No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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INTRODUCTION

"It is a well-established principle of the common law, that in ... all actions on the case for torts," juries may impose punitive damages. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). "Imposing exemplary damages on [a] corporation when its agent commits [a tort] creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1999) (quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927)). Punitive damages also punish the corporation for its wrongdoing and force it to internalize the full consequences of its misconduct. *BMW v. Gore*, 517 U.S. 559, 568 (1996); *id.* at 592-93 (Breyer, J., concurring).[1]

Exxon asks this Court to turn its back on these settled principles because this is a maritime case. According to Exxon, special maritime concerns require unique judge-made limitations on punitive liability for corporate vessel operators.

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[1] As corporations and the ramifications of their wrongdoing have grown, so have punitive awards in cases involving significant harm. *See*, *e.g.*, *Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 87 (2d Cir. 2007) (upholding $1 billion award); *In re Wilson*, 451 F.3d 161, 165 (3d Cir. 2006) ($3.75 billion settlement for claim seeking punitive damages); *In re A.H. Robins Co., Inc.*, 86 F.3d 364, 367-68 (4th Cir. 1996) ($2.47 billion settlement for claim seeking punitive damages); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 866 (Tex. App. 1987) (upholding $1 billion award); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 387 (La. App. 2001) (upholding $850 million award). The same is true with respect to antitrust treble damages. *See Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 795 (6th Cir. 2002) (upholding $1.05 billion award).

Since the earliest days of this Nation, however, it has been clear that "[c]ourts of admiralty allow [exemplary damages] upon the same principles, as they are often allowed damages in cases of torts, by courts of common law." *Boston Mfg. Co. v. Fiske*, 2 Mason 119, 121 (1820) (Story, J.). "Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions" – just as in other tort actions – "where [a] defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995); *see also* David Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 86-98 (1997) (maritime law always has "firmly recognized" availability of punitive damages).

This case fits well within that archetype. "The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." Pet. App. 83a. Unlike any previous shipping disaster, Exxon's reprehensible conduct inflicted such widespread harm to private parties' interests that the district court, *at Exxon's request*, certified a mandatory punitive damages class to protect Exxon from the threat of multiple punitive damage verdicts. Pet. App. 67a. The 83-day, three-phase trial and subsequent appeals established that 32,677 claimants suffered an average of about $15,500 in recoverable economic harm, apart from substantial unrecoverable economic and non-economic harm.

Plaintiffs were awarded an average of approximately $76,500 each in punitive damages – just less than five times their average compensable economic harm. The aggregate punitive judgment stands at $2.5 billion, or about three weeks of Exxon's current net profits.[2] This judgment is rational and proportionate, and should be affirmed.

STATEMENT

Respondents set forth the facts of this case as found by the courts below and other governmental entities, with citations to the trial record only when necessary to fill out the picture. Exxon claims that some of these matters were "hotly disputed," Petrs. Br. 9 n.3; points elsewhere to "Exxon's evidence," *id.* 9; and recites as "facts" various snippets of friendly testimony. But the jury "plainly did not" interpret the evidence according to the tale Exxon tells. Pet. App. 87a. Nor did the district court or the Ninth Circuit in performing *de novo* due process reviews. Pet. App. 22a-31a, 120a-124a, 149a-157a. More fundamentally, this is not the place to argue about evidence that a district court observed over a five-month trial and that it and a court of appeals already have examined, sorted, and distilled from an immense record. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996); *Newell v. Norton & Ship*, 70 U.S. 257, 267-68 (1865).

1. a. In 1973, Congress passed the Trans-Alaska Pipeline Authorization Act (TAPAA), Pub. L. No. 93-153, 87 Stat. 584, which permitted oil companies, including Exxon, to bring crude oil from Alaska's

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[2] Exxon Mobil 2006 Annual Report 5, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf.

North Slope to market. From the pipeline's terminus in Valdez, oil tankers would travel through the "icy and treacherous waters of Prince William Sound," Pet. App. 22a, before heading southward.

As the proceedings leading to TAPAA emphasized, "[t]he economy of this area depends almost entirely on commercial fishing, the processing of the catch, and related activities." JA1442; *see also* Pet. App. 41a, 155a; JA1439, 1475-81. The Sound and adjacent waters also are home to thousands of Native Alaskans, who have engaged for centuries in subsistence living. Congress therefore passed TAPAA only after securing the industry's assurance that tankers would employ extensive safety measures to protect the Sound's pristine and resource-rich waters. *See* Br. of Alaska Legislative Council 4, 10-13.

Like the rest of the industry, Exxon knew the consequences of breaking its commitment – namely, that "a major oil spill in the Valdez area would cause [an] incalculable disaster to the rich fisheries," as well as to Native Alaskans' subsistence cultures. JA1488; *see also* Pet. App. 122a, 232a; JA213-14, 1437-41, 1475-94. The official contingency plan for the area acknowledged that the oil companies could not contain any spill exceeding 200,000 barrels (8.4 million gallons). SJA60sa-62sa. And the industry knew that oil from such a spill would "persist for years." C.A. 2004 Supp. ER1114.

b. Exxon Shipping Company ran Exxon's tanker operations out of the Port of Valdez.[3] An alcoholic

[3] Petitioners stipulated that Exxon Corporation (now Exxon Mobil Corporation) and its subsidiary Exxon Shipping Company would be treated as one entity. JA212-13. Except where

culture pervaded the company. Supertanker crews partied with alcohol aboard ship; drank together in port; "destroyed" confiscated liquor by drinking it; and violated rules that forbade returning to duty within four hours of drinking.[4] Although on paper Exxon had an alcohol policy that prohibited drinking aboard ship, it did not enforce the policy, and Exxon's crews were "pretty conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you."[5]

Exxon put Captain Joseph Hazelwood in command of the EXXON VALDEZ, one of the thousand-foot supertankers that transited Prince William Sound. Hazelwood was a drinking alcoholic, and Exxon knew it. In 1985, Exxon officials learned through internal complaints that Hazelwood had been drinking aboard ship and had been drunk on several occasions when he boarded ship.[6] Because Hazelwood had not self-reported his on-duty drinking, JA355-56, Exxon's written alcohol policy called for him to be fired. JA599. Exxon, however, did not fire him.

Hazelwood instead attended a 28-day alcohol treatment program and started, but dropped out of, a prescribed after-care rehabilitation program. Pet. App. 63a. Nevertheless, after "fail[ing] to evaluate" his fitness for duty or "consider[ing] whether he

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context requires, this brief refers to the two collectively as "Exxon."

[4] JA226-37, 306-08, 314-15, 331-38, 379-80, 423-24, 445-47, 499, 562-71, 639-40, 649, 750-54; SJA118sa-29sa.

[5] JA721-22; *see also* JA372-73, 434, 537, 566-68, 628-35, 707, 713, 742-43, 1012, 1095-96, 1104; SJA360sa.

[6] JA1033-34; SJA135sa-36sa.

should be given a shoreside assignment," Exxon reassigned him to commanding supertankers. Pet. App. 256a; SJA210sa. Hazelwood's supervisor held his back-to-work meeting while enjoying a beer in a bar. JA294-95.

Less than a year after returning to duty, Hazelwood relapsed. Pet. App. 63a-64a, 121a. He did not hide his drinking. JA306. He drank – often with other Exxon personnel – "in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers." Pet. App. 255a-256a.[7] He also ignored rules requiring him to remain on the bridge while transiting Prince William Sound. JA432-33, 448.

Hazelwood's supervisors promptly began receiving reports that he "had fallen off the wagon." Pet. App. 63a-64a, 154a-155a; JA409-26, 849. The first report was relayed to the President of Exxon Shipping, who was told that "Hazelwood was acting kind of crazy or kind of strange." JA960-61.

Shortly before the official 1988 stewardship review for the EXXON VALDEZ, Hazelwood's supervisors, one of whom reported directly to the President, witnessed Hazelwood's relapse. Following a loud encounter in which Hazelwood was "erratic" and "abusive" toward his boss, the supervisor told another officer that "Joe had perhaps gone back to drinking because of his behavior." SJA374sa-375sa. During the review meeting itself, the drunken Hazelwood, whose "physical appearance was very bad" and whose "eyes were bloodshot," fell asleep.

[7] JA227-29, 235, 306-08, 314-37, 357, 379-80, 411-26, 444-47, 562-71, 640-42, 647-50, 694-746, 752-57, 830, 848-50; SJA364sa-383sa; BIO App. 42a-43a.

SJA379sa-380sa. The supervisor and his boss signaled the officer conducting the review to "just keep rolling ... as if nothing happened." SJA380sa-383sa.

"[T]he highest executives in Exxon Shipping" continued to receive reports concerning Hazelwood's drinking. Pet. App. 64a. Less than two weeks before the grounding of the EXXON VALDEZ, Hazelwood's supervisor was told that Hazelwood had been drinking and insulting another captain over the ship's radio. JA693-707, 727-35, 745-46. It was apparent that "[s]omething was wrong with" Hazelwood. JA704. As the district court summarized:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving.

Pet. App. 154a; *see also id.* 29a, 64a, 83a, 89a-91a, 121a-122a, 153a-157a. To make matters worse, Exxon "routine[ly]" staffed its ships, including Hazelwood's, with overworked and fatigued crews. Pet. App. 90a, 254a; SJA70sa.

c. On the night of March 23, 1989, the EXXON VALDEZ departed Valdez loaded with 53 million gallons of crude oil. Hazelwood was the captain and the only officer aboard licensed to navigate through Prince William Sound. Predictably, he also was drunk – "so drunk that a non-alcoholic would have passed out." Pet. App. 87a. Before boarding the ship, Hazelwood had consumed between five and nine double vodkas (between fifteen and twenty-

seven ounces of 80-proof alcohol) in waterfront bars. Pet. App. 64a.

Shortly after getting underway, Hazelwood – his blood alcohol level at about .241, Pet. App. 256a – steered the vessel away from some ice and toward Bligh Reef, a "known and foreseen hazard." Pet. App. 61a, 253a. He put the ship on an "autopilot program [that] sped the vessel up," something not ordinarily done when a vessel is outside shipping lanes. Pet. App. 63a, 87a. With the reef "only minutes away," Pet. App. 253a, Hazelwood abandoned the bridge and went down to his cabin. He left control to the third mate – who was "fatigued" on his second consecutive watch – with "vague" orders concerning the "tricky" turn necessary to avoid the approaching reef. Pet. App. 63-64a, 87a; JA469-72; SJA294sa. With the third mate unable to perform both his own job and Hazelwood's, the supertanker ran aground.

Exxon invites this Court to infer that the "[i]mmediate cause" of the grounding was the mate's failure to execute a simple turn. Petrs. Br. 2. But Exxon stipulated in the district court that Hazelwood "was negligent in leaving the bridge of the vessel on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence." JA212. Expert mariners elaborated that the turn was not simple, Pet. App. 62a-63a, and Hazelwood's decision-making that night defied "common sense." Pet. App. 63a, 87a; JA460-84. Hazelwood took these improper actions because "his judgment was impaired by alcohol," Pet. App. 63a, 87a – a fact apparent from the tape of his contemporaneous

report of the grounding to the Coast Guard. PX92A (Resps' DVD).[8]

After speaking by satellite phone with an Exxon executive in San Francisco, Hazelwood tried to rock the supertanker off the reef. Pet. App. 122a, 234a n.13; JA223-24, 354-55, 872-76; SJA295sa. Had he succeeded, the ship "would probably have foundered, risking the loss of the entire cargo and the lives of those aboard." Pet. App. 122a, 167a-68a.

As it was, the reef ruptured the ship's hull, releasing 11 million gallons of crude oil into the Sound, causing the "most notorious oil spill in recent times." *United States v. Locke*, 529 U.S. 89, 96 (2000). Wind and water spread the oil across 600 linear miles (roughly the distance from Cape Cod, Massachusetts, to Cape Lookout, North Carolina) and over 10,000 square miles of the surrounding marine ecosystem. For days, this situation was "exacerbated greatly by an unreasonably slow, confused and inadequate response by industry and government that failed miserably in containing the

[8] Exxon's suggestion, Petrs. Br. 9 n.3, that Hazelwood was not drunk illustrates just how brazenly its Statement of the Case ignores the detailed decisions below and how severely Exxon slants the record. The jury heard testimony about Hazelwood's drinking on March 23 from crew members who drank with him, bartenders, another customer, and Hazelwood himself. JA219-21, 239-55, 334-35; Tr. 2729, 2766-67. The state-employed pilot testified that he smelled alcohol on Hazelwood's breath before the grounding, JA267-71, as did Coast Guard officers who boarded the ship after the grounding. JA489-92, 1015-16. Coast Guard blood alcohol tests confirmed that Hazelwood had been extremely drunk. Pet. App. 108a, 256a-257a. Even Exxon's Chairman conceded shortly after the spill that Hazelwood was "drunk," PX2 at 7:05 (Resps' DVD); SJA207sa, and Exxon fired him for that reason. SJA198sa.

spill and preventing damage." S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723-24.

d. Eventually, "[i]n keeping with ... legal obligations" imposing a duty even on innocent spillers to clean up toxic discharges, "Exxon undertook a massive cleanup effort." Pet. App. 124a (citing 33 U.S.C. § 1321). But a congressional report determined that Exxon's response was "wholly inadequate." H.R. REP. NO. 101-200, at 6 (1989). Exxon cleaned up only 13-14% of the oil. DX5505A.

What is more, the jury could have concluded that Exxon directed its cleanup efforts more at appearances than effects. In taped conversations with the Alyeska Emergency Center, an Exxon official was reminded, and acknowledged, that the oil industry's contingency plan could not contain a spill this big. PX722A (Resps' DVD). He nonetheless urged the deployment of "bright and yellow" cleanup equipment to avoid a "public relations nightmare." *Id.* at 1:50, 6:03. Exxon's representative explained: "I don't care so much whether [the equipment is] working or not but ... it needs to be something out there that looks like an effort is being made...." *Id.* at 1:54. "I don't care if it picks up two gallons a week. Get that shit out there ... and ... standing around where people can see it." *Id.* at 6:37.

Meanwhile, Exxon's Chairman publicly acknowledged that its executives had known about Hazelwood's alcoholism and that it had been a "gross error" to assign him to the safety-sensitive position of ship master. PX2 at 19:40 (Resps' DVD). He called the assignment a "bad judgment ... on a going in basis." *Id.* at 15:03.

The oil spill "disrupted the lives (and livelihood) of thousands of [people in the region] for years." Pet. App. 24a. The likelihood that any "fish harvested [would be] adulterated by oil," JA1118, required the State of Alaska to close fishing seasons in 1989. The spill also reduced harvests in later years and depressed the prices of all Alaska fish, including those from unoiled areas. JA1155-56. The oil damaged approximately 1,300 miles of shoreline, much of it privately owned. It destroyed the subsistence activities of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. As one would expect from a disaster that cripples an entire region's economy, "[t]he social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress disorder, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a; SJA386sa-572sa.

2. Thousands of individuals and local businesses sued Exxon respecting their private harm. The Limitation of Shipowners' Liability Act, now codified at 46 U.S.C. § 30501 *et seq.*, generally allows a shipowner six months to petition to limit its liability (to the value of the vessel and cargo) if it lacked "privity or knowledge" as to crewmembers' tortious conduct. But Exxon's counsel advised that Exxon "will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood," BIO App. 43a, and Exxon did not even attempt limitation.

The federal government and State of Alaska separately pursued civil and criminal cases against Exxon for the oil spill's environmental impacts. But Exxon quickly entered into settlements with the governments – pleading guilty to three crimes that were punishable by a combined $3 billion fine, but paying only $25 million, and agreeing in the civil matters to pay $900 million over ten years for environmental restoration. Pet. App. 173a-175a, 240a-241a.

Exxon made some compensatory payments to some commercial fishermen, but it refused to pay anything for most of the harm it caused. *See* Pltfs. 2004 C.A. Br. 47-49. It also refused to compensate other injured groups and opposed administrative relief from the Trans-Alaska Pipeline Fund. *Id.*; JA1428-29. So plaintiffs proceeded with this litigation, providing the first opportunity for an adversarial proceeding to develop the facts fully. Pet. App. 174a n.111.

The district court "did a masterful job of managing this very complex case." Pet. App. 67a. At Exxon's request, the district court certified a mandatory punitive damages class. Pet. App. 126a; JA 115. The class includes 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, municipalities, and others.

After years of discovery, the parties tried the case to a jury in 1994. The trial comprised three phases over 83 trial days (filling 7,714 pages of transcript), with 155 witnesses and 1,109 exhibits.

In the first trial phase, the jury found that Hazelwood and Exxon each had been reckless, thus

establishing a necessary but not sufficient condition for assessing punitive damages. Pet. App. 67a.

In the second phase, the jury awarded $287 million in compensatory damages for economic harm to fishermen in the major commercial fisheries. Pet. App. 160a. In post-trial proceedings, the district court and court of appeals determined that the class members, including victims whose claims had been dealt with outside of Phase II, recovered economic damages exceeding $500 million. Pet. App. 38a, 160a-163a. Plaintiffs, however, could not recover for all their harm. The district court dismissed as barred by maritime law or too remote (and the court of appeals refused to reinstate) claims for various other economic injuries and emotional damages. *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); *see* Pet. App. 115a-116a; JA118-61, 1368-81, 1384-90.[9]

In the third phase, the jury was asked to "determine liability for and the amount of punitive damages, *if any*, for all plaintiffs." JA165 (emphasis added). The district court gave the jury "unusually detailed" instructions, which embodied "the very same concepts" later elaborated in this Court's due

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[9] The court of appeals did allow "tenderboat operators and crews, and seafood processors, dealers, wholesalers, and processor employees" to assert certain claims under state law. Pet. App. 115a. These claims later settled for about $5 million. "'For rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy.'" Petrs. Br. 45 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996)). The Court should recognize that the ability of these class members to recover punitive damages under state law will not be affected by its rulings on the federal questions presented.

process cases. Pet. App. 127a, 146a. The instructions further emphasized that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made." BIO App. 12a, 17a.

The jury returned separate verdicts for $5000 against Hazelwood and for $5 billion against Exxon, finding that each award was "necessary in this case to achieve punishment and deterrence" with respect to each defendant. JA1408. The district court upheld the verdicts as supported by the evidence and substantively reasonable. Pet. App. 231a-245a.[10]

3. In 2001, the Ninth Circuit affirmed the jury's compensatory verdict and its decision to award punitive damages. Exxon also argued that the punitive award was constitutionally excessive. But in case the Ninth Circuit "d[id] not wish to reach the issue of constitutional excessiveness," Exxon said that "it should exercise its power as a common law maritime court to reduce the award to no more than the amount, if any, that is necessary to the objective of punishment and deterrence in a maritime context." Exxon 1997 C.A. Br. 81. The court of appeals elected to undertake the constitutional

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[10] Exxon will not have to pay the full amount of any judgment. Before trial, it entered into secret agreements with certain seafood-processor plaintiffs in which those plaintiffs agreed to "cede back" any punitive awards they receive. The agreements entitle Exxon to an 11.38% rebate on any award. SJA341sa-342sa. The Ninth Circuit found the agreements enforceable, though it did "not condone Exxon's conduct" in representing to the jury (and the district court) that it obtained "only receipts in return" for payments it made in connection with these agreements. *In re the Exxon Valdez,* 229 F.3d 790, 800 (9th Cir. 2000).

review and twice remanded the case for the district court to reconsider the size of the punitive award in light of this Court's evolving due process jurisprudence.

4. The district court twice more analyzed the voluminous record. It finally concluded that "a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of ... its right to due process." Pet. App. 178a-179a. In an eighty-one page opinion, the district court reasoned that: (1) it was "highly reprehensible" for Exxon knowingly and repeatedly to allow a relapsed alcoholic to captain a supertanker full of toxic crude oil through Prince William Sound; (2) the ratio of the punitive verdict to compensated economic harm was 9.74 to 1, and falls still lower once non-economic and potential harms are taken into account; and (3) "comparable civil and criminal penalties could have exceeded $5 billion." *Id.* But because the Ninth Circuit had directed it not only to apply the due process guideposts "in the first instance," Pet. App. 95a, but also to reduce the award, Pet. App. 104a, the district court entered a new judgment reducing the award to $4.5 billion – representing roughly a 9:1 ratio between punitive damages and economic harm. Pet. App. 179a-180a.

5. A divided Ninth Circuit reduced the award to $2.5 billion. The majority held that, on these facts, due process would not allow more than a 5:1 ratio to economic harm. Pet. App. 24a, 40a. Judge Browning dissented. He noted that the majority's ratio analysis had not accounted for the vast noneconomic harm or additional potential harm, and "agree[d] with the district court's assessment that there is no

principled means by which this award should be reduced." Pet. App. 42a-56a.

6. The Ninth Circuit denied rehearing en banc. Without discussing the facts, Judge Kozinski argued in dissent that a shipowner should not have to pay punitive damages when it merely has "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a. Judge Bea argued that a 5:1 ratio was excessive. Pet. App. 293a.

7. During the 13 years that Exxon has pursued its post-verdict challenges, approximately 20% of the members of the plaintiff class have died. Hundreds have gone bankrupt. Still others continue to struggle, as roughly 26,000 gallons of oil remain in the water and in subsurface sediments, impairing fish stocks and marine habitat. Jeffrey W. Short, et al., *Slightly Weathered* Exxon Valdez *Oil Persists in Gulf of Alaska Beach Sediments After 16 Years*, 41 ENVTL. SCI. & TECH. 1245 (National Marine Fisheries Serv. 2007). Exxon, meanwhile, has more than recouped the $2.5 billion judgment by operation of the differential between its internal rate of return and the statutory judgment rate. It has assured the district court that paying even the $5 billion jury verdict "would not have a material impact on the corporation or its credit quality." SJA334sa.

SUMMARY OF ARGUMENT

This punitive award is consistent with well-accepted common-law principles, and nothing about maritime law warrants deviation from those standards.

I. The Phase I jury instruction that Exxon was responsible for the acts of its managerial agents does not warrant vacating the judgment.

A. Exxon concedes that Captain Hazelwood was a managerial agent, and the common law of almost every state allows punitive liability against corporations based on managerial agents' recklessness. Federal statutes governing pollution likewise authorize punitive damages and penalties based on the wrongdoing of managerial agents (or any other shipboard employees). Nothing in maritime policy or precedent – especially not the *dictum* concerning privateers in *The Amiable Nancy*, 16 U.S. 546 (1818) – requires a different agency rule here, particularly since Captain Hazelwood acted recklessly *before* leaving port and did not ground the tanker during any crisis at sea. Nor does Exxon's current claim that Hazelwood violated corporate policies alter this analysis. Tort law does not absolve corporations from punitive liability when managerial agents violate company policy. In any event, Exxon did not enforce – or even claim at trial that it enforced – any serious alcohol policy that would have prevented the disaster.

B. Even if Phase I's managerial agent instructions had been flawed, the judgment should still stand. The jury considered whether to award punitive damages in Phase III, after being instructed to assess Exxon's conduct separately from Hazelwood's and hearing arguments focused entirely on Exxon's conduct in leaving a drinking alcoholic in command of the EXXON VALDEZ. The jury's $5 billion verdict against Exxon makes clear that "Exxon is not in the position of the owners in *The Amiable Nancy* or *Lake Shore*." Pet. App. 83a. "[T]he jury found that the corporation, not just the employee, was

reckless" in giving command of an oil tanker to a relapsed alcoholic. *Id.*

II. The Clean Water Act (CWA) does not absolve Exxon of punitive liability.

A. Exxon's argument is not properly before this Court. Exxon never made a timely Rule 50 motion seeking CWA relief in the district court. When a party fails to preserve an argument under Rule 50, appellate courts are powerless to reach it.

B. In any event, the CWA's scheme of penalties does not inhibit respondents' ability to recover punitive damages under maritime law. The CWA does not occupy the field of remedies with respect to oil spills – let alone spills of trans-Alaskan oil, which the Trans-Alaska Pipeline Authorization Act specifically governs. The CWA concerns only the government's ability to enforce statutory discharge standards so as to redress environmental harm. Respondents' claims, by contrast, are tort claims brought by private parties, based upon harm to private economic and quasi-economic interests.

III. The size of the award satisfies maritime-law review.

A. When "no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination [concerning the size of the award] under an abuse-of-discretion standard." *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433 (2001) (quotations omitted). The district court did not abuse its discretion. After overseeing the government's criminal prosecution of Exxon and later presiding over this lengthy trial, the district

court properly concluded that the jury reasonably could have determined that a multi-billion dollar punitive award was necessary to achieve punishment and deterrence. Maritime law requires nothing more; Congress already has set forth the scope of shipowners' supplemental protection from substantial liability in the Limitation of Shipowners' Liability Act, and the Act does not apply here.

B. The award satisfies any set of guideposts this Court might apply. Placing a relapsed alcoholic at the helm of a supertanker transiting Prince William Sound was highly reprehensible conduct. It foreseeably caused catastrophic harm. The ratio of the punitive award to the mandatory class members' economic harm for which they were able to recover is less than 5:1, and the ratio of the punitive award to the totality of their injuries is smaller still. Comparable penalties also gave Exxon ample notice it could face multi-billion dollar punishment for its wrongdoing. Finally, the jury had ample reason to reject Exxon's contention that prior penalties and cleanup expenditures – which totaled only $25 million more than an *innocent* spiller would have paid – had punished and deterred Exxon enough for recklessly and "massive[ly] disrupt[ing]" the lives of tens of thousands of Alaskans and businesses for years. Pet. App. 24a-26a, 242a-245a.

ARGUMENT

I. Both Captain Hazelwood's Recklessness and That of Exxon's Top Management Subjected Exxon to Punitive Liability.

Because a corporation can act only through natural persons, jury instructions on corporate

punitive damages *must* provide guidance as to whose conduct will be attributed to the corporation. This trial's Phase I instructions followed the Restatements of Torts and Agency, which place "strict limits" on the jury's ability to impute an employee's acts to a corporation. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542 (1999). The instructions allowed the jury to hold Exxon responsible for the reckless acts of only "those employees who [we]re employed in a *managerial capacity* while acting in the scope of their employment." Pet. App. 301a (emphasis added). The instructions defined managerial employees as those who "ha[ve] responsibility for, and authority over, a particular aspect of the corporation's business." *Id.*

Exxon concedes that Captain Hazelwood was a managerial employee. Petrs. Br. 10; Pet. App. 264a n.8. It argues, however, that the Phase I instructions were flawed because punitive damages simply "may not be awarded against a shipowner based solely on the conduct of a ship's master." Petrs. Br. 18. Exxon's argument contradicts accepted tort and agency law, misconstrues maritime precedent, and rests on non-existent maritime policies. Furthermore, even if a flaw had existed in the Phase I instructions, the judgment should still be affirmed: the Phase III proceedings and evidence establish that "the jury found that the corporation, not just the employee, was reckless." Pet. App. 83a.

A. Exxon Was Responsible for Captain Hazelwood's Acts Because He Was a Managerial Agent.

1. Overreaching from the start, Exxon says that a "venerable line of cases" prohibits punitive damages based on a master's recklessness, even one conceded to be a managerial agent. Petrs. Br. 15. In truth, this Court has never issued a decision – inside or outside the maritime context – inconsistent with the Restatement's conservative approach treating a managerial agent's tortious acts as those of the corporation for purposes of assessing punitive damages. Nor is any "venerable" maritime rule contrary to the Restatement established anywhere else.

The Amiable Nancy, 16 U.S. 546 (1818), upon which Exxon chiefly relies, did not lay down any "general doctrine" on this subject. *Hopkins v. Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 20 (1857). The case did not involve a corporation, a managerial agent, a master, or even a request for punitive damages. It arose from an unjustified robbery committed by the crew of a *privateer* (a governmentally commissioned warship), whose individual owners had no knowledge or forewarning of the wrongdoing. Justice Story stated that the plaintiff could not have gotten "vindictive damages" against the owners, because imposing such damages would "defeat the policy of the government, by burthening the service [of privateers] with a responsibility beyond what justice requires." 16 U.S. at 559. Nineteenth century courts and treatises understood that *dictum* to be grounded in the "peculiar relations subsisting between the owners

and the officers and crew of a privateer, and on reasons of public policy connected with the employment of privateers in our public wars." *Hopkins*, 36 N.H. at 20; *see also Dias v. The Revenge*, 7 F. Cas. 637, 638-39 (D. Penn. 1814) (No. 3,877) (discussing quasi-public nature of privateers); HENRY FLANDERS, A TREATISE ON THE LAW OF SHIPPING ¶¶151, 154-56 (1853) (owners liable for recklessness of masters, but "different considerations prevail" respecting privateers); THEOPHILUS PARSONS, A TREATISE ON MARITIME LAW 391-94 (1859) (same).

Later cases recognized that corporations could be liable for punitive damages based on employees' misconduct, without pinpointing what position an employee had to occupy before the employee's conduct or acquiescence became that of the corporation. This Court held in 1887, for example, that a railroad could face punitive liability for tortious conduct by a vice-president and assistant general manager. *Denver & R.G. Ry. v. Harris*, 122 U.S. 597, 608-10 (1887). In *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101, 114 (1893), on the other hand, the Court held that another railroad could not be liable for punitive damages based on a conductor's misconduct. In maritime cases, nineteenth and early twentieth century lower-court decisions adopted various approaches, ranging from "full vicarious liability" in punitive damages for any agent's misconduct – whether shipboard or not – to more restrictive formulations. Robertson, *supra*, at 121 (discussing cases); *Colegrove v. The S.S. City of Columbia*, 11 Haw. 693, 700-01 (1899) (imputing recklessness of ship's master to shipowner).

More modern maritime cases likewise have taken varying approaches. *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 704-05 (1st Cir. 1995) (surveying cases). But over the past nearly 100 years, during which both the corporate form and maritime commerce have come of age, *no* federal court has held, as Exxon asks this Court to hold, that "[p]unitive damages may not be awarded against a shipowner based solely on the conduct of a ship's master." Petrs. Br. 18.[11] No current maritime treatise mentions any such rule.

2. This Court draws maritime tort law from two primary sources: (a) state tort law and (b) federal statutory law and policy concerning related maritime issues. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986). These sources dictate that Phase I's managerial agent instructions were correct.

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[11] Only two federal cases stand for Exxon's proposition. *See The Seven Brothers*, 170 F. 126 (D.R.I. 1909); *The Golden Gate*, 16 F. Cas. 141 (C.C.N.D. Cal. 1836). None of the other cases Exxon cites had to decide whether punitive damages may be based solely on a master's recklessness. The First Circuit in *CEH* held that it "need not resolve" the issue because the shipowner "share[d]" "some level of culpability." 70 F.3d at 705. In *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1147 (6th Cir. 1969), the court found that the master's conduct was not reckless. In *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989), the Fifth Circuit considered only whether it should drop "the punitive damage hammer on the principal for the wrongful acts of the simple agent or lower echelon employee," not a ship's master. In *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896), the damages were not "other than compensatory," so the Seventh Circuit did not decide what standard might govern punitive recoveries. The final two cases Exxon cites appear to endorse vicarious liability. *The Ludlow*, 280 F. Cas. 162, 163-64 (N.D. Fla. 1922); *Ralston v. The States Rights*, 20 F. Cas. 201, 208-09 (E.D. Pa. 1836).

a. Federal maritime law presumptively follows the common law applicable to land-based torts. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996); *see also American Export Lines v. Alvez*, 446 U.S. 274, 284-85 & n.11 (1980) (adopting rule of "clear majority of States"); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (adopting general Restatement test). Borrowing from state common law promotes an integrated approach to maritime torts, as states retain concurrent jurisdiction over those torts in state waters. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29-30 (1990).

Among the forty-eight states that permit punitive damages, nearly every one allows them to be imposed against a corporation based upon the reckless acts of at least a managerial agent. 2 JOHN KIRCHER & CHRISTINE WISEMAN, PUNITIVE DAMAGES LAW & PRACTICE § 24-5 (2d ed. 2005). The American Law Institute (ALI) endorses the "managerial agent" approach in the Restatements of Torts and Agency. RESTATEMENT (SECOND) OF AGENCY § 217C(c) (1958); RESTATEMENT (SECOND) OF TORTS § 909(c) (1979); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, at 158 (2006). The Restatement rule rests on the premise that a managerial agent's act *is* the principal's act. It recognizes that "imposition of corporate punitive damages based upon the theory of managerial capacity tends to deter the employment of unfit persons for important positions and encourage their supervision." *Albuquerque Concrete Coring Co. v. Pan-Am World Servs.*, 879 P.2d 772, 778 (N.M. 1994) (citation omitted); *see also*

RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, at 158.

Exxon treats the Restatement test as if it were an accident. But the ALI has endorsed the test on three occasions (in 1958, 1977, and 2005) over a fifty-year span. And the record of ALI proceedings that Exxon cites (Petrs. Br. 23) shows that (i) no one questioned that a managerial agent's tortious conduct could result in corporate liability for punitive damages, and (ii) the motion to retain Section 909 was withdrawn as unnecessary because "there was no one who wanted it to be eliminated." ALI, 50th Annual Meeting Proceedings 236-38 (May 16, 1973). Not only do the vast majority of states impose punitive liability based on a managerial agent's conduct, but this Court has adopted a modified version of the Restatement rule for purposes of Title VII claims, and other federal courts have done so respecting various other federal statutory claims. *See Kolstad*, 527 U.S. at 540-46; *Brady v. Dairy Fresh Prods.*, 974 F.2d 1149, 1153-54 (9th Cir. 1992) (RICO treble damages); *United States v. O'Connell*, 890 F.2d 563, 567-69 (1st Cir. 1989) (False Claims Act punitive damages); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 972-73 (4th Cir. 1987) (Fair Credit Reporting Act punitive damages).

Indeed, for over a century, "[a] slight majority of states" has followed a rule of pure *respondeat superior*, under which a corporation may be held liable for punitive damages based on the wrongdoing of *any employee*. RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e, at 157; *see also Briner v. Hyslop*, 337 N.W.2d 858, 863-65 (Iowa 1983) (surveying cases);

Little Rock Ry. & Elec. Co. v. Dobbins, 95 S.W. 788, 791-92 (Ark. 1906) ("majority of the states" followed this rule); 2 H.G. WOOD, A TREATISE ON THE LAW OF RAILROADS § 317, at 1242-44 (1885) (any agent rule "is now generally held in the better class of cases"). Maine's Supreme Judicial Court explained this doctrine in the much-cited decision in *Goddard v. Grand Trunk Railway*, 57 Me. 202 (1869), just as corporations were emerging as a fixture of American life:

> A corporation … has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. ... All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment.

Id. at 223-24.

This Court recently referenced *Goddard*, by way of acknowledging that *Lake Shore*'s more restrictive formulation "may have departed from the trend of late 19th century decisions." *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982); *see also Smith v. Wade,* 461 U.S. 30, 45-46 n.12 (1983). This Court also has adopted the "any agent" rule for purposes of antitrust treble damages, *Hydrolevel*, 456 U.S. at 575-76, and has held that such a rule in tort cases comports with due process. *Haslip*, 499 U.S. at 14. It "creates a strong incentive

for vigilance by those in a position 'to guard substantially against the evil to be prevented,'" whereas a more limited rule would give an employer "an incentive to minimize oversight of its agents." *Id.* (quoting *Louis Pizitz Dry Goods*, 274 U.S. at 116).

This Court, however, need not revisit the question of "any agent" tort liability here. The jury instructions took the Restatement's conservative approach, allowing only the acts of Exxon's chosen managerial employees to be attributed to it. Not only was Captain Hazelwood a "managerial officer" in charge of the ship and its crew, Petrs. Br. 10, but, under Exxon's practice of "shift[ing] responsibility and authority from the shoreside staff to shipboard teams," SJA288sa; JA896-98, he was broadly responsible for "the goals, operating parameters, and expense projections" in the vessel's annual forecast. SJA289sa. He had the authority to keep the supertanker in port and was the person who decided, on Exxon's behalf, that it was safe to depart on March 23, 1989. Tr. 552. As Exxon's expert declared, the captain of a supertanker "is a CEO." Tr. 3866.

b. "[F]ederal common lawmaking in admiralty ... is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *accord Miles*, 498 U.S. at 26-27. Relevant federal statutory law, which follows the more liberal "any agent" rule respecting corporate liability for wrongdoing at sea, reinforces the propriety of the conservative managerial agent instructions given to the jury.

The Oil Pollution Act of 1990, 33 U.S.C. § 2702 *et seq.*, enacted in response to this spill, requires corporations to pay civil penalties into the hundreds of millions of dollars when the gross negligence of *any agent* – shipboard or not – causes an oil spill. 33 U.S.C. § 2704(c)(1); Pet. App. 104a. Several federal criminal statutes – including three to which Exxon pleaded guilty – likewise impose corporate criminal liability for any agent's wrongful actions at sea. *See*, *e.g.*, Pet. App. 173a-174a (Clean Water Act, Refuse Act, Ports and Waterways Safety Act, Dangerous Cargo Act, and Migratory Bird Treaty Act); C.A. 1997 ER121 (government's statement of factual basis for Exxon's guilty pleas explaining that Exxon acted negligently "through the actions of its employees" aboard the supertanker); Andrew W. Homer, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149, 162-66 (2007) (discussing other statutes and prosecutions).

As to criminal liability generally, this Court long ago held that "we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494-95 (1909). As with punitive damages, such a rule brings "pressure ... on those who own the entity to see to it that their agents abide by the law." *United States v. A&P Trucking*, 358 U.S. 121, 126 (1958). Neither this Court nor any other has suggested that different

considerations apply to corporate vessel operators vis-à-vis their shipboard agents, much less their shipboard *managerial* agents.[12]

3. Contrary to Exxon's argument (Petrs. Br. 24), there is no reason unique to masters at sea categorically to exempt corporate shipowners from the ordinary common-law and statutory rules applying to managerial agents.

a. For as long as corporations have conducted business in America (and even before), this Court

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[12] The Transportation Institute incorrectly suggests that the Limitation of Shipowners' Liability Act and current and former statutes governing shipboard cargo counsel against imputing masters' acts to corporations. Amicus Br. 13-19. TAPAA rendered the Limitation Act inapplicable to spills of trans-Alaskan oil, and OPA suspended the Act with respect to all future oil spills. *See* Exxon Cert. Reply 3 (acknowledging TAPAA's and OPA's effect). Even when the Limitation Act applies, a corporate owner has privity or knowledge respecting tortious conduct "where the negligence is that of an executive officer, *manager* or *superintendent* whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943) (emphasis added); *see also Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 231 (7th Cir. 1993) (limitation denied when "a managerial employee is possessed of 'privity or knowledge'"), *aff'd*, 513 U.S. 527 (1995). Accordingly, the master's "privity and knowledge [i]s that of the corporation" when a corporate owner grants a master "autonomy in the management of the vessel." *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1377 (5th Cir. 1983) (en banc); *see also Holloway Concrete Prods. v. Beltz-Beatty, Inc.*, 293 F.2d 474, 479 (5th Cir. 1961); *Bates v. Merritt Seafood, Inc.*, 663 F. Supp. 915, 932-33 (D.S.C. 1987). The cargo statutes that the Institute references similarly depend on the shipowner's proving, among other things, that it exercised due care in selecting and entrusting authority to a competent master – something Exxon could not show. *See*, *e.g.*, *In re Ta Chi Navigation Corp.*, 513 F. Supp. 148, 157-58 (E.D. La. 1981), *aff'd*, 728 F.2d 699 (5th Cir. 1984).

has made clear that "courts of admiralty ... proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages." *Lake Shore*, 147 U.S. at 108; *accord Boston Mfg. Co. v. Fiske*, 2 Mason 119, 121 (1820) (Story, J.). Accordingly, nothing in *The Amiable Nancy* purported to rest on any special considerations of admiralty (apart from a focus on the unique nature of privateers). Nor did anything in *Lake Shore* distinguish agents assigned to seagoing duty from those on land. The reason for this parallel treatment is obvious: for purposes of the policies underlying punitive damages, a master of a ship does not differ materially from the manager of an offsite factory or the director of a remote power plant, refinery, or research station. *See CEH*, 70 F.3d at 704.

Exxon insists that punishing corporate shipowners for the actions of masters is "unfair" and "potentially counterproductive" because masters must respond "instantly" with "intrepid personal decisions" in "emergencies" at sea. Petrs. Br. 24 (quotations omitted). Yet so must a factory manager facing a life-threatening technological malfunction or a director of a remote facility confronting a violent climatic event. Tort law accommodates these rare events not by categorically excluding managerial agents from the scope of potential employer liability, but by providing that a good-faith split-second decision in a crisis does not constitute reckless behavior. *See*, *e.g.*, *The Genesee Chief*, 53 U.S. 443, 461 (1851); *The Marion E. Bulley*, 94 F.2d 646, 647 (2d Cir. 1938); *Robbins v. Trident Marine Corp.*, 613 F. Supp. 41, 44 (N.D. Ohio 1985); *cf. Anderson v. Creighton*, 483 U.S. 635, 638-41 (1987) (law

enforcement officers not liable for reasonable split-second actions). Even in the case Exxon cites, the court found that the master's conduct at sea was not reckless, noting that he made his judgment call in "good faith." *Fuhrman*, 407 F.2d at 1147.

Exxon had every opportunity to argue at trial that Captain Hazelwood faced an emergency in command of the EXXON VALDEZ. But of course it did not. Hazelwood hardly made an "intrepid personal decision" when he lifted his last glass of vodka in port in Valdez, when he chose to set sail despite his incapacitation, or when he decided to go below moments before a crucial maneuver that required his presence on the bridge (not just as the captain but also as the only officer aboard licensed to navigate in the area). He made the first two decisions shore-side, and made the last without any evident pressure: "Visibility was good. The sea was calm." Petrs. Br. 7. And there was nothing "unusual" about the turn that he should have made to avoid Bligh Reef. *Id.* At each juncture, a moment's sober reflection from the EXXON VALDEZ's "CEO" could have avoided catastrophe.

Any other argument for immunizing shipowners for the reckless acts of masters lacks foundation. One of Exxon's *amici* advocates immunity on the ground that shipowners cannot communicate with or control a master at sea. Transp. Inst. Br. 28-29. Exxon itself does not press that point, and for good reason. Whatever relevance this assertion might have had during the Napoleonic era of *The Amiable Nancy*, when ships were so isolated that a British squadron captured an American vessel several weeks after the end of the War of 1812, PETER B.

SCHROEDER, CONTACT AT SEA I (1967), modern technology gives a corporation as much control over a master as it has over other managerial agents. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 10-24, at 894 (2d ed. 1975) (noting development of "instantaneous" ship-to-shore communication); *cf. The Linseed King*, 285 U.S. 502, 511-12 (1932) (shipowner's ability to communicate and consult with masters forecloses limitation). The EXXON VALDEZ itself was "equipped to maintain communications with Exxon Headquarters during its shipping operations," SJA249sa, and Hazelwood spoke on the phone with an Exxon shoreside executive in San Francisco before his nearly disastrous attempt to dislodge the vessel from the reef. Pet. App. 122a; JA872-76.

The primary reasons for making corporate owners liable in punitive damages for reckless managers – that it will deter "the employment of unfit persons for important positions," RESTATEMENT (SECOND) OF TORTS § 909 cmt. b; *accord Basquall v. The City of Carlisle*, 39 Fed. 807, 817 (D. Or. 1889), and encourage employers to monitor their agents, *Hydrolevel*, 456 U.S. at 573 – have particular force in modern maritime commerce. Massive vessels now routinely transport hazardous substances, ranging from crude oil to nuclear waste. If discharged, these substances can befoul the environment for years, a problem that nineteenth century courts did not confront. *See* Int'l Maritime Org., *IMO and Dangerous Goods at Sea* 1-3 (1996).

More generally, "[t]o hold that punitive damages may not be imposed unless there is some participation by the highest corporate executives is

unrealistic given the size of some corporations whose operations are multi-state or international in character." 10 WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4906.50, at 552 (perm. ed., rev. vol. 2001); *accord Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 721-22 (2d Cir. 1977); *GMAC v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959).

Exxon chides the Ninth Circuit for having paid heed to the attributes of modern American shipping corporations. Petrs. Br. 25. But judge-made law by its nature depends upon "conditions as they now exist." *Funk v. United States*, 290 U.S. 371, 382 (1933); *see also Jaffee v. Redmond*, 518 U.S. 1, 7-8 (1996); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 410-11 (1975) (abrogating admiralty's divided-damages rule because the "reasons that originally led to the Court's adoption of the rule have long since disappeared"). Thus, even if Exxon were correct that the common law at one time imputed only top officers' and directors' actions to corporations for purposes of imposing punitive damages, this Court should reject its proposal to apply such a rule here. Exxon's suggestion would deny the law the "appropriate evolution," *CEH*, 70 F.3d at 705, of treating the Restatement's "managerial agent" test as the modern equivalent of a corporate "complicity" or "participation" requirement. *See Laidlaw Transit v. Crouse*, 53 P.3d 1093, 1098 n.8 (Alaska 2002); *Dahl v. Sittner*, 474 N.W.2d 897, 903 (S.D. 1991); *Johnson v. Rogers*, 763 P.2d 771, 778 (Utah 1988); *Briner*, 337 N.W.2d at 861. As these states and nearly all others recognize, punitive damages will be meaningful only if corporations can

be held accountable for the actions of at least their managerial agents.

b. Exxon's argument that it should be exempted from liability because Captain Hazelwood violated "good faith policies to prevent misconduct" (Petrs. Br. 26) fares no better. No state has adopted any such complete defense as part of its common law. The Restatement takes the position that such policies do not insulate corporations from punitive liability. RESTATEMENT (SECOND) OF AGENCY § 229 cmt. a. And federal law (including maritime law) imposes corporate criminal liability regardless of whether the offending employee acted contrary to a corporate policy. FLETCHER, *supra*, § 4942, at 640-41. The reasons for this overwhelming consensus are simple: corporations are best positioned to prevent gross misconduct, and it is practically impossible to distinguish between effective policies and mere "window-dressing." Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 572-74 (2005).

To be sure, the Federal Sentencing Guidelines that govern criminal pollution (and all other) cases recognize that evidence of a corporation's consistently enforced policy (as well as an agent's lower level status) may mitigate the need for punishment. U.S.S.G. §§ 8B2.1, 8C2.5(f). But that is as far as it goes. And Exxon received precisely such a jury instruction here. BIO App. 17a.

This Court's singular deviation from this general framework in *Kolstad* rested, as the government has urged elsewhere, on considerations "unique to Title VII." *United States ex rel. Bryant v. Williams Bldg. Corp.*, 158 F. Supp. 2d 1001, 1008 (D.S.D. 2001).

That statute precludes punitive damages when a discriminator is subjectively "unaware of the relevant federal prohibition." *Kolstad*, 527 U.S. at 536-37. In that unusual liability regime, employers have a "perverse incentive" to refrain from training managers, lest the training provide a factual basis for arguments that the employees understood that they were violating federally-protected rights. *Id.* at 544-45. Thus, to encourage education consistent with the federal policy of preventing discrimination, this Court felt "compelled to modify" common-law principles to allow an employer to defend against punitive damages by pointing to implementation of policies to encourage statutory compliance. *Id.* at 545.

Kolstad's reasoning does not have any relevance here. Tort liability is based on objective standards. Accordingly, this Court need not be concerned that future shipping companies will have a "perverse incentive" to avoid educating their masters as to the dangers of piloting a supertanker while drunk. To the contrary, the prospect of punitive damages will encourage employers to teach their agents to act with due care.

In any event, an employer that did not diligently enforce any relevant policy is not entitled to an opportunity to make out a *Kolstad* defense. *See*, *e.g.*, *Lowery v. Circuit City Stores*, 206 F.3d 431, 446 (4th Cir. 2000). Any suggestion that Exxon was a diligent employer betrayed by a renegade supertanker captain would make a mockery of the evidence. *See supra* at 4-7. It also would be inconsistent with Exxon's own arguments to the jury. Although the district court instructed the jury in Phase III that it could consider

whether Hazelwood's actions contravened a consistently enforced corporate policy, Exxon discussed only one policy: the requirement that two officers man the bridge when transiting Prince William Sound, Tr. 7400-01, which it enforced inconsistently. JA432-33, 438-39, 448; Tr. 3666-67. In closing, Exxon did not claim diligence in enforcing *any* policy. JA1321-53. It conceded that it "didn't have a written detailed policy" to monitor alcoholics returning to duty, JA1344, or to safeguard the public from the threat of a drinking captain, JA1095, 1104, and it acknowledged criticism that the policy of two officers on the bridge "was ambiguous." JA1346. Exxon had no right to any additional instructions on the point.

B. Exxon's Own Recklessness Subjected the Corporation to Punitive Liability.

Even if the managerial agent instructions had been flawed, there would be no basis to remand for retrial nearly twenty years after the event. The Court does not consider the effect of an erroneous instruction "in artificial isolation" but views it "in the context of the overall charge," taking into account that the judgment is "the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *see also Philip Morris, U.S.A. v. Williams*, 127 S. Ct. 1057 (2007) (evaluating punitive award based on manner in which parties tried case). If the outcome would not change based on different instructions, the Court will not remand. *Jones v. United States*, 527 U.S. 373, 391-94 (1999); *see also Neder v. United States*,

527 U.S. 1, 18 (1999); *id.* at 26 (Stevens, J., concurring); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 157 (1967) (plurality opinion) (despite omission of instruction, declining to remand based on "the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts").

These same considerations counsel affirmance here, irrespective of Phase I's managerial agent instructions. *Lake Shore* noted that "[i]f a railroad company ... knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amendable to the severest rule of damages." 147 U.S. at 116 (quotation omitted). Indeed, "the employment of a known drunken driver" is a time-honored basis for imposing punitive damages. 2 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 749, at 1283 & n.3 (5th ed. 1898) (citing cases); *see also Fuhrman*, 407 F.2d at 1148 (punitive damages available when "the acts ... were those of an unfit master and the owner was reckless in employing him").

The Phase III instructions and special verdict form required the jury to base any award against Exxon on a *de novo* finding – apart from anything it found in Phase I – that punitive damages were necessary to punish and deter *Exxon*. BIO App. 1a-25a (entire set of Phase III instructions), 26a. The

district court brought that point home by instructing the jury that its Phase I findings did "not necessarily mean that [Exxon's conduct] was reprehensible, or that an award of punitive damages should be made." BIO App. 12a, 17a. It also directed the jury to consider whether the employees that were reckless "had lesser duties or responsibilities within the corporation," or, conversely, whether Exxon employees "failed to prevent the wrongful conduct and that those employees held positions involving significant duties and responsibilities within the corporation." BIO App. 18a.

Consistent with these instructions, plaintiffs' counsel in Phase III discussed only Exxon's corporate acts and omissions. Plaintiffs never argued that the jury should award punitive damages against Exxon based on Hazelwood's conduct. JA1291-1320, 1353-67. Exxon's counsel likewise argued to the jury about Hazelwood's superiors' conduct, JA1332-37, claiming that "we tried [to monitor Hazelwood], and we may have made bad mistakes in there and that may be why you found us reckless, but ... we didn't ignore the risk." JA1334.

The jury rejected Exxon's argument. It found that "Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking," and thus that "the corporation, not just [Hazelwood], was reckless." Pet. App. 83a; *accord id.* 31a. The subsequent reviews by the district court and the Ninth Circuit confirm that there is no other way to interpret the jury's $5 billion verdict, for "the highest executives in Exxon Shipping" were well aware of Hazelwood's relapse. Pet. App. 64a; *see also id.* 22a, 26a, 121a-122a, 154a-157a. Thus, as the

Ninth Circuit explained, "Exxon is not in the position of the owners in *The Amiable Nancy* or *Lake Shore* of having neither directed ... nor countenanced ... nor ... participated in the slightest degree in the wrong." Pet. App. 83a (quotation omitted); *accord id.* 26a.[13] At minimum, the Phase III proceedings and instructions bring this case under the First Circuit's cautious ruling in *CEH*, upholding a punitive award because there was "some level of culpability" on the shipowner's part. 70 F.3d at 705.

II. Exxon's Tardy Invocation of the Clean Water Act Does Not Inhibit Respondents' Ability to Recover Punitive Damages.

In 1995, more than one year after the verdict, Exxon lodged a motion arguing for the first time that the Clean Water Act (CWA) prohibited respondents from recovering punitive damages. This Court, like the district court, should decline to reach the merits of this argument because Exxon raised it far too late. In any event, nothing in the CWA's remedial scheme precludes respondents' punitive recovery.

A. Exxon Irretrievably Waived Its CWA Argument.

In 1989, there were two federal Acts that prescribed liability specifically for spilling oil: the Trans-Alaska Pipeline Authorization Act (TAPAA)

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[13] Exxon suggests that the Ninth Circuit held that the evidence "'could have'" supported a finding that Exxon did not know Hazelwood was taking command while drunk. Petrs. Br. 10 (quoting Pet. App. 88a). But the Ninth Circuit's statement, in the context of its two opinions, explained only that Exxon's sufficiency-of-the-evidence argument relied on an improper standard of review.

and the CWA. TAPAA created strict liability up to specified limits and a compensation fund for private harm caused by spills of trans-Alaskan oil. 43 U.S.C. § 1653(c). It also contained a savings clause providing that "[t]he unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law." § 1653(c)(3).[14] The CWA, on the other hand, allowed the federal government to recoup its cleanup costs and to impose civil and criminal penalties for public harm caused by discharges of oil and other hazardous substances. 33 U.S.C. §§ 1319, 1321.[15]

1. Before trial, Exxon moved for partial summary judgment arguing that *TAPAA* "prescribe[s] a comprehensive remedial scheme for [Trans-Alaska Pipeline] oil spills which leaves no room for punitive damages claims." JA63. Nothing in the motion suggested that the CWA impaired plaintiffs' claims. To the contrary, in contending that TAPAA's savings clause did not preserve respondents' right to seek punitive damages, Exxon contrasted that clause with "the broader savings clause" in the relevant portion of the CWA, known as the Federal Water Pollution Control Act. JA87 n.9. The district court denied Exxon's motion, holding that Exxon's argument would "disregard Congress' plain language" in TAPAA to preclude private parties from seeking

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[14] The relevant provisions of TAPAA are reproduced in the appendix to this brief.

[15] The only private right created by the CWA is for "citizen suits" against the government or alleged violators to enforce effluent standards or limitations created under the Act. 33 U.S.C. § 1365. That section expressly provides that it does not limit any right to "other relief" "under any statute or common law." § 1365(e).

punitive damages in a case involving trans-Alaskan oil. JA103.

Exxon never raised the CWA as a bar to recovery until October 23, 1995, in a motion filed *thirteen months* after trial asking that the judgment "not include an award of punitive damages." BIO App. 30a; *see* Pet. App. 73a. Respondents countered that the filing was untimely. BIO App. 33a. Motions for judgment as a matter of law must be filed under Rule 50(b), *see* 9B CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2537, at 576 (3d ed. 2008), and the stipulated deadline for filing any motion under that rule had passed many months before. In addition, Exxon never made a Rule 50(a)(2) motion on CWA grounds during trial, which is a prerequisite to a post-trial Rule 50(b) motion. *See Canny v. Dr. Pepper/Seven-Up Bottling Group*, 439 F.3d 894, 901 (8th Cir. 2006). The district court summarily denied Exxon leave to file its motion. BIO App. 35a.[16]

When Exxon advanced its CWA argument in the court of appeals, respondents argued that it was waived as untimely. Pltfs. 1997 C.A. Br. 79-80. The Ninth Circuit, however, elected to affirm the district court's ruling on the ground that Exxon's CWA argument lacked substantive merit. Pet. App. 73a-74a.

2. Neither of the Ninth Circuit's proffered rationales gave it authority to reach the merits of this issue. First, the Ninth Circuit stated that Exxon

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[16] Deluged by motions, the district court imposed a stay on motion practice, requiring the parties to seek leave to file motions. The district court denied Exxon's request to lift the stay in order to file its CWA motion. *See* BIO App. 28a, 35a.

was raising a significant question of law. But regardless of whether a motion raises a meaningful question of law, "an untimely [post-trial] motion, by itself, is not sufficient to preserve an issue for appellate review." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993). Indeed, this Court recently reaffirmed that a federal court of appeals is "powerless" to reach an argument for relief from a judgment that was not properly raised under Rule 50. *Unitherm Food Sys. Co. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006); *accord Cone v. West Va. Pulp & Paper*, 330 U.S. 212, 213-14 (1947). Exxon does not dispute that its CWA motion failed to comply with Rule 50's timing requirements. BIO App. 37a.[17]

Second, the Ninth Circuit noted that Exxon had "clearly and consistently argued statutory pre-emption" in the district court – albeit under TAPAA, *not* under the CWA. But a party cannot preserve a preemption-type argument by arguing that *an entirely different federal statutory scheme* precludes relief that a plaintiff seeks. *See*, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

3. Exxon's assertion that this Court has the power to review any issue "pressed or passed upon," Cert. Reply 5, cannot erase its waiver problem. This Court recently explained that so long as a plaintiff has

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[17] Exxon's citations in the district court and the Ninth Circuit to Rules 49(a) and 58(2), *see* BIO App. 30a, 37a, accomplish nothing. Rule 49(a) describes how to submit special verdicts to juries, and Rule 58(2) (now recodified as Rule 58(a)(2)(B)) is purely ministerial, directing district courts to "approve the form of the judgment" after the clerk has prepared it. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989). No case suggests that either rule provides a platform for making an untimely substantive motion for judgment as a matter of law.

objected – as respondents consistently have done – to a defendant's attempt to evade Rule 50's filing deadline (which Rule 6(b) says may not be extended) these "*inflexible*" "claim-processing rules ... *assure relief* to a party properly raising them." *Eberhart v. United States*, 546 U.S. 12, 19 (2006) (emphasis added). Reaching the merits of Exxon's CWA argument because the Ninth Circuit chose to ignore these binding rules would turn on its head the rules' "insistent demand for a definite end to proceedings." *Id.* Indeed, it would effectively overrule *Unitherm* and its predecessors, which reversed federal courts of appeals because they reached the merits of arguments not properly raised under Rule 50.

Even if this Court had discretion to reach the merits of Exxon's defaulted CWA argument, the equities would dictate finding it waived. Like the petitioner in *City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (per curiam), Exxon "has informed [this Court] of no special circumstance explaining its failure to preserve this question." Indeed, Exxon's TAPAA motion showed that it was aware of the CWA and eschewed any argument based on that Act. JA87 n.9.

Moreover, resolving Exxon's CWA argument will not give guidance for any future cases. Immediately following this oil spill, Congress passed the Oil Pollution Act (OPA) of 1990. The "statutory displacement" question in any future oil spill will not be whether the CWA forecloses private claims for punitive damages but whether *OPA* does so. *See South Port Marine v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir. 2000) (while "the general admiralty and maritime law that existed prior to the enactment

of [OPA] ... permitted the award of punitive damages for reckless behavior" causing oil spills, OPA's expanded penalties regime does not). Indeed, Exxon has acknowledged that the Ninth Circuit's holding that the CWA leaves room for punitive damages based on private harm from oil spills can "have no progeny in future cases." Exxon 1997 C.A. Supp. Br. 3.

B. The CWA Does Not Foreclose Private Claims for Punitive Damages Based on Private Harm.

There is a simple explanation for Exxon's disinterest in the CWA until its last-ditch effort to avoid entry of judgment: the argument that the CWA precludes punitive damages plainly lacks merit. No court has ever held that the CWA foreclosed punitive damages in a tort action based on private harm from a discharge of any hazardous substance. To the contrary, a leading admiralty treatise written shortly after the CWA's enactment noted that "[t]here is nothing in the [amendments to the CWA at issue] to suggest that claims for property loss, injury or death under the general maritime law are to be *in any way* affected" by the CWA. GILMORE & BLACK, *supra*, § 10-4(b), at 829 (emphasis added).[18] Nor has any common-law court ever accepted the more general

[18] The only other published opinion besides this case to consider the question agreed that the CWA imposes no barrier to recovering punitive damages for maritime recklessness. *Poe v. PPG Indus.*, 782 So. 2d 1168, 1175-78 (La. App. 2001). Other courts have allowed punitive damages in other kinds of water contamination cases. *See, e.g.*, *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1337-39 (11th Cir. 1999) (acid); *Knabe v. National Supply Div.*, 592 F.2d 841, 844-45 (5th Cir. 1979) (industrial waste).

notion that when statutes provide penalties for certain harm from specified conduct, those statutes preclude private plaintiffs from recovering punitive damages based on *entirely different* harms from the same conduct.

1. Exxon first argues that the CWA forecloses respondents' ability to recover punitive damages because it "speaks directly and comprehensively" to the subject of "punishing and deterring maritime oil spills." Petrs. Br. 33. This argument fails for two independent reasons.

a. Exxon proceeds in this Court from the proposition that the CWA is a "controlling statute." Petrs. Br. i. But as Exxon acknowledged in the district court, TAPAA, not the CWA, is "*the* controlling statute with regard to trans-Alaska oil." *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991); *accord In re Tug Allie-B.*, 273 F.3d 936, 947 (11th Cir. 2001); JA64, 80 (Exxon's TAPAA motion). TAPAA's purpose, as explained *supra* at 39-40, is to "expand[] recovery, not restrict[] recovery." JA105 (district court order). Furthermore, TAPAA contains a broad savings clause, providing that any portion of a private claim left unpaid by the Act's enhanced liability regime "may be asserted and adjudicated under other applicable Federal or state law." 43 U.S.C. § 1653(c)(3). The district court therefore held that TAPAA's "plain language" allows respondents to recover punitive damages. JA103-08. Because Exxon did not appeal that order, Pet. App. 73a, and does not challenge it here, it is the law of the case.

The district court's holding also is correct. "TAPAA was designed to supersede any conflicting law." *Glacier Bay*, 944 F.2d at 583. And in the

realm of statutory interpretation, "the specific governs the general." *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992). If TAPAA, a statute that specifically deals with private remedies and specifically governs trans-Alaskan oil, affirmatively preserves private parties' right to recover punitive damages for reckless conduct causing oil spills, then the more generic CWA cannot require a different result. It would contravene TAPAA's text and purpose to prevent those injured by an Alaskan oil spill from seeking remedies otherwise available under traditional maritime law. *See* Br. of Alaska Legislative Council 14-18.

b. Even if TAPAA's specific savings clause left room for the possibility that the CWA could displace private parties' common-law remedies relating to trans-Alaskan oil, it would not matter. Many of the "statutory displacement" cases Exxon cites are really just pre-emption cases. They stand merely for the proposition that a federal statutory scheme forecloses a private tort claim if the plaintiff's *substantive cause of action* would interfere, or be incompatible with, the scheme's operation. *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (CWA's standards for effluent discharges foreclose common-law nuisance action that might impose different standard); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981) (same); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 491-97 (1987) (applying *Sea Clammers* and *Milwaukee* and allowing nuisance claim).

Exxon does not argue that the CWA pre-empts respondents' substantive cause of action. And for

good reason: nothing about respondents' private tort claims risks interference with the CWA's provisions allowing the federal government to set discharge standards, impose penalties for their violation, and recoup its cleanup costs. Indeed, this Court has made clear that the CWA, by means of its savings clauses, "le[aves] ... room" for tort claims arising from water pollution. *Ouellette*, 479 U.S. at 492; 33 U.S.C. § 1321(*o*)(1)-(2); *Askew v. American Waterways Opers.*, 411 U.S. 325, 329 (1973) (identically worded prior version of § 1321(*o*) allowed state regulation).

This leaves Exxon only with the contention that even though respondents have legitimate tort claims, they cannot recover punitive damages. This Court's doctrine, however, is highly skeptical of such contentions. The presumption is that a plaintiff who brings a legitimate common-law cause of action may seek the full panoply of customarily available remedies. *Ouellette*, 479 U.S. at 499 n.19; *see also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996) (parents bringing common-law tort action for wrongful death of daughter, who died riding jet-ski in territorial waters, could seek punitive damages because "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (refusing to split punitive remedy from viable tort claim). Only in the rare situation when a statutory scheme prescribes a "comprehensive tort recovery regime to be uniformly applied" may a plaintiff be deprived of tort remedies beyond what that scheme provides. *Yamaha*, 516 U.S. at 215. *See Dooley v. Korean Air Lines*, 524 U.S. 116

(1998) (DOHSA sets forth exclusive remedies for survival actions arising from deaths on high seas); *Miles*, 498 U.S. at 31-33 (Jones Act's remedies for wrongful death actions govern suit for seaman's wrongful death caused by unseaworthiness); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (DOHSA sets forth exclusive types of recoverable damages for wrongful death actions arising from deaths on high seas).

The court of appeals correctly recognized that the CWA does *not* prescribe a "comprehensive tort recovery regime" with respect to oil spills. Pet App. 74a-75a, 78a-79a. The CWA's provisions applicable to oil spills do not concern tort claims at all. They concern only the enforcement of statutory and regulatory requirements respecting "harm[] to the public health or welfare of the United States," 33 U.S.C. § 1321(b)(4) – in other words, "harm to the environment." Pet. App. 79a; *see also id.* 71a-72a; JA1520 (CWA "designed to protect the environment").

Even then, the CWA does not prescribe any comprehensive regime of punishment and deterrence; the government indicted Exxon for violating *four other* criminal statutes (and Exxon pleaded guilty to violating two). Pet. App. 173a-174a. Accordingly, "there can be no serious claim" that the government's CWA prosecution could or did comprehensively address all harm that Exxon's conduct inflicted, including private harm. Pet. App. 72a.[19]

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[19] Exxon has suggested that its criminal CWA fine was based in part on harm to commercial fishermen. Cert. Reply 6 n.3. Not so. The United States Attorney, Alaska's Attorney General,

Exxon tries to avoid the court of appeals' reasoning by asserting that "Congress knows how to provide punitive damages – when it thinks they are necessary." Petrs. Br. 33. If respondents had brought *legislatively created* claims for which there were no preexisting remedies, Exxon's quip might be relevant. But when, as here, plaintiffs' claim is a *maritime-law* tort cause of action that traditionally provides a certain remedy, the test is whether Congress has *abrogated* the common-law remedy "in unambiguous terms." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 302-05 (1959); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) (*Higginbotham* and *Milwaukee* preclude plaintiffs from recovering common-law remedies in maritime suit only when Congress has "'sp[oken] directly' to the question"); *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580-81 (1943) (abrogation of common-law relief "should hardly be left to conjecture"). Congress has expressly foreclosed punitive damages in other instances but did not do so here. *Compare*, *e.g.*, 28 U.S.C. § 2674 (Federal Tort Claims Act); 49 U.S.C. § 44303(b) (air carrier liability for third party claims arising from act of terrorism).

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and the district judge all emphasized at Exxon's criminal sentencing that the only "victim" in the case was "the environment" or "Prince William Sound." JA1519, 1530-31, 1559; *see also* JA54-55 (sentence did not provide restitution to private victims). The same was true in the civil context, where the government expressly disclaimed any *parens patriae* role respecting private harm. Pet. App. 71a-72a; Letter from United States and Alaska to Counsel for Natives and Native Corporations (Oct. 31, 1991) ("[n]either of these [government] settlement agreements impairs or diminishes private claims available to Alaska Native Villages or Corporations").

Lest there be any doubt, the savings clause in the CWA's oil spill section preserves all preexisting legal "obligations" of vessel owners for harm to private property. 33 U.S.C. § 1321(*o*)(1). Regardless of whether plaintiffs ever have a "right" to punitive damages, *see* Petrs. Br. 37, defendants have an "obligation" to pay them if a judgment awards them. *See Smith v. Wade*, 461 U.S. at 52 n.5 (term "redress" in remedial provision does not foreclose punitive damages). The CWA leaves untouched the preexisting full range of private common-law tort remedies for harm to "private economic and quasi-economic resources." Pet. App. 79a.

Leaving punishment for causing private harm to the private tort system comports not only with tradition but with common sense. At Exxon's CWA sentencing hearing, the Acting Assistant Attorney General of the Department of Justice's Environment and Natural Resources Division explained that "environmental enforcement cases ... are different from other cases." JA1527. "Unlike other economic crimes …, we can't simply pay interest 20 years down the road to make up for the losses. In environmental cases it is critically important that we address the consequence of the conduct immediately." JA1527-28; *see also* JA54-56, 1526. The CWA, therefore, allows the government to impose swift penalties to redress environmental harm.

At the same time, reckless oil spills exact a human toll – one that may take years to measure and thus years to litigate. The CWA wisely leaves any "prosecution" for that harm to the private parties who suffer it. Those parties – whether or not

properly characterized, as Exxon would have it, as "private attorneys general," Petrs. Br. 28 (quotation omitted) – occupy the best position, and have the strongest incentive, to bring lawsuits respecting such harm. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985) (private attorney general lawsuits "are in part designed to fill prosecutorial gaps"). Respondents, as both courts below acknowledged, illuminated and recovered punishment for harm that had not otherwise been accounted for. Pet. App. 72a, 240a.

2. Exxon's fallback argument is equally unsupportable. Without citing authority, Exxon argues that the simple fact that the CWA provides for "substantial civil and criminal penalties" for oil spills should cause this Court to establish a common-law rule barring additional punishment in the form of punitive damages. Petrs. Br. 41-43.

Exxon's lack of authority for this argument is telling. As Exxon acknowledges, this Court has "the duty to determine the rules of general maritime law ... in the same way that state courts determine the common law of their states." Petrs. Br. 43. Yet not one state bars punitive damages on common-law grounds because other statutory provisions already allow the government to impose criminal and civil penalties. Private punitive damages have been allowed under such circumstances since the inception of this Nation. *See* RESTATEMENT (SECOND) OF TORTS § 908, cmt. a; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 11 & n.86 (4th ed. 1971); *Assault: Criminal Liability as Barring or Mitigating Recovery of Punitive Damages*, 98 A.L.R.3d 870 (1980) (collecting cases); *Intoxication of Automobile*

Driver as Basis for Awarding Punitive Damages, 33 A.L.R.5th 303, 345 (1995) ("imposition of criminal sanctions for the offense of driving while intoxicated would not preclude an award of punitive damages").

The most any defendant can obtain in this setting is a jury instruction stating that criminal liability is "one factor in determining whether an award of punitive damages would serve a meaningful deterrent function." *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 159 (Me. 1983); *see also Cook v. Ellis*, 6 Hill 466, 469 (N.Y. 1844) (such an instruction "was quite as favorable to the defendant as he could possibly claim"). Exxon received exactly such an instruction here. BIO App. 20a.

III. The Size of the Punitive Award Is Permissible.

The facts as the jury, the district court, and the Ninth Circuit have found them – coupled with the extraordinary procedural protections and post-trial reviews Exxon received – demonstrate that the punitive award was predictable, proportionate, and justified. That the award is larger than previous maritime awards simply reflects the unprecedented scope of harm that Exxon's highly reprehensible conduct inflicted and the unique class proceeding that took place at Exxon's request.

In light of these facts, this Court need not deviate from the ordinary common-law system of appellate review for abuse of discretion. Even if this Court were to specify bolstered standards, this award would satisfy them.

A. Maritime Law Follows Traditional Common-Law Review, Which This Award Satisfies.

1. The common law has long accepted that "punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved." *BMW v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting); *see also Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than that ... it is the peculiar function of the jury to determine the amount" of punitive damages.); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (task of determining amount "has [always been] left to the discretion of the jury").

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Haslip, 499 U.S. at 15.

This Court, guided and restrained by the Seventh Amendment's Reexamination Clause, has adopted this framework as a matter of federal common law. When "no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination [concerning the size of the award] under an abuse-of-discretion standard." *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433 (2001) (quotations

omitted); *see also Gasperini v. Center for Humanities*, 518 U.S. 415, 432-39 (1996); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1121-22 (10th Cir. 2004). When sufficient evidence supports the punitive award and the trial court reasonably has explained why the award satisfies governing standards, appellate review ends – regardless of whether plaintiffs' claim is based in federal or state law. *Haslip*, 499 U.S. at 18-25; *see also id.* at 24-27 (Scalia, J., concurring in the judgment); *Gasperini*, 518 U.S. at 437-39; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring in the judgment).

This Court takes the same approach in the context of criminal punishment, where at least equally weighty interests in uniformity and avoiding undue punishment apply. *See Gall v. United States*, 128 S. Ct. 586 (2007). "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.* at 597.

The common-law test is readily satisfied here. The jury was told in Phase III to consider Exxon's conduct separately from Hazelwood's and received "unusually detailed punitive damages instructions," which elaborated "the very same concepts embodied within the *BMW* guideposts." Pet. App. 127a, 146a; BIO App. 1a-25a (complete set of instructions). The district court held and the Ninth Circuit confirmed that substantial evidence supported the jury's decision to impose punitive damages against Exxon. Pet. App. 83a, 88a-90a. And the district court thrice found, in increasingly "penetrating" post-trial inquiries, that *$5 billion* was a reasonable

determination of what was necessary to achieve punishment and deterrence. Pet. App. 178a, 221a, 242a-245a.

2. Nothing about maritime torts requires additional analysis. As explained above, it has long been settled that the same principles govern punitive damages in maritime cases as under federal common law generally. *See supra* at 29-30. Consequently, no court sitting in admiralty of which we are aware has reviewed a maritime punitive award under more stringent standards than any other punitive award. *See* Robertson, *supra*, at 88-115, 128-38 (describing maritime decisions upholding punitive damage awards).

To the extent that any interest in protecting maritime commerce could trigger a concern over exposing shipping companies to substantial liability for reckless conduct causing widespread harm, the Limitation of Shipowners' Liability Act, 46 U.S.C. § 30501 *et seq.* – as its name implies – already addresses it. The Limitation Act, enacted in 1851, limits a shipowner's liability to the value of its interest in its vessel and cargo – an amount that does not leave room for any significant punitive award – whenever a seaworthy vessel causes damage "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine*, 531 U.S. 438, 446 (2001). The purpose of the Act was "to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich Co. v. Wright*, 80 U.S. 104, 121 (1871). Recent commentators ranging from Chief Judge Kozinski to Charles Black have called the Act "a vestige of a time gone by" and verging on "economic obsolescence." *In re Esta Later*

Charters, 875 F.2d 234, 235 (9th Cir. 1989); GILMORE & BLACK, *supra*, § 10-4, at 822. But the Act remains on the books, providing far-reaching protection to shipowners in all but the most blameworthy circumstances.

Exxon comes to this Court seeking relief only because, for three independent reasons, it could not seek cover under the Limitation Act: (1) Exxon's knowledge of Hazelwood's alcohol use – as its own lawyers informed it shortly after the spill – constituted "privity or knowledge," BIO App. 43a;[20] (2) Exxon gave Hazelwood such a high level of responsibility as to make his misconduct that of the corporation, *see supra* at 27; and (3) Congress suspended the Act in TAPAA, so as to encourage heightened care in shipping trans-Alaskan oil, *see Glacier Bay*, 944 F.2d at 582-83.

This Court should not upset the balance Congress already has struck. When Congress enacts maritime statutes, it "does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." *Miles*, 498 U.S. at 24. A statute, in other words, may say "this much and no more." *Id.* That is what the Limitation Act does. Indeed, because the Limitation Act is in "derogation of the common law," this Court held long ago that it could not "limit the right of an injured party to a recovery" except as "necessary to effectuate" the purpose of the

[20] For cases supporting Exxon's lawyers' assessment, see *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 338-40 (1955) (crewmember's excessive drinking habits and violent character); *Empresa Lineas Maritimas Argentinas S.A. v. United States*, 730 F.2d 153, 156-58 (4th Cir. 1984) (master's asthma and accompanying sleep deprivation).

Act. *The Main v. Williams*, 152 U.S. 122, 132-33 (1894). This Court should not immunize a vessel operator such as Exxon from full liability in circumstances in which Congress has refrained from doing so.

B. Even if This Court Were to Create New Maritime-Law "Guideposts," the Award Would Satisfy Them.

Exxon's brief avoids proffering any system of maritime excessiveness review that might be generally applied. Instead, Exxon offers only four slogans tailored to make this award look excessive. Petrs. Br. 51-55.

Exxon provides no rational justification for such a result-oriented approach – and none could be advanced. If this Court were to decide to enhance the traditional system of common-law review by adopting a new set of specific maritime guideposts, they should mirror the three that this Court has prescribed as a matter of substantive due process (and which themselves are largely derived from common law), so as to ensure that punitive awards receive consistent review. This award satisfies that test or any variant that might be adopted.

1. *Reprehensibility.* Although Exxon ignores the "reprehensibility of [its] conduct," this factor is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575.

As the district court and the court of appeals have detailed, Exxon's executives' decision to "[p]lac[e] a relapsed alcoholic in control of a supertanker was highly reprehensible conduct." Pet. App. 31a; *see*

also id. 22a-31a, 147a-157a. Even apart from Hazelwood's relapse, Exxon's Chairman characterized placing Hazelwood in command as a "gross error." PX2 at 19:40 (Resps' DVD). But regardless of how one views Exxon's original decision to reinstate Hazelwood to command in 1985 after he enrolled in (but did not complete) rehabilitation programs, Pet. App. 63a; *see* Amicus Br. of American Maritime Safety, Inc. 2-7, Exxon had no excuse for keeping him in that position once it learned he had resumed drinking while managing supertankers. Pet. App. 89a-90a, 155a. The district court called this "deliberate[]" decision to keep Hazelwood in command despite awareness of his relapse "*the* critical factor" in evaluating the nature of Exxon's wrongdoing. Pet. App. 155a-156a.

Exxon not only "repeatedly allowed Captain Hazelwood to sail into and out of Prince William Sound with a full load of crude oil," Pet. App. 154a, but it did so knowing that Alaskans who depended on the Sound for their lives and their livelihoods had no way to protect themselves from Exxon's recklessness. Pet. App. 30a. Equipment sufficient to contain a major oil spill did not exist in Alaska. SJA60sa-62sa. Area residents thus depended on Exxon to transport its toxic cargo through the Sound's resource-rich waters with the utmost care. Pet. App. 155a.

Exxon's conduct was especially egregious because the disastrous consequences of its actions were "entirely foreseeable":

> Anyone setting an oil tanker loose on the seas under command of a relapsed alcoholic has to know that he is imposing [a] massive risk.

> Though spilling the oil is an accident, putting the relapsed alcoholic in charge of the tanker is a deliberate act. The massive disruption of lives is entirely predictable when a giant oil tanker goes astray. Thus, Exxon's reprehend-sibility goes considerably beyond the mere careless imposition of economic harm.

Pet. App. 26a; *see also id.* 30a-31a; JA1431-94.

There is no basis for questioning this conclusion. Exxon has told this Court that its "maritime-law excessiveness arguments implicate no disputed facts." Exxon Cert. Reply 8.[21] And Exxon's opening brief does not challenge the Ninth Circuit's and district court's reprehensibility analyses.

2. *Ratio.* The punitive award is just under five times the amount respondents recovered for economic harm. The common law has long allowed (and sometimes required) punitive or enhanced damages at various single-digit ratios to the underlying harm the defendant's conduct caused. *See State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003) (referencing this history); *TXO*, 509 U.S. at 462 (upholding 10:1 ratio); *Haslip*, 499 U.S. at 23-24 (upholding 4:1 ratio); *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 523 (1885) ("nearly every state of the Union" provides for such damages). Exxon nevertheless suggests that the maximum ratio here is 1:1 because the compensatory damages are substantial. Petrs. Br. 52.

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[21] In any event, historical findings of fact pertaining to a punitive award are subject only to "clearly erroneous" review, *Cooper*, 532 U.S. at 435, 440 n.14, and all of the findings below are supported by substantial evidence.

No court in over 200 years of American jurisprudence has adopted such a common-law rule. Indeed, the only authority Exxon cites for its proposed rule is one sentence of *dictum* in *State Farm*, an insurance case involving a 145:1 ratio, stating 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." 538 U.S. at 425. In addition to ignoring the words "perhaps" and "can" in this quotation, Exxon ignores three aspects of this case that would render any such 1:1 guideline inappropriate.

a. The average amount of compensated economic harm per class member was not "substantial"; it averaged less than $15,500. Pet. App. 168a-169a.[22] The overall harm figure appears large only because this case, *at Exxon's request*, proceeded as a mandatory class action, bringing together the claims of over 32,000 claimants. Pet. App. 126a, 146a-147a.

Aggregating multiple modest individual recoveries into a large collective injury cannot reduce the permissible ratio of a punitive award. Every federal and state court to consider the issue has held that (legislative) limits on punitive awards apply only on a *per plaintiff* basis. *See EEOC v. W&O, Inc.*, 213

[22] Because some plaintiffs' harm is accounted for in settlement payments and administrative proceedings instead of the compensatory judgment here, Exxon attempted in the Ninth Circuit to draw a distinction between harm – the term this Court uses for ratio purposes – and the net compensatory damage judgment, arguing that the latter controlled. The Ninth Circuit rejected this argument, Pet. App. 32a-35a, and Exxon does not renew it here. Respondents' Ninth Circuit brief further explains why Exxon's argument lacked merit. *See* Pltfs. 2004 C.A. Br. 38-50.

F.3d 600, 613-14 (11th Cir. 2000) (Title VII); *Hayes Sight & Sound v. Oneok, Inc.*, 136 P.3d 428, 453 (Ks. 2006) (state-law cap); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 20-21 (N.C. 2004) (same); *Bagley v. Shortt*, 410 S.E.2d 738, 739 (Ga. 1991) (same). This principle applies especially in the context of a class action, for class certification cannot "abridge, enlarge or modify any substantive right of class members." *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997); *see also* Ala. Code 6-11-21(h) (state-law cap inapplicable to class actions); Mont. Code Ann. 27-1-220(3) (same). Exxon conceded as much in the district court, emphasizing that "certification of a mandatory punitive damages class would not in any way ... prejudice any of the parties." JA115-16.

b. *State Farm*'s 1:1 suggestion (as well as its single-digit guidance) assumes a situation in which the monetary value of a plaintiff's noneconomic harm has been quantified, and "the plaintiff has been made whole for his injuries by compensatory damages." 538 U.S. at 419, 425. The plaintiffs in *State Farm*, for example, recovered $500,000 each for eighteen months of emotional distress over whether their insurance claim would be covered. *Id.* at 426. But when the totality of the plaintiffs' harm has not been quantified because "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine,'" higher ratios are permissible. *Id.* at 425 (quoting *BMW*, 517 U.S. at 582).

This principle has special force in the legal regime that governs respondents' tort claims. "[T]he whole [common-law] doctrine of punitory or exemplary damages has its foundation in a failure to

recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation." *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 586 (1885); *see also Cooper*, 532 U.S. at 437 n.11 (referencing this history); KENNETH REDDEN, PUNITIVE DAMAGES § 2.2 (1980) (same). Common-law cases are legion in which punitive damages were allowed because the defendant's conduct caused injuries, most often mental anguish and inexact consequential harm, for which plaintiffs could not recover compensatory damages. *See*, *e.g.*, *Brown v. Swineford*, 44 Wis. 282, 286-89 (1878); *Fay v. Parker*, 53 N.H. 342, 382-84 (1872); *McNamara v. King*, 7 Ill. 432, 437 (1845).

The mental anguish or consequential harm supporting such damages did not need to be "specially pleaded." *Wise v. Daniel*, 190 N.W. 746, 747-48 (Mich. 1922); *see also Coryell v. Colbaugh*, 1 N.J.L. 77, 77-78 (1791). The operative principle was that in cases involving egregious acts, juries could consider whether "mental suffering and injury to the feelings [we]re natural and proximate in view of the nature of the act." *Wise*, 190 N.W. at 748 (quotations omitted). This principle lives on today in pockets of statutory law in which compensatory damages for economic harm may not fully capture the harm that the proscribed conduct causes. *See Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2417 (2006) ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory ... and punitive damages, concluding that the additional remedies were necessary to help make victims whole.") (quotations omitted); *Illinois*

Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977) (treble damages under antitrust laws).

That is the case here. Maritime law, by means of "a pragmatic limitation imposed ... upon the tort doctrine of foreseeability," forbids recovery for many economic and all emotional injuries. *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 833 (3d Cir. 1985); *see also Robins Dry Dock & Repair v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1035 (5th Cir. 1985) (Wisdom, J., dissenting) (maritime law restricts reach of "conventional tort principles of foreseeability and proximate cause"). Accordingly, commercial fishermen were unable to recover anything for the spill's profound emotional impact on them and their families. JA1384-90; *see* Pet. App. 25a-26a, 150a-151a, 166a-169a; SJA385sa-572sa. Nor were Native class members able to recover for the impact on their subsistence cultures, Pet. App. 123a-124a; JA149-61, even though the spill destroyed their traditional way of life. And maritime law did not allow any compensatory damages for "price diminishment in fisheries that were not oiled, diminished value of limited entry fishing permits or fishing vessels absent a sale of the permit or vessel, damages to unoiled land, [or] diminution of market value owing to fear or stigma." *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 167 n.3 (9th Cir. 1997); *see* Pet. App. 115a-116a; JA118-48, 1155-56, 1368-81; SJA1sa-36sa. The punitive award here properly may reflect these real and foreseeable, but more remote and intangible effects of Exxon's tort. Pet. App. 24a-26a, 53a (Browning, J., dissenting), 150a-151a, 166a-168a.

c. Ratio analysis must consider not just the actual harm that the defendant's tort inflicted but also the potential harm it threatened. *State Farm*, 538 U.S. at 424-25; *TXO*, 509 U.S. at 459-62. After consulting with an Exxon executive in San Francisco, Hazelwood tried to rock the EXXON VALDEZ off the reef. Pet. App. 152a-153a; JA223-34, 872-76; SJA295sa. If this maneuver had been successful, the ship "would probably have foundered, risking the loss of the entire cargo and the lives of those aboard." Pet. App. 122a. Spilling the supertanker's remaining 42 million gallons of crude alone would have caused "immense" additional harm. Pet. App. 168a.

d. Instead of engaging any of these points, Exxon suggests – by analogy to the minority of state legislatures that have imposed various punitive damages caps – that this Court can make up whatever new limitations it wants because this case involves federal maritime law. Petrs. Br. 52. But a court's lawmaking authority, as Justice Holmes famously explained, is only "interstitial[]" in nature. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 220 (1917) (dissenting opinion). It does not license judges, as a legislature might do, to undertake major reallocations of costs and risks. Indeed, not a single state court has imposed any common-law cap on punitive awards; all twenty-one state monetary caps or maximum ratios are statutory. *See Cooper*, 532 U.S. at 433 n.6; *BMW*, 517 U.S. at 614-16 (Ginsburg, J., dissenting). And even among the states with statutory limitations, most do not apply to awards under $100,000 per victim; several others suspend them in cases involving intoxication. *See*, *e.g.*, Miss. Code Ann. § 11-1-65(3)(d); N.J. Stat. 2A:15-5.14(c);

N.C. Gen. Stat. § 1D-26. This Court should not legislate new rules that no court has imposed and even most legislatures eschew.

3. *Comparable penalties.* Comparable statutory penalties – assuming they apply to a system of common-law review, *but see Cooper*, 532 U.S. at 448 (Ginsburg, J., dissenting) (this guidepost "is not similarly rooted in common law") – also support the reasonableness of the award. The federal government indicted Exxon for five federal crimes. Exxon pleaded guilty to three charges in exchange for the government's dropping the other two. Those three crimes were punishable by a collective fine of over $3 billion; all five would have been punishable by over $5 billion. Pet. App. 173a-175a. In addition, federal and state legislation enacted in response to this disaster would have subjected Exxon to $1.3 billion in civil penalties. Pet. App. 104a ($786 million federal penalty); Alaska Stat. 46.03.759(a)(1), (a)(2), (c)(1) ($500 million state penalty).

Exxon ignores these realities, limiting its attention to civil penalties in place before the spill. Petrs. Br. 51. But this Court has explained that "[c]omparing the punitive damages award and the civil *or criminal* penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 517 U.S. at 583 (emphasis added). Whatever care must be taken when the imposition of criminal sanctions is a "remote possibility," *State Farm*, 538 U.S. at 428, does not apply when the defendant *pleaded guilty* to three crimes punishable by more than the amount of the punitive award. And post-event civil statutes represent "legislative judgments concerning appro-

priate sanctions for the conduct at issue," *BMW*, 517 U.S. at 583 (quotation omitted), just as much as pre-existing ones.

4. *Wealth.* Contrary to Exxon's suggestion, evidence regarding wealth, "[w]hen compared to the entire trial, ... was a rather small percentage of the total presentation of evidence." Pet. App. 238a. And there was nothing wrong with this evidence. It is a "well settled" matter of common-law practice that juries may consider a defendant's wealth. *TXO*, 509 U.S. at 462 n.28; *see also State Farm*, 538 U.S. at 427-28 (informing jury of wealth is not "'unlawful or inappropriate'") (quoting *BMW*, 519 U.S. at 591 (Breyer, J., concurring)); RESTATEMENT (SECOND) OF TORTS § 908(2) (endorsing this practice). Federal statutes respecting punishment for maritime and other crimes require the same. 18 U.S.C. § 3572(a); *see also* U.S.S.G. §§ 8C2.8, 8C3.3. A defendant's financial condition obviously bears on any rational determination of the amount necessary to punish and deter.

5. *Punishment and deterrence.* Finally, Exxon contends that no punitive damages should be awarded because the corporation's prior penalties and cleanup costs already have "fully punished and deterred" it. Petrs. Br. 48. Exxon made the same argument at trial. Exxon's Chairman took the stand and went through a chart of all of its fines and expenditures relating to the oil spill and told the jury that punitive damages were not "necessary to punish and deter Exxon." JA1278-87; SJA331sa. Exxon's counsel urged the same opinion in closing argument. JA1340-42, 1349-51. The jury, after being expressly instructed that it was free to accept Exxon's

argument, BIO App. 20a, decided that Exxon's prior payments were *not* enough to "punish[] and deter[]" with respect to private harm. JA1408 (verdict form).

The instruction leaving it to the jury whether to accept Exxon's argument was correct, *see supra* at 51-52, and the district court properly held that "substantial evidence" supports the jury's rejection of the argument. Pet. App. 240a-245a. Exxon's civil fines and related expenditures were made "quite simply, to clean up Exxon's mess." Pet. App. 241a; *see also id.* 124a. It is unclear why Exxon deserves praise for that, especially when the cleanup response itself was "wholly inadequate" and more a public relations campaign than an environmental effort. *See supra* at 10.

The *only* money Exxon has paid above and beyond what an entirely innocent spiller would have paid for this oil spill was the $25 million criminal penalty for harming the environment. And that payment was made before discovery in this case. The district court, speaking through the same judge who had accepted Exxon's criminal plea agreement, explained later that not only was that fine limited to addressing environmental harms, but it "did not comprehend the enormity of the harm or number of people adversely affected by the spill." Pet. App. 242a-243a. "It also is possible," the court later observed, "that, from the testimony of Exxon executives, the jury could have inferred a lack of remorse." Pet. App. 245a.[23] This Court does not

[23] Exxon quotes remarks the district court made complimenting Exxon's integrity when accepting the criminal plea bargain. Petrs. Br. 5-6. The court never made any such comment after presiding over the trial – including observing 57 Exxon

second-guess such assessments by a jury and district court.

Exxon's related argument that the punitive award "makes no economic sense" because it should have to do no more than "bear the costs" of the spill, Petrs. Br. 53-54, fares no better. "[D]eterrence is not the only purpose served by punitive damages." *Cooper*, 532 U.S. at 439. Thus, it should suffice to respond that just as the Due Process Clause's punitive damages jurisprudence "does not require [this Court] to adopt the views of the Law and Economics school," *TXO*, 509 U.S. at 491 (O'Connor, J., dissenting), neither does the common law. Indeed, even as to deterrence, "[c]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct." *Cooper*, 532 U.S. at 439 (quotations and citation omitted).

This case illustrates the point. Exxon had sober captains available to manage the EXXON VALDEZ, SJA117sa, and replacing Hazelwood obviously would have avoided an enormous financial risk. Yet Exxon did not respond to textbook economic incentives. It chose instead to let Hazelwood continue in command and apparently accepted the possibility of liability if he grounded a supertanker in Prince William Sound. Pet. App. 170a, 233a. Whether rooted in a sense of imperviousness or the corporation's alcoholic culture, Exxon's "wickedness [was] not greed but rather perverse indifference to another person's values." Marc Galanter & David Luban, *Poetic Justice:*

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employees (including numerous top executives) through live or videotaped testimony – in this case.

Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393, 1438 (1993).

In any event, Exxon's argument fails even on its own terms. A tortfeasor does not bear the full costs of its misconduct unless, at a minimum, it must internalize *all* economic damage it causes, as well as intangible mental and secondary economic and societal harms. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 48-49 (1990). Yet Exxon urges this Court to create a legal system in which tortfeasors that cause massive economic and attendant mental and consequential injuries will *never* – no matter how egregious their conduct – have to internalize more than a fraction of the cascading harm.

Such a system would fail to deliver even rudimentary justice. A jury must have the ability to provide punishment commensurate with the defendant's wantonness and adequate to deter others from similar conduct in the future. The award here serves those crucial functions, while simultaneously serving as a vital reaffirmation of society's values in the face of a historic – indeed, "notorious," *Locke*, 529 U.S. at 96 – wrong.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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APPENDIX

Section 204 of the Trans-Alaska Pipeline Authorization Act, codified at 43 U.S.C. § 1653, as in effect in 1989*

§ 1653. Liability for damages

(a) Activities along or in vicinity of pipeline right-of-way; strict liability; limitation on liability; subrogation; emergency subsistence and other aid; exemption for State of Alaska

(1) Except when the holder of the pipeline right-of-way granted pursuant to this chapter can prove that damages in connection with or resulting from activities along or in the vicinity of the proposed trans-Alaskan pipeline right-of-way were caused by an act of war or negligence of the United States, other government entity, or the damaged party, such holder shall be strictly liable to all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes. Claims for such injury or damages may be determined by arbitration or judicial proceedings.

(2) Liability under paragraph (1) of this subsection shall be limited to $50,000,000 for any one incident, and the holders of the right-of-way or permit shall be

* Sections 204(a) and (b) were modified by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, and Section 204(c) was repealed.

liable for any claim allowed in proportion to their ownership interest in the right-of-way or permit. Liability of such holders for damages in excess of $50,000,000 shall be in accord with ordinary rules of negligence.

(3) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(4) Upon order of the Secretary, the holder of a right-of-way or permit shall provide emergency subsistence and other aid to an affected Alaska Native, Native organization, or other person pending expeditious filing of, and determination of, a claim under this subsection.

(5) Where the State of Alaska is the holder of a right-of-way or permit under this chapter, the State shall not be subject to the provisions of this subsection, but the holder of the permit or right-of-way for the trans-Alaska pipeline shall be subject to this subsection with respect to facilities constructed or activities conducted under rights-of-way or permits issued to the State to the extent that such holder engages in the construction, operation, maintenance, and termination of facilities, or in other activities under rights-of-way or permits issued to the State.

(b) Control and removal of pollutants at expense of right-of-way holder

If any area within or without the right-of-way or permit area granted under this chapter is polluted by

any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

(c) Discharges of oil from vessels loaded at terminal facilities of pipeline; strict liability; limitation on liability; apportionment of liability; establishment and operation of Trans-Alaska Pipeline Liability Fund

(1) Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

(2) Strict liability shall not be imposed under this subsection if the owner or operator of the vessel, or

the Fund, can prove that the damages were caused by an act of war or by the negligence of the United States or other governmental agency. Strict liability shall not be imposed under this subsection with respect to the claim of a damaged party if the owner or operator of the vessel, or the Fund, can prove that the damage was caused by the negligence of such party.

(3) Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control act, as amended (33 U.S.C. 1321(p)) before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

(4) The Trans-Alaska Pipeline Liability Fund is hereby established as a non-profit corporate entity that may sue and be sued in its own name. The Fund shall be administered by the holders of the trans-Alaska pipeline right-of-way under regulations prescribed by the Secretary. The fund shall be subject to an annual audit by the Comptroller General, and a copy of the audit shall be submitted to the Congress.

(5) The operator of the pipeline shall collect from the owner of the oil at the time it is loaded on the vessel

a fee of five cents per barrel. The collection shall cease when $100,000,000 has been accumulated in the Fund, and it shall be resumed when the accumulation in the Fund falls below $100,000,000.

(6) The collections under paragraph (5) shall be delivered to the Fund. Costs of administration shall be paid from the money paid to the fund, and all sums not needed for administration and the satisfaction of claims shall be invested prudently in income-producing securities approved by the Secretary. Income from such securities shall be added to the principal of the Fund.

(7) The provisions of this subsection shall apply only to vessels engaged in transportation between the terminal facilities of the pipeline and ports under the jurisdiction of the United States. Strict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States.

(8) In any case where liability without regard to fault is imposed pursuant to this subsection and the damages involved were caused by the unseaworthiness of the vessel or by negligence, the owner and operator of the vessel, and the Fund, as the case may be, shall be subrogated under applicable State and Federal laws to the rights under said laws of any person entitled to recovery hereunder. If any subrogee brings an action based on unseaworthiness of the vessel or negligence of its owner or operator, it may recover from any affiliate of the owner or operator, if the respective owner or operator fails to satisfy any claim by the subrogee allowed under this paragraph.

(9) This subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements.

(10) If the Fund is unable to satisfy a claim asserted and finally determined under this subsection, the Fund may borrow the money needed to satisfy the claim from any commercial credit source, at the lowest available rate of interest, subject to approval of the Secretary.

(11) For purposes of this subsection only, the term "affiliate" includes—

(A) Any person owned or effectively controlled by the vessel owner or operator; or

(B) Any person that effectively controls or has the power effectively to control the vessel owner or operator by—

(i) stock interest, or

(ii) representation on a board of directors or similar body, or

(iii) contract or other agreement with other stockholders, or

(iv) otherwise; or

(C) Any person which is under common ownership or control with the vessel owner or operator.

(12) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.