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 PROFESSORS DAVID J. BEDERMAN, MARTIN DAVIES, JONATHAN GUTOFF, STEVEN F. FRIEDELL, JOHN PAUL JONES, DAVID J. SHARPE AND STEVEN RICHARD SWANSON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors engaged in study of the admiralty and maritime law of the United States. They have published extensively about it, and currently teach or have spent their professional careers teaching, about it.

The only interest of *amici* is in optimal development of the body of U.S. law that governs in cases of admiralty and maritime jurisdiction. Indeed, we differ on how various questions concerning the maritime law of punitive damages in this case should be answered in general and how those answers should be applied to the award in this case.

We agree, however, that answers of some kind are overdue. Moreover, we agree on the approach that a court should take in formulating the maritime law of the United States and on the sources to which such a court might look in the process. We therefore file this *amicus* brief to assist the Court in its resolution of this significant case.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the Maritime Law Institute of Tulane University, which paid for the printing of this brief, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

ARGUMENT

The petition should be granted to resolve critical questions of national importance regarding whether and under what circumstances federal maritime law allows punitive damages.

In this case, the Ninth Circuit has reviewed at length the award of punitive damages for conformity with this Court's interpretation of the Constitution's guarantee of due process, but its attention to this constitutional question appears to have distracted it from pronouncing federal maritime law. More attention to questions about the general maritime law of punitive damages might have made constitutional review unnecessary.

A. This is a maritime case governed by federal maritime law.

This is a case of harm to the livelihoods of commercial and subsistence fishermen caused by a spill of crude oil from a tank vessel stranded on a reef in Prince William Sound, part of the "navigable waters of the United States" opening to the Gulf of Alaska. A federal jury found that the stranding was caused by negligent navigation and that Exxon, the shipowner, was liable for income unrealized as a consequence of days lost to fishing and distress to the fish stocks of the Sound. Compensatory damages were awarded. Other cases, brought on behalf of the State of Alaska and the United States, raised issues of Exxon's liability for

damages to the environment and natural resources; they were settled. This case was not settled but tried, and because Exxon has not appealed from the judgment that it was liable to these plaintiffs for compensatory damages, the most important matters still in dispute are whether punitive damages are also appropriate, and if so, how much. These are matters to be governed by federal maritime law.

The casualty that gives rise to this case, a vessel's stranding, was maritime, as are the alleged torts, so this case is subject to federal judicial power pursuant to Article III, Section 2, as a case "of admiralty and maritime jurisdiction." (Contrary to the general preference for an interpretation of the words of the Constitution that leaves none of them redundant, it is well settled that "admiralty and maritime jurisdiction" does not describe two sets of cases, but one. In this brief, "admiralty" will ordinarily be used with reference to a federal court with the power to hear cases of this sort, and "maritime" will be used with reference to the body of law applied in such cases.) *See generally Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (clarifying the requirements for admiralty tort jurisdiction); *Sisson v. Ruby*, 497 U.S. 358 (1990) (same).

In section 9 of the Judiciary Act of 1789, Congress vested the federal district courts with jurisdiction to hear "cases of admiralty and maritime jurisdiction." 1 Stat. 73, 76-77 (1789). At the same

time, under the so-called Saving to Suitors Clause, Congress authorized state courts[2] to continue hearing some of the cases, that is, those for which the common law (as distinct from maritime law) also provided a remedy. *Id.* at 77. This scheme, by which federal district courts are authorized to hear any case within admiralty jurisdiction and to implement certain remedies exclusive to maritime law, while state courts are authorized to hear those cases otherwise within admiralty jurisdiction that are suited for ordinary remedies, is preserved in 28 U.S.C. § 1333 (2000).

Because this case is within admiralty jurisdiction, it is presumptively governed by federal law, not state law. *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 206 (1996); *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). As the parties have acknowledged and the courts below agreed, the governing federal law is maritime law, which is made not only in treaties, Acts of Congress,

[2] Under the same theory that permits state courts sitting at common law to hear maritime cases, the Saving to Suitors Clause also permits federal courts sitting on "the law side" (i.e., exercising jurisdiction on some basis other than admiralty) to hear maritime cases. *See, e.g., Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 376-77 (1959) (explaining that federal courts exercising diversity jurisdiction could hear maritime cases under the Saving to Suitors Clause in the same way that state courts did). Indeed, the district court in this case was sitting on "the law side," which explains why there was a jury verdict in a maritime case when admiralty courts do not generally have juries.

and federal regulations, but also in the decisions of courts, both state and federal. *See Norfolk S. Ry. Co. v. James N. Kirby Pty, Ltd.*, 543 U.S. 14, 23 (2004) ("Because the grant of admiralty jurisdiction and the power to make admiralty law are mutually dependent, the two are often intertwined in our cases.") When maritime law is made by judges in case decisions, it is made in a manner similar to that for making common law, and such judge-made law is commonly referred to as "general" maritime law (to distinguish it from law made otherwise, that is, in treaties, statutes, and regulations). *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-65 (1986) ("Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules."). *See* Robert Force, *Admiralty and Maritime Law* 21 (2004); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-1 (4th ed. 2004); David J. Sharpe, *Admiralty Jurisdiction: The Power over Cases,* 79 Tul. L. Rev. 1149 (2005). As substantive law made sometimes by federal judges, general maritime law survived *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

B. The Ninth Circuit neglected its obligation to articulate the federal maritime law requirements for punitive damages.

The body of our maritime law falls short of a comprehensive code. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 216 (1986). Certain aspects of the

general maritime law have been greatly refined by Congress and the courts, while others have not – at least not yet. The law of punitive damages is one of those aspects that have yet to be refined, and this case is pregnant with such unresolved issues.

That the general maritime law of the United States empowers courts to award punitive damages in maritime cases was suggested by this Court as early as 1818, in *The Amiable Nancy*, 3 Wheat. (16 U.S.) 546, and confirmed in dicta in 1893, in *Lake Shore & M. S. R. Co. v. Prentice*, 147 U.S. 101, 108-09. Lower courts have generally proceeded on the basis that they are so empowered. *See, e.g., CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995); *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972). *See generally* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997).

Nevertheless, as the Fifth Circuit has observed, that the general maritime law empowers courts to award punitive damages has not yet formed the basis for a holding by this Court. *See Galveston County Navigation Dist. No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 359 n.11 (5th Cir. 1996); *see also In re Diamond B Marine Serv., Inc.*, Nos. 99-951 & 99-984, 2000 WL 222847 (E.D. La. Feb. 23, 2000). In certain maritime cases permitted by the Saving to Suitors Clause, 28 U.S.C. § 1333, state courts also apply federal maritime law. Courts of Louisiana have expressed doubt

lately that federal maritime law authorizes punitive damages in any case. *See, e.g., Boucvalt v. Sea Trac Offshore Serv., Inc.*, 943 So. 2d 1204, 1207-08 (La. App. 2006). We think it therefore fair to say that a rule of federal maritime law allowing punitive damages has yet to be "judicially established as part of the body of federal admiralty law in this country." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1955).

Even in those federal circuits where it has been assumed that federal maritime law allows for punitive damages in some cases, it is not agreed that a shipowner-employer can be liable vicariously for punitive damages when those misbehaving are employed as a vessel's crew or her captain. Borrowing from the , the First and Ninth Circuits appear to agree that punitive damages against a shipowner are warranted by federal maritime law for qualifying misbehavior on the part of a ship's captain because of the managerial nature of that position. *See Seafarer*, 70 F.3d at 704-05; *Protectus Alpha*, 767 F.2d at 1385-87. Citing to an American treatise, the Seventh Circuit in 1896 found the general rule of maritime law to be that "the owners of a vessel are liable for all injuries caused by the misconduct, negligence, or unskillfulness of the master, provided the act be done while acting within the scope of his authority as master." *The State of Missouri*, 76 F. 376, 379 (7th Cir. 1896) (citing 2 Theophilus Parsons, *A Treatise on the Law of Shipping* 26 (1869)). On the other hand,

the Fifth and Sixth Circuits enforce a strict complicity rule traceable to *The Amiable Nancy*, 3 Wheat. at 558-59, and *Lake Shore*, 147 U.S. at 108-09. *See In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 650-52 (5th Cir. 1989); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

Regarding at least two other unsettled but pertinent issues of the general maritime law of punitive damages, the Ninth Circuit neglected in this case even to say what the law is. To Exxon's argument that federal maritime law should not allow punitive damages when punishment and deterrence are otherwise assured, the Ninth Circuit replied only that:

> Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. Because we have not been made aware of a principle of law pursuant to which we should strike a punitive damages award on the ground that the conduct had already been sufficiently punished and deterred, we reject the argument.

In re Exxon Valdez, 270 F.3d 1215, 1226 (9th Cir. 2001), *reprinted at* Pet. App. 68a.

The proposition that federal maritime law could be drawn from a principle that limits punitive damages when sufficient deterrence and punishment is otherwise assured is at least suggested in *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57 (1985), where the Second Circuit, per Judge Friendly, reversed an

award of punitive damages against the time charterer of a vessel for improper stowage ("deviation") said to be by order of the master or the chief mate in part because

> the deterring effect of punitive damages is severely diluted when the actors are employees not of the person held liable but of another whom he has hired to perform his tasks. And, as pointed out above, the argument for straining to award punitive damages is particularly weak in the case of deviation where heavy sanctions exist in any event."

Id. at 68.

Likewise, to Exxon's argument that the maritime law should require evidence of recklessness that is clear and convincing, the Ninth Circuit answered only that a lower standard was constitutionally permissible and, in the absence of established precedent particular to maritime law, the standard of proof generally applied in federal civil cases should apply. *Exxon Valdez*, 270 F.3d at 1232-33, *reprinted at* Pet. App. 79a-80a. In Alaska, state law calls for clear and convincing evidence of misconduct qualifying for punitive damages. Alaska Stat. Ann. § 09.17.020 (2006). The Ninth Circuit appears to have begged the question about maritime law by defaulting to what it describes as the standard generally applied in federal civil cases.

A bedrock assumption underpinning federal maritime law is that the constitutional grant of

jurisdiction and law making was intended to foster uniformity and consistency for the benefit of maritime commerce. *Norfolk S. Ry. Co. v. James N. Kirby Pty, Ltd.,* 543 U.S. 14, 28-29 (2004); *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1875)); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 738-39 (1961); *see* Schoenbaum, *supra*, § 4-1.[3]

C. In formulating the general maritime law, this Court can look to a wide variety of different sources.

As *amici* we do not suggest the proper source from which to draw the maritime law for punitive damages. In the past, this Court has tapped various sources for a rule that best serves the policy that ought to control under the circumstances. Rules prevailing in the codes of the maritime nations of

[3] But this Court has observed that the requirement for uniform maritime law is not absolute, *American Dredging,* 510 U.S. at 451, and, under certain circumstances, has allowed resort to state law when no rule of federal maritime law has been established, so long as it would not "work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 447; *see also Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199 (1996) (damages available for the wrongful death of a non-seafarer is an issue maritime but local so that state law could be applied); *see generally* Schoenbaum, *supra,* § 4-2. Here, the pressing question however is not whether state law will suffice, but where to turn for content when making federal maritime law instead.

Europe and approved by that continent's leading jurists have long proved persuasive. *See, e.g., Insurance Co. v. Dunham,* 11 Wall. (78 U.S.) 1, 23-24 (1870) *aff'g De Lovio v. Boit,* 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.); *Columbian Ins. Co. of Alexandria v. Ashby & Stribling,* 13 Pet. (38 U.S.) 331, 342 (1839).

More recently, this Court has derived one rule of general maritime law with reference to a consensus among the world's maritime nations and the views of respected scholars and judges. *See McDermott, Inc. v. Amclyde,* 511 U.S. 202, 208 (1994) (recalling *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975)). Persuaded by considerations of judicial economy, the promotion of settlement, and consistency with existing federal maritime law, in *Amclyde* it drew another from the Restatement (Second) of Torts. *Id.* at 211. It has chosen a third consistent with the law in other common law countries, scholarly advice, and the Restatement of the Conflict of Laws.

Wherever it has looked for inspiration when fashioning maritime law in rules of decision, this Court has taken care to harmonize its work with that of Congress. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 31-32 (1990); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625-26 (1978); *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 11 (1972); *Moragne v. Central Gulf Lines,* 398 U.S. 375, 397-99 (1970). *See generally* Force, *supra,* 20-21; Schoenbaum, *supra,* §§ 4-1, 4-2.

With due regard therefore for the manifest interest of Congress, this Court enjoys a range of sources and broad discretion in fashioning as general maritime law the rules of punitive damages that best serve the policy that ought to control under the circumstances.

CONCLUSION

The petition should be granted to resolve uncertainty about critical aspects of the federal maritime law of punitive damages.

Respectfully Submitted,

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