No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

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

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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It is stunningly obvious that a judgment for $2.5 *billion*, 250 times the largest previous punitive damages judgment for unintentional conduct affirmed by a federal appellate court, which created conflicts on three different issues with five different circuits and eight decisions of this Court, is worthy of this Court's review. From the 13 amicus briefs—including briefs filed on behalf of important maritime and shipping associations in the United States and abroad, organizations representing the overwhelming majority of the nation's and the world's shipowners and tonnage, as well as other important maritime interests—it is apparent that the decision below has unsettled the entire international and domestic maritime community, wholly apart from its effect on Exxon or on oil spills.[1] Plaintiffs' objections to certiorari are meritless.

I. VICARIOUS PUNITIVE LIABILITY

Plaintiffs have no serious argument for declining review of the question whether federal maritime law allows vicarious liability for punitive damages. Contrary to plaintiffs' submission here, even the Ninth Circuit recognized both that the question is squarely presented by this case and that its decision conflicts with other circuit decisions and with a prior decision of this Court. Pet. App. 80a-86a. Plaintiffs' counter-arguments cannot withstand even minimal scrutiny.

1. Plaintiffs' primary contention is that the flawed vicarious punishment instruction in Phase I—which allowed the jury to determine that punitive damages were justified *solely on the basis of Hazelwood's own conduct*—is irrelevant because in the Phase III proceeding to determine the amount of punitive damages, the jury was entitled to "start from scratch," and the parties' arguments focused on *Exxon's* own conduct. Opp. 11-15. This argument is frivolous. The Phase I instruction is what allowed the jury to determine whether

[1] *See Owners fear legal safety net will be cut by Valdez case*, Lloyd's List, Oct. 8, 2007 (entire maritime community in "massive show of support for … Exxon Valdez appeal").

punitive damages were authorized at all. If that instruction allowed the jury to do so on an impermissible basis—*i.e.*, without finding that Exxon itself was reckless—then the entire Phase III proceeding, including its verdict, was impermissible. The district court, which designed the phased trial, correctly recognized that the "Phase III instructions did not permit the jury to revisit its Phase I liability determinations." Pet. App. 273a n.16. For the same reason, it is irrelevant that Exxon did not "request an interrogatory in Phase III to pinpoint whose conduct supported the punitive award against Exxon." Opp. 14-15.

2. Plaintiffs also argue that any error in the Phase I instruction was harmless because a properly instructed jury would have found Exxon liable for its own conduct anyway. This argument, too, is frivolous. Even the Ninth Circuit flatly rejected it. Pet. App. 88a-89a. And in a related case involving Exxon and its insurers obliquely referenced by plaintiffs themselves, a Texas jury was asked the question: "Was the grounding of the *Exxon Valdez* the result of Exxon Corporation's reckless conduct?" That jury answered the question "No." CD 7535, Exh. A at 4. Unlike the jury here, the Texas jury was not given the instruction that unlawfully attributed Hazelwood's conduct automatically to Exxon.[2]

3. Plaintiffs contend that the vicarious punishment issue lacks genuine significance to shippers and shipowners engaged in maritime commerce. Opp. 16-17. The outpouring of concern in the amicus briefs submitted on behalf of the domestic and international shipping community is dispositive proof to the contrary. Even the Maritime Law Association—which takes no position on the merits—recognizes that the conflict is exceedingly important and requires resolution. Arguing otherwise, plaintiffs first rely simply on the number

[2] The Texas jury was shown the memorandum featured by plaintiffs in which an Exxon lawyer, unfamiliar with the true facts, expressed his view that Exxon could never defeat privity or prove that it lacked knowledge of Hazelwood's conduct. Opp. 16 n.9. The jury found otherwise.

of reported federal appellate decisions explicitly addressing the issue—but of course most litigants and courts would unhesitatingly apply a clearly binding decision of this Court as the law, so it is hardly surprising that relatively few appellate courts have had occasion to issue published decisions openly discussing whether to continue to follow this Court's controlling precedent. The truth is that many cases are litigated every year involving shipping accidents occurring under circumstances that directly implicate the continuing viability of the *Amiable Nancy* rule. *Intertanko Amicus Brief* 9-13.

Plaintiffs also contend that shipowners have no cause for concern because the Limitation of Shipowners' Liability Act of 1851 already limits their liability and thus gives them adequate protection even if *Amiable Nancy* is wrong and the decision below is right. Opp. 16-17. The amicus briefs of the shipowners who operate under these regimes are, again, dispositive proof that plaintiffs badly misunderstand the legal exposure shipowners face under these very different rules. Plaintiffs' errors are many. First, the Limitation Act will not limit liability for future spills under the Oil Pollution Act ("OPA"), 33 U.S.C. § 2702 *et seq.*, *see Puerto Rico v. M/V Emily S*, 132 F.3d 818 (1st Cir. 1997), just as it did not limit liability for this spill of Alaska North Slope crude oil, *see In re the Glacier Bay*, 944 F.2d 577 (9th Cir. 1991). Second, even when the Act applies, its limits do not apply in cases involving owner negligence—because negligence alone suffices to establish privity and knowledge under the Limitation Act, *see, e.g.*, *Brister v. A.W.I., Inc.*, 946 F.2d 350, 356 (5th Cir. 1991)—leaving owners who are at most negligent exposed to vicarious punitive damages under the Ninth Circuit's rule. Third, even in cases not involving owner negligence, the Act provides shipowners no protection against vicarious punitive damages when the total claims (including vicarious punitive damages under the Ninth Circuit rule) do not exceed the value of the ship and pending freight. In short, the Limitation Act provides shipowners nowhere near the protection from vicarious punitive damages for accidents at

sea that is secured by the *Amiable Nancy* rule, and cannot solve the problems created by the Ninth Circuit's decision.

4. While not denying the circuit conflict, plaintiffs suggest it is not implicated here, because the decisions rejected by the Ninth Circuit do agree that a shipowner can be liable for the acts of an agent when the shipowner itself is reckless or complicit in the agent's wrongdoing. Opp. 17-18 & n.11. Unlike those cases, plaintiffs insist, this case involved Exxon's own misconduct. But that argument of course assumes the jury *necessarily found liability on that basis*—an insupportable assumption, as discussed above, since the jury was instructed it did not need to reach that question. Pet. 13.

5. Finally, plaintiffs contend that the vicarious punitive liability instruction was correct, despite this Court's *Amiable Nancy* decision. Opp. 18. Notably, plaintiffs never deny that *Amiable Nancy* applied here by its terms; instead they contend the decision should be overruled or its rule revised to reflect "our modern commercial era." Opp. 19. This of course is a merits argument better left for merits briefing. The critical point for present purposes is that whether *Amiable Nancy* should be overruled or revised is a question that has squarely divided the circuits, and that is ultimately answerable *only* by this Court. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). That said, it bears noting that even the "modern" rule plaintiffs point to—an employer is not vicariously liable for an employee's acts when the acts violated the employer's own enforced policies, *see, e.g.*, *Kolstad v. American Dental Ass'n*, 527 U.S. 556, 541-45 (1999)—is *not* the rule adopted by the Ninth Circuit, and *is* a rule Exxon unsuccessfully sought below. Whatever else may be disputed, in other words, there seems to be general agreement that the rule of automatic vicarious liability adopted by the Ninth Circuit both conflicts with this Court's decisions and those of other circuits, and is unsound on its own terms. It is difficult to imagine a more compelling case for certiorari.

II. JUDICIALLY-IMPLIED MARITIME REMEDIES

Plaintiffs' arguments against review of the second question presented—*viz.*, whether federal courts can properly imply a federal maritime law punitive damages remedy for maritime conduct already comprehensively governed by a federal statute—are equally meritless.

1. Plaintiff's primary argument against review of this question is that Exxon waived it at the trial court. Opp. 19-21. This is another frivolous contention. The Ninth Circuit squarely held that Exxon did *not* waive the argument, Pet. App. 74a, and not even plaintiffs deny that the Ninth Circuit passed on the argument and issued a published decision—a decision that controls all maritime conduct connected to the Ninth Circuit's vast geographic maritime jurisdiction. This Court's waiver practice "precludes a grant of certiorari only when the question presented was not pressed or passed upon below," *United States v. Williams*, 504 U.S. 36, 41 (1992); *see Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530-31 (2002); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here the issue was *both* pressed before *and* passed upon by the court of appeals.

2. Plaintiffs next assert that the judicially-implied remedies argument can be ignored because several lower courts have allowed punitive damages on *state-law* nuisance theories, as if those cases answered Exxon's claim that the Clean Water Act ("CWA"), 33 U.S.C. § 1311 *et seq.*, displaces judge-made *federal* remedies. Opp. 20-21. But the rule governing preemption of state law by federal statutes is the opposite of the rule governing displacement of federal common law. A federal statute is presumed to displace federal common law; it is presumed *not* to preempt state law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981). Plaintiffs' reference (Opp. 24) to *Askew v. American Waterways Opers., Inc.*, 411 U.S. 325 (1973), and *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), is flawed for the same reason. Those cases held, on their facts, that the state law remedies asserted were not barred by the general maritime law;

they have nothing to do with Exxon's claim here that general maritime law is displaced by a federal statute.

3. Plaintiffs also spend several pages elaborating an artificial and meaningless distinction between cases "dealing with rights" and those "dealing with remedies." Opp. 22-24. The gravamen of plaintiffs' analysis appears to be that when Congress creates statutory rights, a plaintiff asserting such rights is limited to the statutory remedies, but so long as common-law claims are allowed, plaintiffs are free to pursue any and all common-law remedies, including punitive damages. Yet again this is a merits argument with little relevance at this jurisdictional stage. In any event, there is not the slightest indication in any of the cases that the courts deciding them considered or relied on the distinction that plaintiffs attribute to them. To the contrary, the cases state and follow a much simpler principle: When Congress has provided statutory remedies for particular conduct, federal courts sail "in occupied waters," and may not impose broader remedies under federal maritime law. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). Here the operative statute is the Clean Water Act.[3] It affirmatively allows recovery for damages to property; compensatory claims are thus permitted. But although it prescribes in detail what is necessary to punish and deter oil spills, it does not create any punitive damages remedy. Federal courts must honor that statutory scheme because of the basic nature of the relationship between Congress and the federal courts. Separation of powers does not depend on the artificial distinctions plaintiffs proffer between rights and remedies.

[3] Plaintiffs elliptically suggest that the CWA addresses only *environmental* harms, and reflects no congressional judgment about remedies for *economic* harms. Opp. 23. The premise is false: The CWA does provide penalties gauged to non-environmental harms, including fines based on losses to private persons. In this very case, the Government's Sentencing Memorandum explicitly based Exxon's fine in part on the $300-plus million in claims payments made by Exxon. ER (1997) 111-14.

4. Plaintiffs finally contend that the question raised in the petition will never arise again, because Congress enacted OPA in 1990. Opp. 24. Plaintiffs elide the fact, however, that the CWA *still governs spills of oil, hazardous substances, and other pollutants*. OPA increased potential statutory civil penalties for such spills, but it did not change the fact that CWA's pre-existing scheme of civil and criminal penalties—which, like OPA's scheme, comprehensively governed oil spills and did not include private punitive damages remedies—was *already* a comprehensive congressional scheme governing oil spills. This case thus squarely presents the question whether a court may add remedies to those provided in a comprehensive federal maritime statute governing the same conduct. OPA's increases in the statutory penalties do not affect that underlying threshold question at all.[4]

III. EXCESSIVE PUNISHMENT UNDER MARITIME LAW AND DUE PROCESS

Exxon's petition also sought certiorari on the ground that the $2.5 billion award violated principles of maritime law and due process, and that this case would be an effective vehicle for confirming and clarifying those principles.

1. Remarkably, plaintiffs' main response is yet another demonstrably frivolous waiver argument. Plaintiffs contend that Exxon waived its maritime-law arguments below because Exxon supposedly "told the Ninth Circuit it need not address maritime law if it considered the due process challenge." Opp. 28. But what Exxon actually said (as plaintiffs

[4] The case plaintiffs cite to illustrate the supposed differences between the CWA and OPA—*South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000)—actually confirms the need for certiorari. *South Port* holds that OPA displaces private punitive damages remedies specifically because "*Miles* dictates deference to congressional judgment where … there is an overlap between statutory and decisional law." *Id.* at 66. That conclusion cannot be reconciled with the decision here; *South Port* thus illustrates the continuing division among courts over the proper operation of *Miles* and other cases strictly limiting courts' authority to add common-law remedies to those Congress authorized.

themselves quote it, Opp. 25) is transparently the *opposite* of what plaintiffs argue: "if the Court does not wish to reach the issue of constitutional excessiveness, 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." That statement on its face merely asserts the ordinary rule that constitutional rulings should be avoided whenever possible. No lawyer could read that language as telling the Ninth Circuit that if it *rejected* Exxon's constitutional arguments against the award, the court should then blithely ignore the maritime-law issues Exxon had raised. The court itself did not understand Exxon to be urging it to ignore maritime-law issues; and the court considered (and rejected) them on the merits. *See* Pet. App. 68a (rejecting Exxon's argument that maritime-law policies preclude punitive damages when conduct already punished and deterred); *id.* at 69a-70a (rejecting other maritime-law objections).

2. Plaintiffs also contend that Exxon's excessiveness arguments are factbound. Not so. This Court has already held that whether a punitive damages award is constitutionally excessive is a pure question of law, *see Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *Cooper*'s reasoning would apply equally to review of a punitive damages award under maritime law.

Exxon's maritime-law excessiveness arguments implicate no disputed facts. The arguments are: whether the (undisputed) massive civil and criminal sanctions and other payments have already imposed adequate punishment and deterrence; whether the (undisputed) size of the compensatory award should limit the punitive damages; whether the (undisputed) fact that the award wildly exceeds all civil penalties prescribed for the same conduct renders it unlawful; and whether the (undisputed) fact that the jury was allowed to consider the net worth of the defendant renders it unlawful. Pet. 24-27. And the basic question whether maritime law should include those standards as limits on punitive damages

is a pure question of law—one this Court can and must answer as the final arbiter of the general federal maritime law.

The same is true for Exxon's constitutional arguments. On reprehensibility, it is a pure issue of law whether the Ninth Circuit improperly considered alleged non-economic injuries plaintiffs did not litigate (and which Exxon was thus denied the opportunity to contest), as well as unrealized harm to non-plaintiffs to whom maritime law would have denied punitive damages even if they were injured. On ratio, it is a pure issue of law whether a multiplier for at most "mid range" conduct is permissible when compensatory damages are substantial. On comparable penalties, it is a pure issue of law whether punitive damages may exceed substantial and analogous legislative penalties by billions of dollars.

3. Plaintiffs contend that this Court should not address maritime-law limits on punitive damages because "no other court" has done so. Opp. 29. Plaintiffs have things backwards. The Ninth Circuit was unwilling to impose any limits, despite the "force of Exxon's arguments as logic and policy," Pet. App. 68a, precisely because this Court had not yet spoken. The lower courts' failure to address these important issues underscores the need for this Court's leadership.

4. Plaintiffs' substantive objections to Exxon's maritime-law arguments are merits arguments that warrant little attention here. Plaintiffs primarily argue that Congress has already addressed these issues through the Limitation Act, Opp. 29, an erroneous argument addressed above. They also falsely contend that the CWA fines punished only environmental harms. *See* n.3 *supra.* Beyond that, plaintiffs cannot explain why $2.5 billion in punishment—*on top of* the $3.4 billion Exxon already paid—is necessary to punish and deter Exxon's actions, especially when, as here, nobody contends that Exxon sought to achieve some corporate savings or advantage by putting its multimillion-dollar cargo at risk.

5. Plaintiffs' merits objections to Exxon's constitutional arguments deserve equally little attention at this stage.

Reprehensibility. Plaintiffs mainly argue that the award is justified because of unlitigated claims of noneconomic harm (which Exxon was deprived of the opportunity to refute), and alleged risk of injury to non-parties, such as the ship's crew. Opp. 26. But that argument only begs the question whether consideration of such unlitigated or unrealized harms is proper, especially when they would have been vigorously contested had they been litigated. The problem is most salient for the alleged safety risks to non-party crew members, who would have had no legal claims *at all* for punitive damages, even if they had *actually* been injured. Pet. 29.

Ratio. Plaintiffs focus on the fact that plaintiffs' case was certified as a class action, Opp. 27, but that makes no difference for due process analysis—the proper *total* amount for punishment and deterrence cannot vary depending on whether plaintiffs bring one suit or 32,677 suits. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991); *see* Pet. 24. Nor could 32,677 plaintiffs have sued individually and each recovered a multiple of their compensatory damages. Opp. 27. Payment of prior punitive awards must be considered in mitigation of later awards, *Haslip*, 499 U.S. at 22; *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993), and at some point they serve to reduce later recoveries. That is why a class was certified here.

Comparable penalties. Plaintiffs concede that the maximum total amount in state and federal civil penalties was $80 million. Opp. 28. They contend that the penalty *could have* been $255 million if *all* the oil had spilled, but they do not explain how even their inflated $255 million figure justifies an award *two billion dollars higher*. This guidepost reflects the deference courts owe to legislatures, and is a fundamentally important part of the due process analysis, which the Ninth Circuit and other courts have trivialized—a problem only this Court can correct. *API Amicus Brief* 10-11, 17-20.

CONCLUSION

The petition for writ of certiorari should be granted.

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