressed by a statute, such as the Jones Act, there is no question that maritime common law remedies cannot be expanded beyond those delineated by the statute. Where the relationship between the statute and cause of action is more tenuous, however, the lower courts have not managed to fashion a consistent rule of law, thus creating confusion and a lack of uniformity.

For example, some courts apply *Miles* to all maritime injury and death cases, while others limit its application to cases in which the plaintiff is a seaman. *See, e.g., Jurgensen v. Albin Marine, Inc.*, 214 F. Supp. 2d 504 (D. Md. 2002) (collecting cases). Other courts have held that the damages are limited when the general maritime law cause of action arises out of the same events or activities addressed by the statute, even when that statute does **not** speak to

that particular cause of action at all. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d at 1506 (punitive damages barred for wrongful failure to pay maintenance and cure to a seaman, even though cause of action was not governed by the Jones Act). "If the situation is covered by a statute like the Jones Act or the Death on the High Seas Act, and the statute directs and delimits the available damages, the statute directs and delimits the recovery under general maritime law as well." *Id.*

Not all courts agree. Just last month, the Eleventh Circuit announced a view contrary to *Guevara*, holding that because *Miles* did not specifically address punitive damages in a maintenance and cure case, it was bound to follow pre-*Miles* precedent in the circuit which was directly on point. *Atlantic Sounding Co. v. Townsend*, No. 06-13204, 2007 WL 2385928 (11th Cir. Aug. 23, 2007). This has become yet another area of punitive damages under maritime law on which the circuits conflict. *Id.* at *5-6.

It is not hard to understand why both courts and commentators continue to seek clarification, even in seamen cases. "It appears, therefore, that a universal rule governing the recoverability of punitive damages by seamen in maritime law will not be realized until the Supreme Court or Congress provides a clearer, more express rule." Stephen K. Carr, *Living and Dying in the Post-Miles World: A Review of Compensatory and Punitive Damages Following Miles v. Apex Marine Corp.*, 68 Tul. Mar. L. J. 595, 621 (Jan. 1994).

In other cases, especially those involving non-seamen, a few courts have permitted the imposition of punitive damages under the general maritime law, at least in the absence of an applicable statute. In *CEH, Inc. v. F/V Seafarer*, the First Circuit held that *Miles* did not bar the recovery of punitive damages for the reckless destruction of a fisherman's lobster traps, a situation which was not covered by any federal statute. 70 F.3d 694 (1st Cir. 1995). As noted by another court in a subsequent opinion, "*Miles* does not signify a 'universal uniformity of maritime tort remedy,' but rather 'emphasizes the importance of uniformity in the face of applicable legislation.'" *Jurgensen*, 214 F. Supp. 2d at 509 (*quoting CEH v. F/V Seafarer*, *supra*). Unfortunately, the distinction between the two concepts has become blurred, especially in the area of property and economic damages such as those at issue here.

The application of *Miles* to other cases has been aptly characterized as "a labyrinth of factual scenarios and legal theories from various courts yielding different results." *Jurgensen,* 214 F. Supp. 2d at 506 (*citing Schumacher v. Cooper,* 850 F. Supp. 438, 454 (D.S.C. 1994) (*quoting Emery v. Rock Island Boatworks, Inc.,* 847 F. Supp. 114, 116 (C.D. Ill. 1994)). It is generally thought by the commentators, and many courts, that non-pecuniary damages in general, and punitive damages in particular, are unavailable under general maritime law. *Kelly v. Bass Enter. Production Co.*, 17 F. Supp. 2d 591, 600 (E.D. La. 1998) ("Since the Supreme Court's ruling in *Miles,*

there has been considerable dialogue by both the courts and commentators over not only the vitality but also the very existence of punitive damages under general maritime law"); *Complaint of Clearsky Shipping Corp.*, No. 96-4099, 1998 WL 241515 (E.D. La. May 11, 1998) ("Although not completely settled, since the Supreme Court's decision in *Miles v. Apex Corp.*, the prevailing view is that non-pecuniary damages . . . are unavailable under the general maritime law"); Robert Force, *Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity Whither Goest Thou?*, 21 Tul. Mar. L. J. 7, 51 (Winter 1996) ("While punitive damages were once available as a matter of course under appropriate circumstances, the availability of such damages under general maritime law in the wake of *Miles* . . . is now uncertain at best.").

This uncertainty has spilled over into the pollution arena. "[I]t remains unclear exactly how much vitality punitive damages under the general maritime law retain in light of Congress's enactment of comprehensive damage schemes such as OPA which do not include them." Lawrence K. Kiern, *Damages in Maritime Cases: Environmental Damages Under Federal Law*, 72 Tul. Mar. L. J. 693, 704 (Dec. 1997). This unpredictability is inimical to the interests of Keystone and others in the United States maritime industry. Every day, hundreds of U.S. flag tankers, tugboats and other vessels ply our lakes and coastal waters carrying cargo and passengers between ports. Although most voyages are completed safely and

without incident, there is a unique risk inherent in sending one's ships to sea. *See, e.g., Valdez II*, Pet. App. at 290a-291a. Carriers of dry cargo and passengers are not unaffected by the specter of punitive damages, as they carry fuel and lubricating oil which can be spilled in the event of a collision, grounding or other marine incident. Keystone and other owners of tank vessels have a particular need to fully understand the consequences of a pollution incident, including all of the damages to which they may be exposed. The possibility of punitive damages is of particular importance because such damages are often uninsurable by reason of public policy. *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *But see Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (5th Cir. 1992) (no specific and controlling maritime law on the issue)[7] and *Sarrio v. McDowell*, No. 85-1692, 1987 WL 32336 at *3 (E.D. La. Dec. 23, 1987) (law on insurability of punitive damages varies from state to state).

This Court should therefore dispel the ambiguity that surrounds the issue of statutory preemption in the area of pollution. In 1990, Congress enacted the Oil Pollution Act of 1990 [hereinafter "OPA"] in response to the very spill at issue in this case. 33 U.S.C. § 2701, *et seq.* Since then, the issue of punitive damages in pollution cases has been litigated on several occasions. The First Circuit found that

[7] *on remand to*, No. 90-1403, 1994 WL 118303 (E.D. La. Mar. 25, 1994), *aff'd in part*, 47 F.3d 427 (5th Cir. 1995).

punitive damages are unavailable under the general maritime law when the injury involves an oil spill. *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000). That Court's reasoning was based squarely on the premise that Congress had adopted a comprehensive scheme to deal with oil spills, stating, "*Miles* dictates deference to congressional judgment 'where, at the very least, there is an overlap between statutory and decisional law.'" *Id.* at 66 (*quoting CEH*, 70 F.3d at 701). This decision was followed in *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127 (D. Or. 2001). Both *South Port* and *Clausen* involved property damage claims which resulted from pollution, and the latter case involved the economic losses of oyster farmers after a spill, claims which are not dissimilar to those of the Respondent fishermen in this case.

Although the spill of oil from the EXXON VALDEZ is obviously not governed by OPA, the Ninth Circuit recognized that the statute could nonetheless provide valuable guidance. *Valdez I*, Pet. App. at 1031-104a.[8] The VALDEZ spill was governed by the CWA, which is still in effect today and applies to, *inter alia*, the spill of hazardous substances which are

[8] "Nevertheless, the Oil Pollution Act has value as a legislative judgment, made in the course of legislative evaluation of this particular oil spill, of what amount of punishment serves the public interest in deterring and punishing, but not over deterring, the conduct that caused the spill. Congress sought to deter pollution, but not so aggressively as to deter transporting oil." *Id.* at 104a.

not within OPA's purview. 3 *Benedict on Admiralty* § 112 p. 9-44 (7th Ed. 2005). After analyzing the criminal and civil penalty provisions of the CWA, the Ninth Circuit concluded that the statute did not preempt the application of punitive damages under general maritime law. *Valdez I*, Pet. App. at 78a-79a. In reaching that conclusion, however, the Court candidly acknowledged its own doubts on this particularly close question. *Id.* at 75a, 77a.

Finally, this discussion would not be complete without referencing this Court's decisions in *Milwaukee* and *Sea Clammers*, which held that the federal common law of nuisance has been completely preempted by the CWA in pollution cases, and therefore the plaintiffs' tort claims were barred. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). These decisions did not, however, specifically address the legislative preemption of the general **maritime** tort remedies at issue here, and this case presents the Court with the perfect opportunity to do so now. 453 U.S. at 10.

In adopting both the CWA and OPA, Congress specifically delineated the consequences which a vessel owner faces when his gross negligence or willful misconduct has caused the spill. 33 U.S.C. §§ 1321(b)(7)(D) and 2715(c)(1)(A). Although, unlike OPA, the CWA does not provide the remedies available to third parties injured by a spill, the CWA can certainly be read as part of the comprehensive scheme of federal legislation which addresses spills in

general, and those caused by gross negligence and willful misconduct in particular, thus triggering the *Miles* prohibition against an expansion of remedies under general maritime law. Put simply, should one who spills a non-petroleum substance be subject to punitive damages while one who spills a similar or even greater amount of petroleum is not? In light of the Ninth Circuit's own doubts on the subject, it should have considered the issue *en banc*, and this Court's guidance is needed.[9]

Keystone has a unique interest in this issue, as the vessels which it owns and operates carry petroleum products, chemicals, and dry cargo in the Great Lakes and Gulf of Mexico, as well as the coastwise waters of the United States and other nations. Keystone is one of the largest operators of U.S. flagged ships in the country today, and its vessels continue to

[9] Keystone realizes that this case does not involve the spill of hazardous substances, or the application of OPA. Nonetheless, this potential disparity in the treatment of willful or grossly negligent spills should be a matter of concern for this Court, as both uniformity and fairness are at stake. As one commentator noted, a narrow reading of *Miles* has led to a perceived "functional preference for property damage plaintiffs over personal injury and death plaintiffs [which] is perverse enough to demean our legal system." David W. Robertson, *Punitive Damages in American Maritime Law*, 28 Journal Mar. Law & Comm. 73, 161 (Jan. 1997). Unless *certiorari* is granted to resolve such issues, carriers of hazardous substances, which are in many cases less harmful to the environment, may face greater liabilities than those contemplated by Congress and which are imposed upon the spillers of oil.

play an important role in commercial shipping as well as our nation's military operations.[10] The protection of such maritime commerce and the need for a uniform set of laws has been hailed as the very foundation of the federal court's admiralty jurisdiction. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004); *Exxon Corp. v. Central Gulf Lines Inc.*, 500 U.S. 603, 608 (1991); *Sisson v. Ruby*, 497 U.S. 358, 367 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982).

Congress has also encouraged the continued vitality of a national merchant marine with the passage of the legislation which requires that cargo and passengers carried between U.S. ports fly the American flag, and be built, owned and manned by U.S. citizens. *See, generally*, Jones Act, 46 U.S.C. § 55102. In order to maintain a strong American presence in the shipping industry and a merchant marine to support our military, it is critical that all responsible owners and operators are treated equally and fairly in the event of a pollution incident, irrespective of where the spill occurs and whether the substance spilled is petroleum or non-petroleum based. This Court is, therefore, urged to review and correct the disparity which has been created by the Ninth Circuit's punitive damages decisions in the EXXON VALDEZ case.

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[10] Keystone's vessels have supported the United States military in every war since the business was founded in 1909.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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