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 *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of businesses and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region. One important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The courts' fair, consistent and predictable administration of punitive damages awards is of profound concern to the Chamber's members.

Accordingly, the Chamber regularly files *amicus* briefs in significant punitive damages cases, including every case in which this Court has addressed that issue during the past two decades. Petitioners here (hereafter "Exxon") present critically important questions related to the power of federal courts to establish common law with respect to punitive damages awards in the context of federal maritime law – issues on which the federal courts are in acknowledged conflict. In addition, the decision below exacerbates the courts of appeals' disarray with respect to the application of the constitutional guideposts for punitive damages awards established in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). The divisions among the courts of appeals on the issues presented here result in fundamental unfairness, as massive differences in punitive damages awards turn on the fortuity of where a case happens

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

to be filed. Moreover, the absence of uniformity in maritime law not only contravenes maritime policy and congressional intent, but also creates damaging uncertainty for businesses in this sector. These entities do not know whether they are subject to imputed liability for the tortious acts of a ship master or crew, when conduct governed by the Clean Water Act might also be subject to punitive damages, or what legal standards govern punitive damages in maritime cases.

The Chamber believes that its knowledge of the practical implications for the business community of the legal principles embodied in the decision below can assist the Court in assessing the merits of Exxon's petition.

BACKGROUND AND INTRODUCTION

Although the Chamber fully supports review of all three questions presented, this brief does not address the first issue of imputed liability under maritime law, *viz.*, whether punitive damages may be imposed on the owner of a vessel for the tortious acts of the master and crew when the owner has not authorized, ratified, or controlled such actions. That issue is amply addressed by Exxon and by other *amici*. This brief supports Exxon's arguments that the remaining issues in the petition are independently worthy of review.

First, this Court should review the question whether the comprehensive remedial scheme of the Clean Water Act ("CWA") has displaced federal common law remedies, a recurring and important question on which the lower courts are in conflict. As this Court and others have made clear, where Congress enacts a comprehensive remedial design that does not expressly include a specific remedy, courts are not free to supplement that scheme with an additional remedy under federal common law. This is true not simply under maritime law, but as a general principle: A federal statute with a comprehensive remedial scheme displaces federal common law remedies – particularly punitive damages. This case provides an excellent example, because Exxon was

assessed $125 million in fines under the CWA alone. The continuing lack of consistency concerning the CWA's effect on federal common law remedies treats litigants unfairly, encourages forum shopping, and undermines maritime laws and policies that recognize the critical importance of national uniformity and minimize burdens on maritime commerce. The resulting uncertainty is harmful to affected businesses making decisions in this unpredictable legal environment.

Second, this Court should grant the petition to delineate the common law principles that the federal courts should apply when reviewing punitive damages awards in maritime cases. In maritime and other common law cases, before addressing the question whether a punitive damages award is constitutional, the federal court must review the award under the relevant principles of federal common law. The court below wholly failed to do so, and thus affirmed an award that contravenes maritime policies in numerous respects. Moreover, as noted above, it is essential to maritime law and policies that federal courts apply uniform, consistent principles to maritime law questions – including the question whether a punitive damages award in a maritime case is excessive under federal common law. Yet, this Court has never addressed the federal common law principles that govern judicial review of punitive damages in maritime cases. This Court should grant the petition to end the damaging uncertainty about both the process and substance of judicial review in this important area of commerce.

Third, the decision below adds to the confusing and inconsistent array of lower court decisions applying two of the *Gore* guideposts for constitutional review of punitive damages awards. Specifically, the Ninth Circuit joined other courts that simply do not take seriously this Court's instruction that when "substantial" compensatory damages have been awarded, punitive damages should yield at most a 4-to-1 ratio – in cases of highly reprehensible conduct – and a 1-to-1 ratio in all other circumstances. In addition, the court

of appeals noted *Gore*'s instruction that a reviewing court must consider the disparity between the punitive damages award and available civil sanctions, but read *State Farm* to make consideration of this guidepost essentially optional. In both respects, the decision badly misreads this Court's punitive damages holdings and exemplifies the unfair inconsistency currently permeating this area of law. The broadening uncertainty and division on these recurring legal questions is harmful to the legal system and American business. This Court's review is thus fully warranted.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER THE CLEAN WATER ACT DISPLACES COMMON LAW REMEDIES.

The Ninth Circuit acknowledged that "[b]efore and after the *Exxon Valdez* oil spill, the Clean Water Act's section on 'Oil and hazardous substance liability' provided a carefully calibrated set of civil penalties for oil spills, generally with ceilings on penalties, even if the spills were grossly negligent or willful." App. 74a. That remedial regime has never included punitive damages. The court of appeals nonetheless held that a punitive damages award "does not conflict with the statutory scheme," and therefore that the CWA "does not preclude a private remedy for punitive damages." *Id.* at 75a, 77a. See also *id.* at 77a ("a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy").

As Exxon makes clear (Pet. 17-18), the decision below conflicts with decisions of other federal courts of appeals. It is also utterly inconsistent with this Court's enduring teaching that federal common law is displaced where Congress has directly spoken to a particular subject matter.

Where, as here, "Congress addresses [a] problem formerly governed by federal common law," courts must construe the

federal statute at issue with a "willingness to find congressional displacement of federal common law." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 & n.9, 315 n.8 (1981) ("*Milwaukee II*") (emphasis omitted). This is because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. As other courts of appeals have recognized, "once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982); see *Milwaukee II*, 451 U.S. at 324. See also *United States* v. *Oswego Barge Corp.* (*In re Oswego Barge Corp.*), 664 F.2d 327, 335 (2d Cir. 1981) ("separation of powers concerns create a presumption in favor of [displacement] of federal common law whenever it can be said that Congress has legislated on the subject").

Federal common law claims and remedies are displaced by direct congressional treatment of an issue even if Congress does not expressly state that it is displacing common law. See *Resolution Trust Corp.* v. *Frates*, 52 F.3d 295, 297 (10th Cir. 1995) (to "supersede authority previously established by federal judicial ruling, Congress need not affirmatively proscribe that authority, but may do so simply by speaking directly to the issue"); *Milwaukee II*, 451 U.S. at 313-15; *Resolution Trust Corp.* v. *Miramon*, 22 F.3d 1357, 1360 (5th Cir. 1994).[2] Indeed, this Court has repeatedly observed that

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[2] The threshold for finding displacement of federal common law is lower than that for finding preemption of state law by federal common law. *See Frates*, 52 F.3d at 297. And, although the Second Circuit has suggested that "the presumption of statutory preemption [applies] somewhat less forcefully to judge-made maritime law than to non-maritime federal common law," *In re Oswego Barge Corp.*, 664 F.2d at 336, that court too acknowledged that "preemption of maritime law has occurred both as to prior judge-made law and the authority to fashion new

"'[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)). Moreover, "'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" *Id.* at 147 (quoting *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981)); see also *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"); *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 406, 417 n.18 (1981) (under parts of § 301 of the Labor Management Relations Act, the availability of a "significant array of other remedies" counsels against the imposition of punitive damages as a matter of federal common law).

This Court has already made clear that these principles govern in the maritime context, as described in detail by Exxon. See Pet. 15-19 (citing cases). They also govern federal statutory interpretation as a general rule.

For example, the Employee Retirement Income Security Act of 1974 ("ERISA") has a comprehensive remedial scheme. Civil remedies for ERISA violations are set forth in § 502, 29 U.S.C. § 1132, which "provides 'a panoply of remedial devices' for participants and beneficiaries of benefit plans." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101,

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law," *id.* at 337. And, in admiralty law, this Court has "decline[d] to fashion new remedies if there is a possibility that they may interfere with a legislative program." *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 n.40 (1981); *see id.* at 96 ("[e]ven in admiralty, however, where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress").

108 (1989) (quoting *Russell*, 473 U.S. at 146).[3] This Court has declined to supplement ERISA's remedial regime for violations of benefit plans with extracontractual compensatory and punitive damages remedies under common law, declaring itself "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. In addition, the Court noted, "there is a stark absence – in the statute itself and in its legislative history – of any reference to an intention to authorize the recovery of extracontractual damages." *Id.* at 148. Thus, the Court concluded, "Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." *Id.*[4]

Federal courts of appeals have taken a similar approach in evaluating the effect of the comprehensive remedial scheme of the Family Medical Leave Act ("FMLA"). Under 29 U.S.C. § 2617(a)(1)(A), any employer who violates the statute is liable "for damages equal to . . . the amount of": (1) "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation"; (2) interest on that amount; and (3) "an additional amount as liquidated damages equal to the sum of the amount described [in number one]." Courts have declined to supplement this detailed plan, uniformly concluding that

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[3] Under ERISA § 502(a)(1)(B), a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(3)(B) authorizes civil actions "to obtain other appropriate equitable relief (i) to redress . . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." *Id.* § 1132(a)(3)(B).

[4] *See also Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993) (suggesting that neither § 502(a)(2) nor § 502(a)(3) permits a participant or beneficiary to recover punitive damages); *Sommers Drug Stores Co.* v. *Corrigan Enters., Inc.*, 793 F.2d 1456, 1462-65 (5th Cir. 1986) (same).

only compensatory damages are available under the FMLA. See *Brumbalough* v. *Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1007-08 (6th Cir. 2005) (denying recovery for emotional distress under the statute); *Xin Liu* v. *Amway Corp.*, 347 F.3d 1125, 1133 n.6 (9th Cir. 2003) ("FMLA only provides for compensatory damages and not punitive damages"); *Walker* v. *UPS, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001) ("courts have consistently refused to award FMLA recovery for such other claims as consequential damages and emotional distress damages") (citations omitted); *Nero* v. *Indus. Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999) (same).[5]

Like these other federal statutes, the CWA enacts a comprehensive legislative scheme that precludes courts from inferring that additional remedies such as punitive damages may be available and that displaces any preexisting federal common law right to such an award. Pet. 15. The CWA authorizes substantial civil and criminal penalties. Under 33 U.S.C. § 1319(c), those who negligently or knowingly violate the Act are subject to fines of not less than $2,500 or $5,000 nor more than $25,000 or $50,000 per day of violation, respectively, and/or by imprisonment of not more than 1 or 3 years, respectively."[6]

On the civil side, an entity who violates the statute is subject to a civil penalty "not to exceed $25,000 per day for each violation." *Id.* § 1319(d). Under § 1321(b)(6)(B), if an "owner, operator, or person in charge of any vessel ... from

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[5] *Cf. Snapp* v. *Unlimited Concepts, Inc.*, 208 F.3d 928, 930, 933-35 (11th Cir. 2000) (holding that §§ 216(a) & (b) of the Fair Labor Standards Act establish "a comprehensive remedial scheme for violations of the FLSA's substantive provisions that covers the whole terrain of punitive sanctions, compensatory relief, private rights of action, and actions brought by the Secretary of Labor," and declining to authorize awards of punitive damages under the private cause of action).

[6] Repeat offenders are subject to maximum penalties of $50,000 or $100,000 per day of violation, depending upon whether the violation occurred negligently or knowingly. 33 U.S.C. § 1319(c)(1)-(2).

which . . . a hazardous substance is discharged in violation of the statute, that individual or entity may be assessed up to" either $10,000 per violation (up to $25,000) or $10,000 per day for each day for which the violation continues (up to $125,000), depending on the kind of civil penalty assessed. 33 U.S.C. § 1321(b)(6)(A)-(B). Additionally, as the Ninth Circuit noted, 18 U.S.C. § 3571, "the federal measure for fines in this case," could result in a $200,000 civil fine, as well as a potential $1.03 billion criminal fine, which is "'not more than the greater of twice the gross gain or twice the gross loss'" suffered by another person as a result of the offense. App. 101a, 102a.

"The judiciary may not, in the face of such [a] comprehensive legislative scheme[], fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981). The court of appeals decision violates this standard.

The Ninth Circuit's ultimate conclusion[7] that – despite its comprehensive remedial provisions – other CWA provisions *preserve* a plaintiff's right to pursue punitive damages is meritless. Section 1321(o)(1) preserves only actions to remedy "'damages to ... *property*'" (emphasis supplied) (omission in original), and § 1365(e) limits only the reach of the citizen suit provision. Pet. 20 n.7. Neither provision preserves the common law remedy of punitive damages for conduct comprehensively addressed by the CWA.[8]

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[7] In analyzing the question whether the CWA displaced the punitive-damages remedy, the Ninth Circuit acknowledged that "the question is not without doubt," App. 75a, and that "[t]he issue is close," *id.* at 77a.

[8] The Ninth Circuit also maintained that "a statute providing a comprehensive scheme of public remedies need not be read to preempt a preexisting common law private remedy." App. 77a. A statute imposing only "public remedies" might not displace or preempt *compensatory* damages through which aggrieved private parties recoup their losses. But like other public remedies, punitive damages serve the goals of

For numerous reasons, the conflict and uncertainty concerning this issue should not be permitted to continue. First, "'[t]he need for a body of [maritime] law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention.'" *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (alteration in original). This Court, too, has remarked on the necessity for "uniformity and consistency" in maritime law in light of its interstate and international character. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). Second, allowing the conflict to endure is fundamentally unfair to litigants whose entitlement to punitive damages will turn on the geographic location in which the case is filed, and will serve to encourage unseemly forum shopping. Third, uncertainty about the scope of a federal statute has harmful consequences for any national business whose conduct is regulated by that statute.

This Court should grant the petition to decide whether the CWA displaces the federal common law remedy of punitive damages for conduct regulated by the Act.

II. THE COURT SHOULD GRANT THE PETITION TO DELINEATE THE FEDERAL COMMON LAW PRINCIPLES GOVERNING REVIEW OF PUNITIVE DAMAGES IN MARITIME CASES.

The court of appeals failed to review the punitive damages award in this case to determine whether it was consistent with governing federal common law principles. This omission cannot be reconciled with this Court's decision in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), or with the longstanding principles of common law that apply to appellate review of punitive damages awards. Moreover, had it been reviewed, the award could not have survived scrutiny under the applicable common law principles. Granting

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punishment and deterrence, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007), and thus a comprehensive scheme of public remedies presumptively preempts punitive damages.

review would allow this Court first, to make clear that in federal common law cases, including maritime cases, a court must review a punitive damages award under both federal common law principles and the Constitution, and second, to articulate uniform standards for review of such awards in maritime cases illuminated by maritime laws and policies.

"Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.* at 421; see also *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991). Long before this Court addressed federal constitutional limits on punitive damages awards, federal and state courts routinely reviewed those awards under common law principles. *Oberg*, 512 U.S. at 424-25; Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 1014 (2001) ("[o]n the common-law side, courts have reviewed punitive damages verdicts for excessiveness since 1763"). But despite Exxon's repeated requests for review under federal common law, the court of appeals addressed only constitutional limits on the punitive damages award. App. 68a-70a, 90a-91a. The court thus abdicated its responsibility as a federal common law court.

Honda Motor Corp. v. *Oberg* involved an amendment to the Oregon Constitution that precluded judicial review of punitive damages awards except in certain very narrow circumstances. 512 U.S. at 418. As the Court explained, "if the defendant's only basis for relief [was] the *amount* of punitive damages the jury awarded, Oregon provide[d] no procedure for reducing or setting aside that award." *Id.* at 426-27. This Court rejected this scheme, holding that "the Due Process Clause requires judicial review of the amount of punitive damage awards." *Id.* at 420.

The Court observed that "[j]udicial review of the amount awarded was one of the few procedural safeguards which *the common law* provided against that danger," *id.* at 432 (emphasis added), and that "Oregon, unlike the common law,

provides no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts," *id.* at 429. The Court held that, by "remov[ing] that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time," Oregon violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 432.

The Court's decision in *Oberg*, accordingly, makes clear that common law courts must conduct *some form* of review of punitive damages awards sufficient to ensure that "those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. Although some form of judicial review (or some equally effective safeguard against excessiveness and arbitrariness) is required, it is for the common law court – be it state or federal – to determine the precise content of that mandatory common law review. And, *Oberg* shows that this common law review is independent of, and precedes, the application of constitutional limits on punitive damages awards. (Indeed, the Court did not mandate the application of substantive constitutional limits on such awards until two years later in *Gore*.) Thus, a common law court (either state or federal) must review a punitive damages award for compliance with applicable common law *and* the Constitution.

Many state common law courts conduct this two-phase review as a matter of course, first applying the pertinent excessiveness standard under common law and then considering the constitutional limits. See, *e.g.*, *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001) ("the guideposts announced in *Gore* are additional factors for the reviewing court in Oregon to consider as part of the . . . rational juror review"); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 307 n.33 (Tex. 2006); *Dardinger* v. *Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 143-44 (Ohio 2002); *Sweet* v. *Roy*, 801 A.2d 694, 714-15 (Vt. 2002);

Bowden v. *Caldor, Inc.*, 710 A.2d 267, 277-78 (Md. 1998); see also *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996) ("[f]or rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy").

In cases involving federal common law, a federal appellate court reviewing a punitive damages award should assume the same role as state appellate courts and conduct the same two-tier analysis. In reviewing the punitive damages award here, the court of appeals thus should have started by reviewing the punitive damages award under the applicable principles of federal common law. Its failure to do so was legal error.

Moreover, had the court of appeals reviewed the award under federal common law principles, it would have been required to give content to those principles. In maritime law, as in other areas governed by federal common law, the federal courts create the applicable federal common law. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); *E. River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("[w]ith admiralty jurisdiction comes the application of substantive admiralty law"); *In re Oswego Barge Corp.*, 664 F.2d at 336 (citing the "substantial law-creating function for federal courts in maritime law"). This entails, *inter alia*, establishing the *remedies available for each cause of action. United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) ("the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime").

Exxon has already described in detail the maritime law and policies that should inform courts in reviewing the punitive damages award in this case, Pet. 22-25. Briefly, the maritime policies of uniform and consistent laws, appropriate and fair compensation for injury, avoidance of undue burdens on commerce, the encouragement of settlement of claims, and judicial economy all militate against the massive and unprecedented punitive damages awarded below in this case.

Id. The Court's review is of particular importance in this instance, where the $2.5 billion punitive damages award is *in addition to* the nearly $3.5 billion Exxon has already expended – in fines, settlements, and affirmative mitigation costs – as a result of the oil spill. *Id.* at 3-4.

Indeed, Exxon was not asking the court of appeals to do anything other than to fulfill its responsibilities as a federal common law court – *i.e.*, to determine the appropriate procedural and substantive standards for reviewing punitive damages awards in light of the federal policies and interests at stake. That is precisely what the federal courts have done in the closely analogous context of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), a statute that instructs the courts to create a federal common law interpreting, enforcing, and remedying violations of collective bargaining agreements and agreements between labor unions and their members. See *Nw. Airlines*, 451 U.S. at 95, 96 n.35. Pursuant to that statutory command, federal courts have not only developed the general contours of the law governing labor agreements, but also have crafted the law governing the remedies for violations of such agreements. In doing so, their decisions are informed by the relevant federal labor policy. See *Int'l B'hood of Elec. Workers* v. *Foust*, 442 U.S. 42, 50-52 (1979) (barring awards of punitive damages for breach of a union's duty of fair representation); *Merck* v. *Jewel Food Stores*, 734 F. Supp. 330, 331 (N.D. Ill. 1990) (Posner, J.) (agreeing with the majority of federal courts that refuse to allow punitive damages for violations of collective bargaining agreements under § 301), *rev'd in part on other grounds*, 945 F.2d 889 (7th Cir. 1991).[9]

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[9] *See also Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455-58 (1957) (enforcement of arbitration agreements); *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36-45 (1987) (limited review of arbitration awards).

The same approach should have been utilized here. The Ninth Circuit abjured its obligation to review the punitive damages award under common law standards, and thus necessarily failed to fulfill its responsibility to craft common law principles of review informed by maritime laws and policies. The court's failure to determine and apply the applicable common law principles was clear legal error, and led directly to the excessive award in this case.[10] Moreover, the decision creates uncertainty about the nature of review of punitive damages awards in maritime law – uncertainty with the damaging consequences set forth *supra*. And, because the federal court must determine the applicable common law standards in this context, this Court has a unique opportunity to demonstrate to other common law courts how punitive damages standards ought to operate – not at their outermost constitutional limits, but in fulfilling punitive damages' basic function of deterring and punishing wrongful acts. For these reasons, too, the Court should grant the petition.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE DISARRAY IN THE COURTS OVER APPLICATION OF *GORE*'S GUIDEPOSTS.

1. In *State Farm*, this Court sought, *inter alia*, to provide guidance to the lower courts on the proper application of *Gore*'s guideposts for assessing punitive damages. Relevant here, this Court stated in describing the second *Gore* guidepost that "few awards exceeding a single-digit ratio

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[10] In *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc*, this Court refused to find a punitive damages award based on a state-law cause of action "excessive as a matter of federal common law," holding that "[i]n a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." 492 U.S. 257, 277, 278 (1989). Here, in contrast, the underlying claim arises under a form of federal common law and thus review under judge-made common law principles is mandatory.

between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. Critically, moreover, the Court added that a ratio exceeding double-digits may be permissible when "'a particularly egregious act has resulted in only a small amount of economic damages,'" but that "*[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" *Id.* (emphasis supplied). This is because when compensatory damages are substantial, "further sanctions" generally are not required "to achieve punishment or deterrence." *Id.* at 419.

Despite this facially clear guidance, many lower courts have failed to comply, which has resulted in the persistent, inconsistent treatment of punitive damages in the lower courts. The instant case exemplifies this disturbing state of affairs. Although compensatory damages in this case were $20.3 million, the court of appeals first held that the actual harm suffered was $500 million. This award was "'substantial,'" App. 293a, and thus the same amount of punitive damages should have been at the "outermost limit of the due process guarantee." The court of appeals instead followed the path marked out in its decision in *Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006), which authorized a ratio of up to 4-to-1 for cases involving significant economic damages *without* egregious behavior and a higher ratio when behavior is egregious. Accordingly, the court affirmed an award that imposed punitive damages at a ratio of 5-to-1 to the court's estimate of harm (many times higher than actual damages). App. 41a-42a.[11]

This award directly contravenes *State Farm*. It also highlights a disturbing trend among courts that undermines this Court's intent to ensure due process by achieving greater

[11] For the reasons set forth in the Petition at 28-29, the court of appeals also erred by labeling Exxon's conduct egregious.

uniformity, predictability and reasonableness in the punitive damages arena. The Ninth Circuit and many other courts have failed to heed this Court's instructions about the appropriate relationship between compensatory and punitive damages awards. For example, in *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), the court upheld a $2.6 million punitive damages award in relation to a $360,000 compensatory damage award (a ratio exceeding seven to one). The court did not discuss the impact of the substantial nature of the compensatory award, but simply declared that it was "aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages." *Id.* at 1044.

Similarly, the Federal Circuit noted that a $50 million punitive damages award did "not even approach the possible threshold of constitutional impropriety," as it was "barely above three times the compensatory award of $15 million in this case." *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003). The court held that because the 3-to-1 ratio "remains within the '[s]ingle-digit multipliers [which] are more likely to comport with due process,' not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect[,] . . . . this low ratio of punitive to compensatory damages award lies well within the bounds of constitutional propriety." *Id.* (first two alterations in original) (quoting *State Farm*, 538 U.S. at 425). The court simply ignored this Court's instructions concerning awards in cases involving substantial compensatory damages despite its clear application to an award of $15 million. See also Pet. 28 n.9 (citing cases disregarding this Court's instructions).

Other courts, however, have heeded this Court's clear call for restraint, as the citations in Exxon's petition (*id.*) again reveal. As the Sixth Circuit recently explained, "the general principle [is] that a plaintiff who receives a considerable compensatory damages award ought not also receive a

sizeable punitive damages award absent special circumstances." *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007). In addition, the Eighth Circuit has generally reduced exorbitant punitive damages awards when measured against substantial compensatory ones. See *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (reducing $15 million punitive damages award to $5 million to achieve a 1-to-1 ratio); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (remitting the punitive damages award to an amount equal to the compensatory damages award of $600,000 because "[s]ix hundred thousand dollars is a lot of money"). But see *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (finding $500,000 in compensatory damages "substantial," but only reducing the 10-to-1 ratio to 4-to-1).[12]

Clearly, the goals of uniformity and predictability that motivated this Court's due process standards for punitive awards have continued to elude the lower courts, in significant part due to their failure faithfully to apply *Gore* and *State Farm*. This failure – and the resulting uncertainty – continues to have an outsized effect on American businesses by distorting how business and litigation are conducted.

2. As the petition observes, the decision below does not apply *Gore*'s teaching that courts should consider "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *State Farm*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). The court justified this omission by relying on the *State Farm* Court's statement that it "need not dwell long on this guidepost," *id.* The court of appeals took this statement to

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[12] The *Stogsdill* approach was also utilized in *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), where the court held that "[a]lthough the [plaintiffs] received substantial compensatory damages, given the facts of this case, the [four-to-one] ratio of punitive damages to compensatory damages does not indicate that the punitive damages award violates due process."

mean that a disparity between punitive damages and potentially analogous civil penalties was unimportant. See App. 41a ("[i]n our own circuit's more recent post-*BMW v. Gore* and *State Farm* cases, we have generally not attempted to quantify legislative penalties" but "have looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws. In several recent discussions we have not discussed the factor at all") (citation omitted).

This attitude, which is not confined to the Ninth Circuit, is based on a misinterpretation of *State Farm*, and sabotages this Court's efforts to guide the lower courts to consistency and uniformity. First, as the context makes clear, the court below completely misread *State Farm*. This Court stated:

> Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

538 U.S. at 428 (citation omitted). As this language makes plain, *State Farm* duly considered the disparity between the punitive damages award and comparable civil sanctions. This Court simply found that its application in that instance was uncomplicated, because the comparable penalties were "dwarfed" by the Utah Supreme Court's award.

That is hardly a license to adopt the Ninth Circuit's utterly cavalier approach to this disparity question, which unfortunately is not limited to the Ninth Circuit. Some courts have plainly indicated that the this guidepost should be "'accorded less weight in the reasonableness analysis than the first two

guideposts.'" *Action Marine, Inc.* v. *Cont'l Carbon, Inc.*, 481 F.3d 1302, 1322 (11th Cir. 2007) (quoting *Kemp* v. *AT&T*, 393 F.3d 1354, 1364 (11th Cir. 2004)), *petition for cert. filed*, No. 07-257 (Aug. 24, 2007). Others claim that the third guidepost "has been criticized as ineffective and very difficult to employ." *Aken* v. *Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 671 (N.M. 2002). Still others, including the Ninth Circuit, have fashioned alternative approaches. See, *e.g.*, App. 41a (assessing only whether or not the legislature "dealt with [the issue] seriously").

Since establishing *Gore*'s third guidepost, the Court has not elaborated further. Here, the combined civil penalties imposed on Exxon could not have exceeded $80 million, and the court below acknowledged that this case is "'unusually rich in comparable[]'" civil penalties. Pet. 30 (quoting App. 101a). This case is, accordingly, also an excellent vehicle for the rehabilitation of this *Gore* guidepost which has often received short shrift from the lower courts, although it is an integral part of the due process equation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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