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 AMICUS CURIAE OF TRUSTEES FOR ALASKA, ALASKA CENTER FOR THE ENVIRONMENT, ALASKA COMMUNITY ACTION ON TOXICS, ALASKA MARINE CONSERVATION COUNCIL, COOK INLETKEEPER, DEFENDERS OF WILDLIFE, ENVIRONMENTAL LAW & POLICY CENTER, EYAK PRESERVATION COUNCIL, HUMANE SOCIETY OF THE UNITED STATES, IZAAK WALTON LEAGUE OF AMERICA, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, PRINCE WILLIAM SOUNDKEEPER, WATERKEEPER ALLIANCE AND THE WILDERNESS SOCIETY IN SUPPORT OF RESPONDENTS

HOWARD A. LEARNER
Counsel of Record
ALBERT F. ETTINGER
BRADLEY D. KLEIN
ENVIRONMENTAL LAW & POLICY CENTER
35 East Wacker Drive, Suite 1300
Chicago, Illinois 60601
(312) 673-6500

Attorneys for Environmental Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF INTEREST

The environmental *amici curiae*[1] have long engaged in environmental and wildlife protection and natural resources preservation activities in Alaska and across the nation. They work to implement and enforce the Clean Water Act and other federal environmental statutes, federal and state common law, and state laws and policies in order to advance their organizational goals and the public's environmental interests.

Environmental *amici* address the limited issue of whether the federal Clean Water Act should be held to preempt maritime law remedies for damage to private property and other economic damages caused by oil spills. Such preemption would create an unwarranted gap in the framework of federal and state statutes and federal and state common law governing

[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned Environmental *amici*: Trustees for Alaska, Alaska Center for the Environment, Alaska Community Action on Toxics, Alaska Marine Conservation Council, Cook Inletkeeper, Defenders of Wildlife, Environmental Law & Policy Center, Eyak Preservation Council, Humane Society of the United States, Izaak Walton League of America, National Wildlife Federation, Natural Resources Defense Council, Northern Alaska Environmental Center, Prince William Soundkeeper, Waterkeeper Alliance and The Wilderness Society represent that (1) each party has filed with the Court blanket consent to the filing of *amicus curiae* briefs, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

clean water protection. The Clean Water Act is designed to "restore and maintain" the integrity of our nation's waters. 33 U.S.C. § 1251(a). It should not shield a private company from part of its liability for damages arising from an environmental disaster for which it is responsible.

Environmental *amici* seek to protect the public's interests in the integrity and effectiveness of the nation's integrated system of environmental statutes and common law remedies to preserve our natural resources and achieve cleaner waters.

SUMMARY OF THE ARGUMENT

The Clean Water Act (CWA), state statutes and common law rights and remedies together provide a complementary and robust legal structure for cleaning up our nation's waters. Exxon's argument that the CWA "leaves no room" for maritime law punitive damages remedies would create a gap in this structure even though Congress stated no such intent. The CWA's text and the legislative history indicate that Congress intended the Act to supplement private remedies by enhancing the federal government's ability to deter and clean up oil and other water pollution, not to displace shipowners' existing obligations and incentives to keep clean water clean. Moreover, Congress' silence in the statute cannot be deemed to imply preemption, especially when the CWA includes savings clauses that explicitly preserve

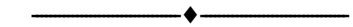
private remedies for damages to property and allow any person, under common law, "to seek any other relief. . . ." There is a legal presumption favoring the retention of common law remedies where Congress has not directly spoken.

When the text, structure and history of the CWA are given their due regard, it becomes clear that: (1) Exxon's reliance on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), is misplaced, and (2) punitive damages awards for economic losses of private parties do not inherently conflict with the administration of the CWA, nor frustrate any purpose of the federal remedial scheme. Exxon has not overcome the presumption that when Congress passes legislation, it intends to retain common law remedies. *United States v. Texas*, 507 U.S. 529, 534 (1993). This case is much like *Silkwood v. Kerr-McGee* in which the Court held that state-imposed punitive damages for the release of plutonium from a nuclear power plant were available despite the extensive federal regulatory framework governing nuclear safety. 464 U.S. 238 (1984).

Effective environmental protection depends on the interwoven fabric of federal statutory and regulatory standards, state statutory and regulatory standards, and federal and state common law remedies. Federal environmental laws often work in combination with, and leave room for, pre-existing private remedies, and they should be interpreted to preserve common law remedies unless Congress has directly spoken to displace them. Under Exxon's theory,

Congress would be compelled to write even more detailed and lengthier statutes lest a gap be implied even when a savings clause is specifically enacted.

Exxon's conduct in this case – leaving a relapsed alcoholic in command of a supertanker – resulted in an environmental disaster and widespread property damage. Accepting Exxon's overreaching preemption argument in this case could lead to the ironic and unfortunate result of the federal CWA being used as a shield against, rather than a sword to help achieve, cleaner water. Such a result would undermine Congress' objectives and weaken the nation's efforts to protect the environment.



ARGUMENT

I. The Text, History and Purposes of the Clean Water Act Preserve Common Law Remedies for Property Damage Caused By Oil Spills.

A. The Text of the Clean Water Act Does Not "Speak To" Private Remedies for Property Damage, Except to Explicitly Retain Them.

Exxon contends that the CWA "speaks directly and comprehensively" to plaintiffs' claims. Exxon Br. 33. However, no provisions of the Act affirmatively define a private remedy for property damages, and the plain language shows that Congress decided not to displace tort claims for property damage when it enacted the oil spill liability provisions of the Act:

> *Nothing* in this section shall affect or modify *in any way* the obligations of *any* owner or operator of *any* vessel . . . to *any* person or agency under *any* provision of law for damages to *any* publicly owned or privately owned property resulting from a discharge of *any* oil or hazardous substance. . . .

33 U.S.C. § 1321(o)(1) (emphasis added). Similarly, the CWA's citizen suit provision states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law . . . to seek any other relief. . . .

33 U.S.C. § 1365(e). These broadly worded savings clauses "negate[ ] the inference that Congress 'left no room'" for common law remedies. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

B. The Legislative History of the Clean Water Act Confirms That Congress Did Not Intend for the Act to Provide Exclusive Remedies for Oil Spills.

The CWA's legislative history confirms that the oil pollution liability section "in no ways affects the rights of third parties against the party causing the discharge." S. Rep. No. 91-351, at 5 (1969). Exxon argues that the CWA "prescribes a comprehensive, calibrated scheme of public enforcement." Exxon Br. 40. However, the oil liability provisions at issue here are different than the CWA's section 402 pervasive

regulatory program for permitting point source discharges.[2] The federal oil liability regime has "historically provided only partial protection." It set statutory liability limits "with respect to Federal oil spill removal costs and natural damages," but provided "no coverage or compensation for other damages." S. Rep. No. 101-94, at 3 (1989) (Legislative History of the Oil Pollution Act of 1990) (describing the federal provisions as they existed at the time of the *Exxon Valdez* disaster).

Exxon's argument that the CWA was intended to be the exclusive remedy for oil spills is also incorrect. Congress has noted that, in 1989, "at least five statutes" dealt with the issue of oil spill liability and compensation. S. Rep. No. 101-94, at 3. "Each is different, and each is inadequate." *Id.* Moreover, if the CWA provisions had been intended to limit the liability of shipowners in third-party tort suits, Congress would not have explicitly preserved the ability of States to provide "additional requirements and penalties" that are "separate and independent from those

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[2] *See* discussion *infra* at 13-14. The preemptive effect of the section 402 regulatory program was considered in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318-19 (1980); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); and *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). These cases, involving the Act's "pervasive" and "all-encompassing" program for regulating permitted discharges from point sources under section 402 of the Act, are not directly relevant to the Court's evaluation here of the more limited oil pollution liability provisions at section 311 of the Act.

imposed by [the federal Act]." H.R. Rep. No. 91-940, at 42 (1970) (Conf. Rep.). Nor would Congress have included the savings clauses at sections 1321(o) and 1365(e) of the CWA. *See Askew v. American Waterways Opers., Inc.*, 411 U.S. 325 (1973) (holding that the 1970 Water Quality Improvement Act did not preempt strict liability under Florida's Oil Spill Prevention Act, in part, because "no remedy under the Federal Act exists for state or private property owners damaged by a massive oil slick").[3]

C. Exxon Mischaracterizes the Goals and Purposes of the Clean Water Act in Arguing that Congress Intended to Cap the Liability of Shipping Companies.

Exxon argues that the CWA involves "twin goals," which are "carefully calibrated": "protecting the environment *and* limiting the liability of shipowners." Exxon Br. 16, 32, 39-41. However, the legislative history contradicts this argument, which incorrectly elevates benefits for the shipping industry to one of Congress' principal purposes in this part of the Act. Congress instead recognized that oil pollution was a growing national problem that requires a multi-pronged approach, including both federal clean-up actions and penalty authority while explicitly preserving existing state and common law remedies.

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[3] As of 1990, 24 States had oil spill liability and compensation laws, and 17 of them had liability *without* specified limits. S. Rep. No. 101-94, at 7.

For example, following "extensive discussion," the Senate Committee on Public Works reported that "[t]wo factors" influenced the decision regarding liability for oil spills: "First, the increasing volume of oil being handled by an increasing number of vessels and facilities enhances the risk of major disaster, and, second, the protection of our vital water resources and shorelines is more and more imperative." S. Rep. No. 91-351, at 5-7 (1969). In conclusion, the Committee explained that "[w]hile the legislative approach is complex, the intent of the committee is clear. The legislation is designed to encourage preventive action to eliminate discharges of oil wherever possible and to provide adequate authority to clean up those discharges which do occur and assess the cost on the responsible party. . . ." *Id.* at 7. The report clarified that the "oil pollution section deals only with the matter of clean up of discharges and costs associated therewith," and "in no ways affects the rights of third parties against the party causing the discharge." *Id.* at 5.

Twenty years later, Congress considered, but ultimately decided against, changing the "long-standing policy" that federal oil liability provisions are a floor, not a ceiling. *See* S. Rep. No. 101-94, at 6-7, 17 (history of the Oil Pollution Act of 1990). Thus, even after enacting the Oil Pollution Act, Congress plainly intended that the owners or operators of vessels would be liable in accordance with "[the new Act] and section 311 of the Clean Water Act . . . [*and*] *under maritime tort law*. . . ." *Id.* at 14 (emphasis

added). At that time, the shipping industry argued vigorously for a federal liability cap. *See id.* at 17 ("Preemption has been discussed by the members of the Committee more than any other single issue."). The shipping companies' arguments then, which sound remarkably like Exxon's policy arguments now, were explicitly rejected by Congress:

> It is sometimes argued that liability must be limited in order for the owner or operator to afford reasonably priced insurance coverage. Some arguments are so extreme as to suggest that tankship companies and offshore producers would not operate in an atmosphere of "unlimited" risk. *But these claims are totally unfounded.* Even in the 17 States without liability limits, oil shipping and producing companies are not refusing to do business. None of the testimony received by the Committee contained evidence that any shipper or producer has avoided these 17 States or has chosen to quit the business.

S. Rep. No. 101-94, at 7 (emphasis added).

Exxon's preemption argument here would allow the shipping industry to achieve a liability cap through the courts where it has been unable to achieve such a policy through Congress. Just as courts should not "supplement" Congress' answer when a federal statute speaks directly to limit available remedies, *Miles*, 498 U.S. at 31, the courts should refrain from unnecessarily limiting the common law where Congress gives "no affirmative indication of an intent to preclude the

judicial allowance of a remedy." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970).[4] The Court should reject Exxon's preemption argument as contrary to the CWA's text, legislative history and purposes and should allow for common law remedies for property damage caused by oil spills.

II. Exxon Cannot Overcome the Presumption Favoring Retention of Pre-Existing Common Law Remedies.

When statutes "invade the common law," there is a presumption favoring the retention of existing law "except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534-35 (1993).

Exxon attempts to avoid this presumption in two ways. First, it claims that there is a "presumption *in favor of preemption*" in this case because it involves federal common law. Exxon Br. 29, citing *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981). But the Court has held that the presumption favoring

[4] In *Moragne*, the Court, guided by "major legislative innovations" at both the state and federal level, held that a federal cause of action for wrongful death exists under general maritime law. 398 U.S. at 392-93. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine*, 498 U.S. 19 (1990), the Court limited the remedies available for maritime wrongful death claims, finding that "Congress has spoken directly to the question of recoverable damages on the high seas" in the Death on the High Seas Act and the Jones Act, respectively.

the retention of existing law applies equally to cases involving preemption of federal common law as it does to preemption of state law. *United States v. Texas*, 507 U.S. at 534. Here, the CWA does not "speak to" private remedies for private oil spill damages, and thus "no presumption of preemption arises." *Oswego Barge*, 664 F.2d at 345.

Second, Exxon incorrectly portrays this case as asking the courts to "supplement" and create new "judge-made" remedies after passage of the CWA. Exxon Br. 28, 33. However, admiralty law developed long before the passage of the CWA, and courts have "freely awarded punitive damages in property damage cases" arising under admiralty law. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 137-38, 360-67 (1997).

This is not a case like *City of Milwaukee v. Illinois*, 451 U.S. 304 (1980), in which the Court was determining whether the creation of federal common law was necessary to fill an "interstice" in the existing decisional framework. *See id.* at 323, 324 n.18. The real question here is not whether the Court should *supplement* the CWA; it is whether Exxon can demonstrate an evident statutory purpose to *supplant* pre-existing maritime law with respect to claims for property damage caused by oil pollution. *United States v. Texas*, 507 U.S. at 534-37.

Exxon then makes two general claims in attempting to meet its burden of showing that the statutory purpose of the CWA requires preemption of

punitive damages. First, citing *Miles,* Exxon argues that the CWA "speaks directly" to the issue and "leaves no room" for maritime law. Exxon Br. 31-36. Second, citing *City of Milwaukee* and *Sea Clammers,* Exxon argues that punitive damages will interfere with Congressional policies and "obliterate" the balance that Congress has struck. Exxon Br. 33-41. These arguments, however, are not rooted in the CWA's text or purpose or sound policy. They fail to rebut the presumption favoring retention of pre-existing common law remedies.

A. The Clean Water Act's Silence Regarding Punitive Damages Does Not Imply an Affirmative Congressional Purpose to Supplant Maritime Law.

The Court's preemption analysis is straightforward when a federal statute speaks directly to the types of remedies available. In the Death on the High Seas Act (DOHSA), for example, Congress explicitly limited recoverable damages in wrongful death suits to "pecuniary loss." When Congress has "spoken directly to the question . . . the courts are not free to 'supplement' Congress' answer. . . ." *Miles*, 498 U.S. at 31 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

In this case, however, Exxon overlooks the "basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil,* 436

U.S. at 625. Here, when "Congress has not spoken" to the obligations of shipowners for private property damages, there is "no basis" to apply *Miles*. *See CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 701 (1st Cir. 1995). The Clean Water Act does not speak directly to private parties' property damage claims under maritime law, except to explicitly preserve them through the savings clauses.

The best Exxon can do is argue that the word "obligations" in the savings clause at section 1321(o) was not intended to include punitive damages because punitive damages are "never awarded as of right." Exxon Br. 37, citing *Smith v. Wade*, 461 U.S. 30, 52 (1983). *Smith*, however, does not support Exxon's interpretation. In that case, the Court broadly interpreted the text of 24 U.S.C. § 1983 to *include* the availability of punitive damages in appropriate circumstances because the defendant had failed to provide a "persuasive reason" based on the "policies and purposes" of the federal statute that would "require a departure from the rules of tort common law." *Id.* at 48-49, 51. Notably, the Court rejected the defendant's argument that the phrase "for redress" at the end of section 1983 meant that Congress intended to limit recovery to compensatory damages. *Id.* at 36 n.5. Here, as in *Smith*, the defendant's "novel construction is strained." *Id.*

Exxon argues that Congress' silence "speaks volumes." Exxon Br. 33. Actually, it says nothing at all. The Court specifically rejected this line of argument in *Silkwood v. Kerr-McGee*:

> Kerr-McGee focuses on the differences between compensatory and punitive damages awards and asserts that, at most, Congress intended to allow the former. This argument, however, is misdirected because our inquiry is not whether Congress expressly allowed punitive damage awards. . . . Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted. Thus, it is Kerr-McGee's burden to show that Congress intended to preclude such awards.

464 U.S. at 255. *See also Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989) ("Since a common-law tort action for personal injury by definition includes the element of damages, including punitive damages where factually appropriate, the omission in the [New York statute] and the legislative silence with respect to punitive damages do not preclude such a recovery.") (citations omitted).[5]

In this case, as with Kerr-McGee in *Silkwood*, Exxon "is unable to point to anything in the legislative

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[5] Exxon also argues that "Congress knows how to provide punitive damages" when it "thinks they are necessary." Exxon Br. 33. While this is true, Congress also knows how to explicitly forbid punitive damages when it wants to do so. *See*, *e.g.*, 28 U.S.C. § 2674 (Federal Tort Claims Act); 2 U.S.C. § 1361 (Congressional Accountability Act); 3 U.S.C. § 435 (Presidential and Executive Office Accountability Act); 6 U.S.C. § 442 (Homeland Security Act of 2002). Thus, it is not appropriate to draw conclusions from Congress' silence. *Cf. Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (repeals by implication are disfavored).

history or in the regulations that indicates that punitive damages were not to be allowed." 464 U.S. at 255. When the text, history and purpose of the CWA are taken into consideration, the better conclusion is that Congress did not intend to "speak to" property damage claims at all. *See Ouellette*, 479 U.S. at 499 n.19 (finding "no suggestion" of a distinction between compensatory and punitive damages remedies in either the Act or its legislative history); *Poe v. PPG Indus.*, 782 So.2d 1168, 1174 (La. Ct. App. 2001) ("Simply stated, we fail to discern the existence of any applicable relevant legislation which eviscerates the deterrent protection of punitive damages. . . ."). In this regard, this case is more like *Moragne* than it is like *Miles*.[6]

The CWA's express savings clause and evident purpose are the proper guideposts for the Court here. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215-16 (1996) (considering the relevant savings clause and congressional purpose underlying DOHSA in determining that *Miles* does not bar state remedies for deaths in territorial waters). "Taking into account what Congress sought to achieve," *id.* at 216, the

[6] *See Moragne*, 398 U.S. at 397-98 (DOHSA's provision of a statutory cause of action for wrongful death on the high seas does not implicitly bar a maritime cause of action for deaths in territorial waters because Congress' "failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act.").

Court should reject Exxon's argument that *Miles* controls this case and that Congressional silence should be construed as a deliberate and complete shield to a punitive damages remedy for reckless conduct.

The Court of Appeals below correctly concluded:

> It is reasonable to infer that had Congress meant to limit the remedies for private damage to private interests, it would have said so. The absence of any private right of action in the Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them.

In re Exxon Valdez, 270 F.3d 1215, 1231 (9th Cir. 2001).

B. Punitive Damages Do Not Frustrate the Purposes of the Clean Water Act.

Even though Congress did not "speak directly" to the availability of punitive damages in the CWA, Exxon contends that punitive damages would somehow frustrate the Act's purpose. However, this is not a case like *City of Milwaukee*, *Sea Clammers* or *Ouellette,* each of which involved the Act's detailed section 402 program for regulating permitted discharges from point sources and potential interference through common law of expressly permitted activities. The CWA's oil pollution provisions do *not* involve permitted activities and common law does not so interfere.

In *Sea Clammers*, the Court noted that respondents' claims "appear to fall into two categories," both involving the government's administration of permits under the CWA and the Marine Protection, Research, and Sanctuaries Act (MPRSA). *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 12 (1981).[7] In other words, the specific claims in *Sea Clammers* were based on "substantive violations" of sections of the CWA and MPRSA that provide their own "comprehensive enforcement mechanisms." *Id.* at 20. The Court recognized that claims arising under other statutes or common law would be "far different." *Id.* at 21 n.31. Likewise, *Ouellette* states: "[t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act." 479 U.S. at 497.

In this case, there are no effluent standards applicable to oil spills, and Exxon could not apply for and receive a CWA permit to crash one of its supertankers against a reef. Therefore, unlike those cases involving permits for discharges, there is no opportunity for a court in this case to rebalance CWA obligations and

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[7] The main contention is that the EPA and the Army Corps of Engineers have permitted the New Jersey and New York defendants to discharge and dump pollutants in amounts that are not permitted by the Acts. In addition, they seem to allege that the New York and New Jersey defendants have violated the terms of their permits.

Id. at 12.

common law principles or rewrite rules that Congress or the implementing agencies have enacted.

When reviewing the "evident purpose" of a federal statute as part of a preemption analysis, the Court has taken care to avoid finding unnecessary conflicts. *United States v. Texas*, 507 U.S. at 536; *see, e.g., Silkwood*, 464 U.S. at 257 (punitive damages would not "frustrate any purpose" of the federal atomic energy remedial scheme); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 451 (2005) (private remedies "would seem to aid, rather than hinder" the functioning of federal pesticide law). The Court has rejected arguments that advance a false "balancing" purpose as Exxon contrives here. *See Hillsborough County v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 720 (1985) (even if local regulations restricted the national blood supply, they were not preempted because neither Congress nor the FDA had "struck a particular balance between safety and quantity," but had merely intended to "establish minimum safety standards").[8]

[8] S*ee also Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003) ("We take it as true that Congress wanted to reduce pollution caused by motor vehicles, but at the same time did not want to harm the nation's economy by causing gasoline prices to rise too much. But saying that Congress might not have wanted to cause a substantial increase in gasoline prices is not the same as saying that assuring inexpensive gasoline was a goal of the Act.").

In *United States v. Texas*, the Court recognized that the Federal Debt Collection Act was passed "in order to strengthen the Government's hand in collecting its debts," but under the reading proposed by respondents, it "would have the anomalous effect of placing delinquent States in a position where they had less incentive to pay their debts to the Federal Government than they had prior to its passage." 507 U.S. at 536-37.[9]

The same logic holds here. Congress passed the CWA to restore and maintain water quality. Exxon misconstrues the statute in ways that would have the anomalous effect of weakening overall incentives to keep clean water clean. *See* S. Rep. No. 101-94, at 7 (preemption of state oil pollution laws might result in "a decrease in the degree of protection from oil spill damage, rather than an increase"). The Court should reject Exxon's preemption argument as contrary to the CWA's purposes and because Exxon has not demonstrated that punitive damages would result in "irreconcilable conflict" or would otherwise "frustrate the objectives" of federal law. *Silkwood*, 464 U.S. at 256.

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[9] Chief Justice Rehnquist's opinion in *United States v. Texas,* 507 U.S. at 534, rested in part upon maritime law, *Mobil Oil v. Higginbotham*, and CWA case law, *City of Milwaukee v. Illinois*.

III. Federal Environmental Laws Do Not "Wipe Out" Common Law Tort Remedies in Cases Involving Pollution.

Congress passes environmental laws to enhance environmental protection, not to "wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (Posner, J.) (discussing the Comprehensive Environmental Response, Compensation, and Liability Act, "CERCLA").

Congress typically designs federal environmental laws to work in combination with existing common law tort remedies. CERCLA, for example, preempts certain types of claims – e.g., contribution and indemnity – for which the Act specifically provides a private cause of action, but "preserve[s] to victims of toxic wastes the other remedies they may have under federal or state law." *PMC, Inc.*, 151 F.3d at 617. Thus, courts regularly uphold common law remedies in toxic tort cases for damages to persons or property. *See*, *e.g.*, *Satsky v. Paramount Commc'ns*, 7 F.3d 1464, 1470 (10th Cir. 1993) (CERCLA does not cover private property); *In re Cropwell Leasing Co. v. NMS, Inc.*, 5 F.3d 899, 901 (5th Cir. 1993) (traditional maritime claims not barred by CERCLA); *Alabama v. Ala. Wood Treating Corp.*, 2006 U.S. Dist. LEXIS 37372 at *43 (S.D. Ala. 2006) (punitive damages not barred by CERCLA).

The same complementary framework exists in other federal environmental statutory contexts. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984) (Federal Insecticide, Fungicide and Rodenticide Act would preempt state damage actions "only if FIFRA were viewed not as a regulatory statute aimed at protecting citizens from the hazards of modern pesticides, but rather as an affirmative subsidization of the pesticide industry"); *Bates,* 544 U.S. at 450-51 (private remedies "would seem to aid, rather than hinder, the functioning of FIFRA"); *Wilson v. Chevron Chem. Co.*, 1986 U.S. Dist. LEXIS 16368 (S.D.N.Y 1986) (punitive damage awards not preempted by FIFRA); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472 (6th Cir. 2004) (Clean Air Act does not foreclose companion punitive damage claims under common law); *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 457 F. Supp. 2d 324 (S.D.N.Y. 2006) (Clean Air Act does not preempt common law remedies, despite comprehensive federal Reformulated Gasoline Program); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1284 (W.D. Tex. 1992) (preemption of private damage claims "is clearly not intended under, and would not further the goals of, the Clean Air Act").

Plaintiffs' claims here bear the same relationship to the CWA as toxic tort claims do to CERCLA. They neither duplicate any statutory cause of action, nor do they interfere with any statutory purpose. Thus, courts can and often do award punitive damages for private torts that involve water pollution. *See, e.g.,*

Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir. 1999) (polluting stream with acidic water); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188 (6th Cir. 1988) (contaminating water supply); *Knabe v. Nat'l Supply Div.*, 592 F.2d 841 (5th Cir. 1979) (dumping industrial waste); *Doralee Estates, Inc. v. Cities Servs. Oil Co.*, 569 F.2d 716 (2d Cir. 1977) (spilling oil).[10]

In this case, the "relevant misconduct" – indeed, the "critical factor" – was Exxon's failure to remove Captain Hazelwood from command. Pet. App. 22a, 155a-156a. Leaving a relapsed alcoholic in charge of a supertanker set in motion a series of events that ultimately resulted in a massive and catastrophic oil spill from the *Exxon Valdez*. Consequently, the fishing grounds were closed, and the plaintiffs incurred enormous economic harm.

By enacting the Clean Water Act, Congress did not intend to immunize defendants like Exxon from maritime liability simply because one of the links in the causal chain between recklessness and harm happens to involve oil pollution. The Act does not "speak to" this matter of maritime tort law. *See Poe*,

[10] "Exemplary damages are intended to inject an additional factor into the cost-benefit calculations of companies who might otherwise find it fiscally prudent to disregard the threat of liability. To function effectively, the award must be 'of sufficient substance to 'smart' . . . the offender.'" *Doralee Estates*, 569 F.2d at 723 (quoting *Reynolds v. Pegler*, 123 F. Supp. 36, 41 (S.D.N.Y. 1954)).

782 So.2d at 1174 (holding that the Clean Water Act is "not sufficiently relevant . . . to invoke a shield against punitive damages").

Exxon's expansive preemption theory fails to account for the Act's savings clauses, and it is contrary to the presumptions against preemption and in favor of the retention of existing common law remedies. Exxon's argument, if accepted, would weaken environmental protections, threaten principles of federalism, and undermine Congress' efforts to protect the nation's waters.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

HOWARD A. LEARNER
Counsel of Record
ALBERT F. ETTINGER
BRADLEY D. KLEIN
ENVIRONMENTAL LAW & POLICY CENTER
35 East Wacker Drive, Suite 1300
Chicago, Illinois 60601
(312) 673-6500

January 28, 2008