

No. 07-219

IN THE
Supreme Court of the United States

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

v.

GRANT BAKER, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Plaintiffs offer no persuasive reasons for upholding this unprecedented \$2.5 billion punitive award in the face of (1) the longstanding maritime law prohibiting vicarious punitive damages; (2) a federal statute comprehensively addressing punishment and deterrence of marine oil spills; and (3) the absence of any basis to conclude that an additional award of \$2.5 billion under judge-made federal law, on top of the \$3.4 billion Exxon has already paid in fines, restitution, and public and private compensation, is either reasonable or necessary to punish or deter the conduct here in issue. Nothing justifies the massive award here, which violates multiple precepts and policies of maritime law. It must be reversed.

I. This Court Should Not Overrule 200 Years of Maritime Law Prohibiting Vicarious Punitive Damages

A. The Vicarious Punishment Issue Is Properly Presented

1. Plaintiffs argue that any instructional error on vicarious punishment was harmless because the jury here “found that the corporation, not just the employee, was reckless.” Br. 38-39 (quoting Pet. App. 83a). Plaintiffs are wrong. The Phase I instructions on their face *required* the jury to impute Hazelwood’s recklessness to Exxon as a matter of law. App. A-1 (“[t]he reckless act or omission of a managerial agent or employee ... is held in law to be the reckless act or omission of the corporation”). Given those explicit instructions, no one can say whether the jury found that Exxon was reckless independent of Hazelwood’s acts. If the jury followed its instructions, it was not required even to reach the issue. Once the jury

found Hazelwood individually reckless (as it expressly did, Pet. App. 303a), it had *no choice* but to find Exxon vicariously reckless.

Plaintiffs' one-sided recitation of facts allegedly evidencing independent recklessness by Exxon does not advance their argument. As Exxon previously demonstrated at length in its Opposition to Plaintiffs' Conditional Cross-Petition, No. 07-276 ("OCCP"), at 15-25, plaintiffs seriously distort the record,¹ but they also miss the point: even if the jury *could* have found Exxon independently reckless, the question here is whether the jury could also have found Exxon *not* independently reckless. On this point, both the Ninth Circuit and the district court expressly agreed that reasonable jurors could have found for Exxon. Pet. App. 88a-89a (jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk"), 252a-257a (repeatedly acknowledging that "reasonable minds might draw inconsistent conclusions based on the evidence"). As both courts recognized, contrary to plaintiffs' argument here, abundant record evidence supported Exxon's position. *See* OCCP 10-25.

¹ The discussion at Br. 6-7, for instance, certainly sounds bad. But the first full paragraph is false as shown at OCCP 20. The second is false as shown at OCCP 19. The third is not from the record below, but from another case in which the jury found Exxon *not* reckless. And the fourth is misleading as shown at OCCP 20.

When it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground, “the judgment must be reversed.” *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 11 (1970); see *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993). The need to apply that rule here is patent. In a dispute between Exxon and its insurers involving substantially the same contentions and evidence, a jury not required by its instructions to impute Hazelwood’s recklessness to Exxon found that Exxon did *not* act recklessly. Dkt.7535, Exh.A at 4. After the trial here, jurors told the press that they, too, did not decide that Exxon was independently reckless, but instead relied on the challenged instruction. 1997ER638-39, 652-54. Plaintiffs would have this Court affirm a \$2.5 billion punitive award on the mere supposition that the jury would have found for them regardless, effectively denying Exxon the right to defend its conduct before a factfinder properly instructed on the requirements for liability. No principle of law permits that result.

2. Plaintiffs are equally incorrect that the Phase III instructions somehow “cured” the instructional error in Phase I. Br. 37-39. First, the Phase I instructions were what allowed the jury to determine that punitive damages were authorized at all. If those instructions allowed the jury to do so on an impermissible basis, then the entire Phase III proceeding (including its verdict) was impermissible.

Second, Phase III Instruction 20 expressly incorporated Phase I liability findings as the basis for consideration of punitive damages. App. A-3 (“[i]n Phase I of the trial, you determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless”). Instruction 20 thus imported the

Phase I error into Phase III. Pet. App. 273a n.16 (“Phase III instructions did not permit the jury to revisit its Phase I liability determinations.”).

Third, plaintiffs falsely assert that the Phase III instructions *required* the jury to base any award against Exxon on Exxon’s independent recklessness. Br. 37. Plaintiffs emphasize (Br. 38) Instruction 30, which stated, in part, that “the 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,” and also authorized jurors, in deciding whether to award punitive damages against Exxon, to consider “not just the fact that [Exxon] may have legal liability for the acts of its employees,” but also whether “corporate policymakers actually participated in or ratified” those acts, or conversely, whether the acts were by “lower-level employees” acting “contrary to corporate policy.” App. A-3.

The plain language of that instruction contradicts plaintiffs’ contention that it required the jury to find Exxon independently reckless. It states that jurors “*may*”—but therefore *need not*—consider more than “just” vicarious corporate liability as a basis for a punitive award. App. A-4. It thus presumes that a *primary* basis for any award would be vicarious liability. And the instruction further states that *if* the jury considers other factors and finds that corporate policymakers did not authorize or ratify the wrongful acts, or affirmatively prohibited them, then the jury “*may*”—but again therefore *need not*—apply this factor “in mitigation” of any punitive award it might otherwise find proper. *Id.* The instruction thus did *not* require the jury to find Exxon independently reckless, but affirmatively instructed the jury that

(1) it was free to base its punitive award against Exxon on “just the fact” that Exxon was vicariously liable for Hazelwood’s recklessness, and (2) in setting the amount, the jury was free to ignore the fact that Hazelwood’s acts directly violated Exxon’s policies.

Finally, there is no merit to any suggestion that this Court may simply presume that the jury found Exxon independently reckless based on the unprecedented size of the jury’s ultimate award. It is at least equally plausible that the jury determined the amount of its award based on plaintiffs’ arguments about Exxon’s wealth, which dominated both the evidence and the arguments in Phase III. JA1182-86, 1297-1301, 1315-20. Asserting that Exxon had earned \$5 billion in the year of the spill and enjoyed a \$20 billion increase in share value over the next five years (JA1316-17), plaintiffs argued that any award lower than \$5 billion would have no impact on Exxon (JA1316). Plaintiffs asked for just \$1 of punitive damages against Hazelwood (JA1319), but urged that any meaningful punishment and deterrence of Exxon would require an award of \$5 billion *at a bare minimum* (JA1320). The jury’s award of \$5000 against Hazelwood (much more than plaintiffs sought) and \$5 billion against Exxon (the bare minimum they sought) does not even suggest—much less prove conclusively—that the jury found Exxon independently reckless. To the contrary, it suggests that the jury awarded only the minimum plaintiffs requested because it did *not* find Exxon independently reckless.

**B. Plaintiffs Offer No Persuasive Reasons
For Abrogating The Maritime-Law Rule
Prohibiting Vicarious Punitive Damages**

1. Plaintiffs’ attempt to deny the existence of the maritime-law rule against vicarious punitive damages contradicts 200 years of unbroken maritime decisions. No maritime case has suggested that the rule of *The Amiable Nancy*, 16 U.S. 546 (1818), applies only to privateers, and this Court squarely held otherwise in *Lake Shore & M.S. Ry. v. Prentice*, 147 U.S. 101 (1893), which adopted the *Amiable Nancy* rule as the general rule applicable under pre-*Erie* federal common law:

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intention on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*[.]

Id. at 107-08; *see also* *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 541 (1999) (“this Court historically has endorsed” the rule that “agency principles limit vi-

carious liability for punitive awards,” citing both *Amiable Nancy* and *Lake Shore*).²

Likewise, plaintiffs cannot cite even one U.S. maritime-law case (other than the two recent Ninth Circuit decisions rejecting *Amiable Nancy*) that has allowed vicarious punitive damages. Plaintiffs simply misread cases like *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (“Undoubtedly, the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the [owner] for the unauthorized tort of the [ship’s master]”), *The Ludlow*, 280 F. 162, 163-64 (N.D. Fla. 1922) (owner not vicariously liable to pay punitive damages for master’s torts absent acquiescence, ratification, or authorization), and *Ralston v. The States Rights*, 20 F. Cas. 201, 210 (E.D. Pa. 1836) (no vicarious punitive damages for master’s torts when owners, though possibly negligent, were not complicit). Indeed, in *Lake Shore*, this Court cited *The States Rights* as an example of a maritime case applying the *Amiable Nancy* rule. 147 U.S. at 109.³

² Plaintiffs’ sole contrary authority is *Hopkins v. Atlantic & St. Lawrence Railroad*, 36 N.H. 9 (1857), a *non*-maritime decision from a State which, a few years later, abandoned the doctrine of punitive damages altogether. See *Fay v. Parker*, 53 N.H. 342 (1872). In *Lake Shore*, this Court expressly declined to follow *Hopkins*. 147 U.S. at 116-117.

³ Plaintiffs cite *Colegrove v. The S.S. “City of Columbia,”* 11 Haw. 693, 700-01 (1899), but that case applies pre-annexation Hawaii law—and applies even that law incorrectly, see *Duncan v. Wilder’s Steamship Co.*, 8 Haw. 411, 415 (1892) (shipowner is vicariously liable only for compensatory damages, not punitive damages, for unlawful conduct of captain, citing *Amiable Nancy*).

Notably, all of these decisions applied the rule in cases involving alleged misconduct of ships' masters. And the maritime cases uniformly *reject* plaintiffs' argument that because a master has "sole and absolute command" of the ship, his acts expose its owner to punitive damages. *Pac. Packing & Nav. Co. v. Fielding*, 136 F. 577, 580 (9th Cir. 1905) (citing *Amiable Nancy* and *Lake Shore*); see *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1147-48 (6th Cir. 1969); *McGuffie v. Transworld Drilling Co.*, 625 F. Supp. 369, 371-73 (W.D. La. 1985) (employee in charge of offshore rig).⁴

Finally, plaintiffs' assertion that no modern maritime-law treatise recognizes the *Amiable Nancy* rule is mystifying. The treatise authored by *plaintiffs' own amicus* states: "[A]dmiralty cases deny punitive damages in cases of imputed fault, holding that a principal or master cannot be liable for an agent or servant's wanton or willful misconduct unless it participated in or ratified the wrongful conduct." Schoenbaum, *Admiralty and Maritime Law* §5-17 (Supp. 2008).

2. Plaintiffs are wrong, therefore, that the vicarious punishment question requires this Court to look to state or other law as if it were formulating a new maritime-law rule on an issue of first impression. See, e.g., *E. River S.S. Co. v. Transamerica Delaval*, 476 U.S. 858 (1986). Plaintiffs instead ask this

⁴ Plaintiffs' attempt to paint Hazelwood as something more than a master (Br. 27) is meritless. Hazelwood was in charge of his vessel, but he was not in any sense senior management of Exxon Shipping Company, and was in fact subordinate to shoreside ship group operators, fleet managers, and company senior management. JA289sa.

Court to abrogate a longstanding maritime-law rule that courts have consistently and unproblematically applied for 200 years. Such a change ought to require compelling reasons, but plaintiffs do not suggest any.

Plaintiffs and their amici argue, for example, that the *Amiable Nancy* rule is anachronistic in light of modern radio communications that may facilitate shoreside supervision of shipboard operations (Br. 32-33). But this does not eliminate the rationale for the rule, as the facts of *Fuhrman*, *supra*, dramatically illustrate. Moreover, the rule against vicarious punitive damages serves other equally important maritime-law policies, such as the avoidance of arbitrary and unnecessary burdens on maritime commerce. See *Norfolk S. Ry. v Kirby*, 543 U.S. 14, 25 (2004) (the “fundamental interest giving rise to admiralty jurisdiction is the protection of maritime commerce”). And more generally, the rule vindicates the basic policy—repeatedly recognized by this Court—that punitive damages generally should not be imposed vicariously on parties who do not themselves commit wrongful acts meriting retributive punishment. *Kolstad*, 527 U.S. at 541-46; *Lake Shore*, 147 U.S. at 107-12; *Amiable Nancy*, 16 U.S. at 558-59; see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (“[u]nder ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct”).

Plaintiffs also argue that the maritime-law rule is undermined by the absence of similar vicarious liability limitations in the civil and criminal penalty provisions of marine pollution statutes like CWA and OPA, which authorize substantial penalties against oil transporters based on the wrongful acts of their

employees and agents. Plaintiffs have it backwards. The existence of modern regulatory statutes authorizing vicarious civil or criminal penalties to deter oil spills shows that there is no reason or need to relax the traditional maritime common-law rule. Moreover, regulatory penalties fundamentally differ from punitive damages in that they are capped, subject to prosecutorial discretion, and contain provisions authorizing disinterested regulators to tailor or remit penalties to reward prompt remedial action and achieve other sound regulatory objectives, as was done with Exxon’s criminal sentence in this case. JA43-59; 33 U.S.C. §1321(b)(8). Expansion of open-ended vicarious common-law punitive damages at the hands of self-interested private parties would inevitably and needlessly interfere with regulators’ ability to implement *calibrated* penalties in the public interest.

Plaintiffs and their amici argue that maritime law is out of step with the land-based law in the various states. But “jurisdictions disagree over whether and how to limit vicarious liability for punitive damages.” *Kolstad*, 527 U.S. at 542. And a number of them follow the *Amiable Nancy* rule or something close to it. For example, as then-Judge Scalia wrote:

[T]he purpose of punitive damages is to punish a wrongdoer, and thus to deter similar action in the future. That purpose is not served by the imposition of such charges upon a person who is responsible for the tort only vicariously, without any personal blame. Thus, in the District of Columbia, a principal will not be held liable for punitive damages for his agent’s conduct without a showing that he “participated in

the doing of such wrongful act or had previously authorized or subsequently ratified it with full knowledge of the facts.”

Jordan v. Medley, 711 F.2d 211, 216 (D.C. Cir. 1983).⁵

Moreover, the stated policy reason for adopting a more expansive rule of vicarious punishment—to encourage corporations to exercise care in selecting managerial agents (Br. 32)—has no force in this context. The existing maritime-law rule already allows punitive damages against principals who *recklessly* engage unfit agents. Plaintiffs’ proposed change would effectively impose vicarious punitive damages for faultless, or at most negligent, engagement of unfit agents. There is no legitimate retributive purpose for punishment based on mere negligence, *see Smith v. Wade*, 461 U.S. 30, 43 (1983), so the purpose must be deterrence. But neither plaintiffs nor their amici suggest any reason why liability for compensatory damages—and in the oil spill context, substantial vicarious civil and criminal penalties, as well as

⁵ See also *Exxon* Br. 22 n.7; *Bulgo v. Munoz*, 853 F.2d 710, 716 (9th Cir. 1988) (Hawaii law); Kan. Stat. Ann. §60-3701(d)(1); Ky. Rev. Stat. Ann. §411.184(3); *Shoucair v. Brown University*, 917 A.2d 418, 434-35 (R.I. 2007); *Freeman v. Sproles*, 131 S.E.2d 410, 414 (Va. 1963).

Further, most of the amici States would disallow the punitive damages award imposed here. One prohibits punitive damages altogether, several others authorize them by statute only in circumstances not present here, and most—including *Alaska*—enforce protections (such as capping their amount or requiring proof by clear and convincing evidence) that *Exxon* was denied here. Kircher & Wiseman, *Punitive Damages: Law & Practice* §21:15-16 (2007); Blatt et al., *Punitive Damages: State-by-State Guide to Law & Practice* §3:2 (2008); American Law of Products Liability 3d §60:97 (2008).

massive financial losses and cleanup costs—do not already provide more than adequate incentives for care in hiring. The only practical consequence of relaxing the traditional maritime-law rule here would be to confer on fully-compensated plaintiffs an enormous windfall at the expense of a defendant who has already paid billions in damages and penalties. That is not a sufficient reason to change 200 years of well-considered maritime law.

3. Finally, plaintiffs do not explain why, if the Court decides to modify the longstanding maritime rule, it should go further than the court in *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), which allowed punitive damages for a shipowner’s failure to implement any policy directives guiding the conduct of the ship’s master. *Id.* at 705 & n.10. That approach—essentially the rule adopted in *Kolstad*, 527 U.S. at 539-46—would at least focus the inquiry on the existence of adequately enforced policies, the only practical means by which corporations can manage employee conduct.⁶

⁶ See also *White v. Ultramar, Inc.*, 21 Cal.4th 563, 573 (1999) (limiting vicarious punitive damages to employees with “substantial independent authority and judgment over ... corporate policy”). As *CEH* and *Ultramar* illustrate, *Kolstad*’s focus on conduct at a *policymaking* level was not unique to anti-discrimination contexts (Br. 35), but was based on a general recognition that punishment should not be imposed vicariously on parties personally innocent of wrongdoing. 527 U.S. at 544.

II. Punitive Damages Are Not Available Under Federal Maritime Law For Oil Discharges Governed By The CWA

A. The CWA Issue Is Properly Presented

Plaintiffs' renewed waiver argument (Br. 39-44) comes to nothing. "[I]n granting certiorari," this Court "necessarily considered and rejected" the argument. *United States v. Williams*, 504 U.S. 36, 40 (1992). Plaintiffs offer no basis for reconsidering that judgment "at this late stage." *Id.*

As plaintiffs concede, the CWA issue was *both* "pressed" *and* "passed on" in the Ninth Circuit—all that matters for this Court's review. *Id.* at 41. Their newly-asserted claim that the Ninth Circuit had no "power" to pass on the issue is incorrect. *Unitherm Food Sys. Co. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), holds only that non-compliance with Rule 50 precludes appellate review based on *sufficiency of the evidence*. *Id.* at 404-07. The CWA issue presented a pure question of law, unrelated to the evidence. Appellate courts have discretion to review such questions even when not raised in the district court at all. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (review is "left primarily to the discretion of the courts of appeals"); 28 U.S.C. §2106 (appellate court may "affirm, modify, vacate, set aside or reverse any judgment," or order such relief "as may be just under the circumstances").

Nor can plaintiffs seriously claim that the Ninth Circuit abused that discretion. As the panel noted, Exxon "clearly and consistently" put the general question of statutory displacement before the district court, and tendered its CWA-specific motion "before the entry of judgment." Pet. App. 74a. Indeed, the

district court denied leave to file the motion after plaintiffs argued that the court had already ruled on the issue. *Id.* at 73a-74a; BIO App. 33a. The Ninth Circuit had ample basis to conclude that the “the issue should not be treated as waived,” both because the equities self-evidently favored Exxon and, independently, because “the issue is massive in its significance to the parties and is purely one of law, which requires no further development in the district court.” Pet. App. 74a.⁷

B. The CWA Displaces Private Punitive Damages Remedies For Maritime Oil Spills

Plaintiffs likewise have no persuasive support for their contention that the CWA’s calibrated scheme of civil and criminal sanctions and penalties—a comprehensive public enforcement scheme specifically addressed to punishing and deterring marine oil spills—leaves room for arbitrary imposition of open-ended punitive damages, under judge-made federal maritime law, for the very same spills.

⁷ Professor Miller urges this Court to rule that the Ninth Circuit abused its discretion merely because the trial court declined to address Exxon’s motion. Miller Br. 17. This too is unsupportable. An appellate court may take into account a district court’s reasons for refusing to consider an argument, but here the district court gave no reasons. BIO App. 35a. Further, the tendered issue had nothing to do with the trial court’s familiarity with the record or docket (Miller Br. 21-22), but was rather about the law that governs the entire case, here affecting the validity of a multibillion-dollar claim. And since the Ninth Circuit would have had discretion to address such an issue if Exxon had never tendered it to the district court *at all*, it plainly could have no *less* discretion to do so when the issue *was* tendered.

1. Plaintiffs first contend that notwithstanding the CWA, the Trans-Alaska Pipeline Authorization Act (“TAPAA”) expressly saves federal common-law punitive damages for Alaska oil spills (Br. 45-46). Plaintiffs do not explain how a 1973 statute could revive a remedy that a 1972 statute displaced. But TAPAA’s provisions make plain that it speaks to compensation only and, unlike the CWA, does not address *punishment* at all.

TAPAA creates strict liability up to \$100 million for “all damages ... *sustained*” from an oil discharge. 43 U.S.C. §1653(c)(1). It does not authorize fault-based claims for punitive damages, but only no-fault claims for “damages sustained.” *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989) (provision for “‘damage sustained’ is entirely compensatory in tone.... Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not ‘sustained’ by the victim”), *rev’d in part on other grounds*, 499 U.S. 530 (1991). The savings clause provides that if strict liability claims exceed \$100 million, the “total claims ... shall be reduced proportionately,” and the “unpaid portion of any claim may be asserted and adjudicated under other applicable law.” 43 U.S.C. §1653(c)(3). By its plain terms, this clause preserves only the “unpaid portion” of claims otherwise available under TAPAA, *i.e.*, only *compensatory* claims for “damages sustained.”

2. Plaintiffs also argue that the CWA does not displace private punitive damages because it does not address private tort remedies for marine oil spills. Br. 48, 50. But again plaintiffs miss the point. The CWA does not create (as TAPAA does) a statutory remedy for compensatory damages from

marine oil spills. But it does comprehensively address the *punishment and deterrence* of such spills, and in so doing displaces any judge-made maritime-law punitive damages. Exxon Br. 31-41.

Plaintiffs insist that private punitive damages redress “different harm[]” (Br. 45) than the CWA, but this simply misunderstands the function of punitive damages. They are not awarded to compensate particular *harms*—but to punish particular *conduct*. “The focus is on the character of the tortfeasor’s conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.” *Smith*, 461 U.S. at 54. Both the CWA and the punitive award here focused on “the character of [Exxon’s] conduct,” *i.e.*, what penalties were appropriate, beyond compensation, to punish and deter that conduct. The CWA provided a clear legislative answer to that question; the jury below provided a radically different answer completely at odds with the CWA’s punitive framework.

For the same reasons, plaintiffs cannot tenably argue that wildcard punitive-damages fill a “prosecutorial gap” (Br. 51) in the CWA. Plaintiffs assert that the private economic harms caused by reckless oil spills “may take years to measure.” Br. 50. But the *conduct* can be investigated and addressed promptly by the Government, which is charged under the CWA with investigating conduct and seeking penalties it deems warranted for punishment and deterrence in the public interest. The extent of private harms may sometimes take longer to establish, but once established those harms are fully redressed by *compensation*. Private punitive damages—on top of substantial penalties the Government has already

obtained for the same conduct—serve no identifiable public interest whatsoever.⁸

Moreover, the private harms here did not take years to measure—Exxon immediately paid out \$300 million to compensate fishermen for lost harvests. OCCP 5. The 1991 CWA settlement and criminal sentence specifically accounted for those payments, both in calculating the sentence and determining the remittitur. JA44-56. The penalty deemed by Alaska, the United States, and the district court to be *fully sufficient* punishment and deterrence was \$150 million (remitted to \$25 million). Exxon Br. 5-6. Additional settlements and payments (including the \$20 million net damages awarded at trial) brought the final private harm tally up from \$300 million to \$500 million. Yet the “appropriate” punishment for the same conduct somehow then rocketed from \$150 million to \$2.5 billion. That unexplained—and unexplainable—leap is irreconcilable with the calibrated interest in punishment and deterrence reflected in the CWA’s penalty provisions.

3. Equally baseless is plaintiffs’ argument that CWA displacement of judge-made federal law is “really just preemption” (Br. 46) and therefore governed by cases analyzing federal preemption of *state-*

⁸ Further, the CWA does not punish and deter oil spills just to protect “the environment.” Br. 48. The statute’s oil spill provisions are equally intended to protect “public health and welfare” and “private property.” 33 U.S.C. §1321(b)(4). Likewise, that other federal statutes may authorize punishment of the same conduct (Br. 50) does not show that private punitive damages are justified. On the contrary, it shows that Congress has provided numerous public enforcement tools for punishing and deterring oil spills, further undermining any role for private punitive damages.

law claims.⁹ When the issue is whether a federal statute preempts state law, federalism principles ordinarily dictate a presumption against preemption. But when the issue is whether a federal statute displaces *federal* common law—including maritime law—there are no federalism interests whatsoever, and separation of powers principles dictate the opposite presumption—that federal statutes displace judge-made federal law. Exxon Br. 29-30.

Likewise, plaintiffs wrongly suggest that unless a federal statute entirely abrogates a federal maritime-law cause of action, a party entitled to pursue such a cause of action “may seek the full panoply of customarily available remedies.” Br. 47. Both *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), held otherwise, ruling that plaintiffs who still possessed parallel maritime-law claims could *not* seek remedies beyond those provided by federal statutes. Exxon Br. 34-35. Plaintiffs have no answer to *Miles* and *Mobil*, or to the many circuit-court decisions that have applied the rule to preclude discrete remedies in maritime-law actions—including punitive damages. *Id.* at 36 n.12.¹⁰

Indeed, plaintiffs’ assertion that a party with a cause of action may seek all possible relief does not

⁹ *E.g.*, *Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238 (1984); *Askew v. Am. Waterways Ops.*, 411 U.S. 325 (1973).

¹⁰ Plaintiffs also cite cases holding that a federal statute providing remedies against one party does not displace a federal common-law remedy against a *different* party. Br. 49. Those cases are irrelevant here, as plaintiffs seek a sanction against Exxon for the same conduct punished by the CWA.

state the correct rule even outside maritime law. A party has only a “presumption” of entitlement to seek “appropriate relief.” *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992). As to judicially-created federal causes of action, the scope of “appropriate” remedies is necessarily limited by Congress’s actions. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284-90 (1998).

4. Plaintiffs also err in asserting (Br. 50) that the CWA’s savings clause preserves punitive-damage claims as “obligations ... under any provision of law for damages to ... property.” 33 U.S.C. § 1321(o). Plaintiffs’ punitive-damage claims are not based on property damage, but on economic losses. And punitive damages in any event are not “for” damage to property—they are “for” punishing and deterring the conduct that caused the damage. *See O’Gilvie v. United States*, 519 U.S. 79, 83 (1996) (punitive damages are not awarded “on account of” personal injury, but are awarded “on account of” need to punish and deter defendant’s conduct). Nor are punitive damages an “obligation”—they are never a matter of right. Exxon Br. 37. Plaintiffs argue (Br. 50) that punitive damages *become* an “obligation” once a jury awards them, but under the statute the obligation must arise from a “provision of law”—not a jury verdict. And plaintiffs cite no “provision of law”—*i.e.*, statute or regulation (Exxon Br. 38 n.14)—creating such an “obligation.” Nothing about the savings clause saves punitive damages.

5. Finally, plaintiffs mischaracterize Exxon’s position on this Court’s authority to allow punitive damages for oil spills in light of the CWA. Exxon does not contend that punitive damages are displaced because of “the simple fact” that criminal

penalties for oil spills exist. Br. 51. Unlike generic criminal statutes, the CWA is both targeted and comprehensive: it deals specifically with marine oil spills, and provides a wide range of civil and criminal enforcement measures designed to provide the Government flexibility in punishing and deterring such spills while rewarding cleanup and remediation. It thus reflects very significant policy judgments concerning a very specific subject: the extent—and limits—of appropriate punitive measures for marine oil spills.

Allowing arbitrary and unpredictable punitive damages for those same spills would completely obliterate those policy judgments. And for no good policy reason. Punitive damages have never had a significant role in the regulation of maritime commerce—no maritime-law statute authorizes them, and when Congress enacted the CWA, only a handful of cases had awarded them.¹¹ All involved malicious actions directed at the person or property of another. None involved accidental conduct. And

¹¹ In the 200 years before the 1970 enactment of the CWA, only *four* U.S. maritime-law cases awarded punitive damages. See *Yankee v. Gallagher*, 30 F. Cas. 781 (C.C.N.D. Cal. 1859) (false imprisonment); *Morrison v. The John L. Stephens*, 17 F. Cas. 838 (N.D. Cal. 1861) (deliberate placement of man in married couple's stateroom); *Roza v. Smith*, 65 F.2d 592 (N.D. Cal. 1895) (false imprisonment); *The Dredge General*, 1944 A.M.C. 948 (S.D. Fla. 1944) (malicious destruction of a cable). An article cited by plaintiffs notes eight additional cases, but the opinions do not support the conclusion that punitive damages were awarded. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73 (1997). Including them, however, only brings the total to 12 known maritime-law punitive damage awards in 200 years—and still none involving oil spills or purely economic losses.

none arose from claims seeking purely economic losses. See *Barber Lines A/S v. M/V Dona Maru*, 764 F.2d 50, 51-57 (1st Cir. 1985) (Breyer, J.) (explaining why maritime-law and common-law tort principles generally preclude recovery for purely economic losses). In the highly unlikely event that Congress thought punitive damage awards could usefully supplement the CWA's calibrated enforcement scheme, it could have said so. It did not. Or Congress could have said so when it enacted TAPAA, which provided expansive compensatory remedies for TAPS oil spills. It did not. Or Congress could have said so when it enacted OPA, the *entire purpose* of which was to significantly increase *punishment* for reckless marine oil spills. Again it did not.

This Court should not supplant Congress's policy judgments about the appropriate measures for punishing and deterring oil spills with the Ninth Circuit's opinion that a punitive-damages lottery would better accomplish the objectives of maritime law.

III. Maritime Law Does Not Permit This Award

Plaintiffs and their amici offer no plausible argument that \$2.5 billion is allowable under the applicable law and facts. Indeed, on plaintiffs' view, both law *and* facts are irrelevant. Plaintiffs argue that *no* legal standard other than due process ever constrains the amount of punishment a jury may impose. Br. 57. And they ask this Court to affirm the jury award based on contested evidence that the jury never considered, about factual matters the jury was instructed to ignore, drawn from sources never subjected to adversarial scrutiny, concerning issues not in the case.

Plaintiffs’ approach is not law but caprice. This case demonstrates that when there are no meaningful standards for punitive damages, juries render arbitrary awards that—as the briefs of plaintiffs and their amici illustrate—cannot be defended on the basis of the trial record.

A. The Award Must Be Reviewed Under Maritime-Law Standards

Misreading mid-19th-century cases, plaintiffs contend that the sole constraint on punitive damages apart from due process is whether a jury’s award is supported by “substantial evidence.” Br. 54.

This Court rejected plaintiffs’ view of common-law procedure in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). “Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.” *Id.* at 421. Even the seemingly deferential common-law “passion and prejudice” review was, in practice, *substantive* review for excessiveness: “Judges would infer passion, prejudice, or partiality from the size of the award.” *Id.* at 425. Federal and state courts today routinely conduct this two-tier review, reducing awards under applicable federal or state law before considering constitutional standards. Exxon Br. 44-45; Chamber Br. 19-20; PLAC Br. 5, 13.

This Court has also rejected plaintiffs’ contention that punitive damages must be upheld if supported by “substantial evidence.” *See Oberg*, 512 U.S. at 429. That standard applies to review of *factual* determinations, *e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999), but “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury,” *Cooper Industries*,

Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) (quoting *Gasperini v. Center for Humanities*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

Contrary to plaintiffs’ suggestion that an abuse-of-discretion standard applies to non-constitutional review (Br. 53), this Court has repeatedly explained that punitive damages must be subject to “[e]xacting appellate review” to ensure that the award “is based upon an ‘application of law, rather than a decision-maker’s caprice.’” *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); see *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991). Substantive governing law must be applied to “constrain[] ... a jury or court’s discretion, and thus protect[] against purely arbitrary behavior.” *BMW of N. Am. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring). And even if abuse-of-discretion review were nominally the correct standard, “it is a familiar ... maxim that deems an error of law an abuse of discretion,” *Gasperini*, 518 U.S. at 448 (Stevens, J., dissenting), and “if an award exceeds what is lawful, legal error has occurred and may be corrected,” *id.* at 443 n.2.¹²

¹² The Limitation Act obviously does not prohibit admiralty courts from exercising their common-law authority to eliminate or reduce excessive punitive damages. Br. 55-56. The Act is not the sole principle of limitation in maritime law; to the contrary, it is but one of *many* that reflect the fundamental maritime-law policy of limiting legal liabilities associated with sea-going commerce, in order to protect and promote (not punish) investment in this critically important but very dangerous commercial activity. Transp. Inst. Br. 11-25; see *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 270 (1972) (“[t]hrough long experience, the law of the sea ... is concerned with ... limitation of liability”).

B. Maritime-Law Standards Prohibit This Award

This Court's cases recognize that the only purpose of punitive damages is to punish and deter the defendant's conduct. *See State Farm*, 538 U.S. at 416; *Smith*, 461 U.S. at 54; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128, 132-33 (1956). Ensuring that punitive damages do not exceed what is necessary to punish and deter is especially important in the maritime-law context, since maritime policies of uniformity, predictability, and liability limitation (Exxon Br. 46) are fundamentally at odds with inherently unpredictable, erratic, and excessive punitive damage awards. *Gertz*, 418 U.S. at 350; *Haslip*, 499 U.S. at 42 (Kennedy, J., concurring).

Plaintiffs have not shown that *any* punitive damages are necessary to provide punishment and deterrence “over and above that provided by” the \$3.4 billion Exxon has already paid as a result of the spill. *Smith*, 461 U.S. at 54. They certainly have not explained why *\$2.5 billion more* is necessary for punishment and deterrence. And in hundreds of pages of briefs, plaintiffs and their amici cite *not one precedent* awarding punitive damages under maritime law for an accident not involving intentional harm to person or property, or where the defendant's conduct earned it not a single additional dollar. Nor do they cite any maritime-law case awarding punitive damages to plaintiffs who suffered only consequential economic losses. The award is completely without justification or precedent.

1. *The Award Cannot Be Justified By Legally And Factually Baseless Extra-Record Harms The Jury Was Instructed To Ignore*

Plaintiffs' main argument is that \$2.5 billion will compensate them for non-compensable emotional and remote economic harms, and will punish harms to the environment and various non-parties, including owners of unoiled property and Alaska Natives. Br. 62-63; Ak. Br. 5-10, 17; Sociologists Br. 3-18; Natural Scientists Br. 7-36; NCAI Br. 12-32; PWS RCAC Br. 12-19. This is indefensible. At least since the 1893 *Lake Shore* decision, this Court has rejected the idea that punitive damages are awardable as *de facto* compensation for non-cognizable injuries. 147 U.S. at 107-08; see *Cooper*, 532 U.S. at 437 n.11; *O'Gilvie*, 519 U.S. at 84; *City of Newport*, 453 U.S. at 266; *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 & n.14 (1979). The jury was instructed to assume that all plaintiffs had been fully compensated, and *not* to award punitive damages either to compensate plaintiffs or remedy environmental harms. BIO App. 14a, 16a.

And it bears emphasis that plaintiffs have, in fact, been *fully* compensated for *all* their economic losses. OCCP 5-8. Plaintiffs falsely assert that "Exxon made some compensatory payments to some commercial fishermen, but it refused to pay anything for most of the harm it caused." Br. 12. In fact, Exxon's claims program *pre-paid* most losses, so they were never suffered at all, and the jury *rejected* most of the rest of plaintiffs' claimed economic losses.¹³

¹³ Plaintiffs claim they were not compensated for fishing losses after 1989. Br. 63; Ak. Br. 18. But plaintiffs tried those claims before the jury and largely lost them. JA1404-07. As

Exxon’s claims program thus paid *96% of all required compensation* before judgment here. OCCP 5-7. So when plaintiffs complain about lack of compensation, they are complaining almost entirely about compensation for claims that are *factually or legally baseless*.

This Court rejected one key premise of plaintiffs and their amici—that a punitive damage award can be justified on the basis of harms to parties not before the Court—in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (“we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others”). The problem is even worse here because, unlike in *Philip Morris*, the alleged injuries to non-parties *were not even litigated before the jury*. See Exxon’s Opposition to Alaska’s Motion for Divided Argument [“Opp. Div. Arg.”] 4. *Philip Morris* rests on the unfairness of punishing a defendant based on charges it has no opportunity to defend, 127 S. Ct. at 1063; massive monetary punishment on the basis of “facts” never addressed by the defendant *and* never considered by the jury would make a mockery of due process. Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000) (any fact that increases punishment for crime must be determined by jury).

The same principle applies to unproven “harms” to plaintiffs themselves. Plaintiffs asserted claims, based on methodologically and statistically worthless evidence (*see* Dkt.7535), for emotional injuries stemming from lost fishing income, and for more remote economic losses. The lower courts held those claims

the Alaska Attorney General stated in 1991: “[T]he fish came back to Prince William Sound.” JA1538.

not cognizable. JA1380, 1389; Pet. App. 115a-116a. Accordingly, the jury *never heard any evidence* about them. Punitive damages cannot be justified to force Exxon to “internalize” (Br. 69) the costs of emotional and remote injuries the jury never considered, and which plaintiffs could never have proven.

Moreover, and contrary to plaintiffs’ contention that punitive damages are needed to make up for specially restrictive rules of maritime law, both courts below held that plaintiffs’ claims for emotional injuries and remote economic losses would have been denied under the law of *any* jurisdiction. The emotional-distress claims were dismissed (JA1389) under the federal common-law rule identified in *Consolidated Rail Corp. v. Gottschalk*, 512 U.S. 532 (1994), a non-maritime case. Plaintiffs did not even appeal. OCCP 6-7. Economic-loss claims based on the “stigma” associated with Prince William Sound were dismissed as “too remote” under standard common-law causation requirements. Pet. App. 116; JA1381 n.13. Alaska Natives’ claims for “cultural” losses were likewise rejected under standard common-law principles. *In re Exxon Valdez*, 104 F.3d 1196, 1197-98 (9th Cir. 1997). Maritime law thus imposed no unique restrictions on plaintiffs’ recoveries.¹⁴

¹⁴ If anything, plaintiffs’ recovery was uniquely generous. Fishermen recovered for purely economic losses, even though the common law generally “den[ies] plaintiffs compensation for their consequential or ‘pure’ economic loss” when they “cannot connect [their own] physical injury or property damage to the acts or omission of defendants.” Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 Ariz. L. Rev. 773, 773 (2006); see *Dona Maru*, 754 F.2d at 54-56; 532 Madison Ave. *Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1102-03 (N.Y. 2001); Pet. App. 112a.

Finally, as both courts below also held, environmental harms have no relevance here. The State settled and released them for full compensation, and the jury was instructed not to consider them. Pet. App. 59a; BIO App. 16a; Opp. Div. Arg. 1-4. Amici’s arguments about environmental harms thus rely *entirely* on extra-record assertions. And they are exaggerated and often false to boot. The State’s own authoritative study of the continuing effects of the spill—ignored by most amici—actually shows that there are *no significant continuing environmental effects from the spill*. *Id.* at 3 n.2 (quoting report’s findings). There is no basis for providing fully-compensated economic-loss plaintiffs an additional windfall to account for the State’s own fully-compensated environmental injuries.

2. *No Award On Top Of \$3.4 Billion Is Necessary To Punish And Deter Exxon*

The \$3.4 billion Exxon has already paid is enough to deter anyone from anything. Punitive damages are economically irrational when the tortfeasor has already borne the costs of wrongdoing and there was no potential profit from the conduct and no likelihood of escaping detection. Exxon Br. 53-54. Plaintiffs do not really disagree. Their real argument is that deterrence is irrelevant. It “should suffice to respond,” they say, that “[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.” Br. 68 (quoting *Cooper*, 532 U.S. at 439).

But no citizen or legislator has determined that maritime-law punitive damages should overdeter beneficial maritime commerce in the name of subjec-

tive and arbitrary moral condemnation. To the extent not resolved by the CWA, this policy decision must be made by this Court, guided by longstanding maritime-law policies, which do *not* “tolerate”—and indeed strongly discourage—losses in the efficiency of maritime commerce. Those policies dictate that punitive damages be awarded only when they are economically rational. As plaintiffs virtually concede, this award is not.¹⁵

The United States determined in 1991 that Exxon’s \$3 billion-plus in payments and \$150 million criminal fine was “sufficient to provide punishment and deterrence for the unintentional conduct in question.” JA49; *see* JA50; JA58-59. The Alaska Attorney General agreed, quite colorfully and passionately. JA1530-40. Plaintiffs offer no serious basis for rejecting the assessment of those senior public officials that the public purposes of punishment and deterrence were fully served by the 1991 fine and civil settlement.

Alaska now suggests that the settlement was focused on environmental harms and was not intended to settle private claims for economic losses (Ak. Br. 12). In fact the fine was deemed fully sufficient to

¹⁵ Likewise, maritime-law policies should prohibit the economically irrational practice of justifying greater punishment based on a corporate defendant’s wealth. *Gore*, 517 U.S. at 591 (Breyer, J., concurring); Exxon Br. 55; PLAC Br. 31-34. Plaintiffs say wealth “obviously” matters (Br. 66), but do not explain why. Nor do they address the opinions of this Court warning that punitive damages inherently pose an “acute danger” that juries will “use their verdicts to express biases against big businesses, particularly those without strong local presences.” *Oberg*, 512 U.S. at 432; *see Haslip*, 499 U.S. at 43 (O’Connor, J., dissenting); *Foust*, 442 U.S. at 50 n.14.

punish and deter Exxon for *all* damage, both public and private. *Supra* at 16-17. But even if Alaska were right, its argument misses the point. If both Alaska and the United States believed that a \$150 million fine, remitted to \$25 million to reward (and thereby encourage) exemplary cleanup efforts, sufficed to achieve full punishment and deterrence for the environmental damage elaborated at such great length by Alaska and other amici, it is impossible to justify \$2.5 billion more for private economic losses—losses largely compensated before they were experienced, and which pale in comparison to the environmental harms.

Plaintiffs and Alaska also try to justify the award by attacking Exxon's cleanup efforts. In fact, Exxon's efforts throughout were conducted under the direction of the Coast Guard and Alaska itself. DX3928, DX3958. The responsible federal officer testified at trial concerning Exxon's cleanup efforts:

A. I don't know of one instance in any [cleanup] plan that I submitted that Exxon did not comply with the provisions. I don't know of any.

Q. Was it your experience that Exxon consistently followed the conditions of your approvals of these plans?

A. Yes.

Q. Did Exxon do a good job of keeping you informed of its progress?

A. Absolutely they did.

Tr. 7439-40. Alaska fully agreed. DX3958 (“[E]veryone associated with the cleanup operation did a truly remarkable job These efforts coupled with that of

‘mother nature’ continue to restore the environment impacted by the spill.”). The record thus unambiguously refutes plaintiffs’ outlandish assertion that the \$2.1 billion Exxon spent in coordination with the Government was spent on “appearances” (Br. 10) rather than effective cleanup.¹⁶

Finally, mischaracterizing the evidence (OCCP 15-24), plaintiffs contend that the award is justifiable to punish Exxon for “reprehensible” conduct prior to the spill, *i.e.*, not removing Hazelwood once Exxon supposedly became aware of his off-duty drinking. Br. 58. But it is not clear the award is based on that conduct at all. API Br. 14. Given the vicarious punishment instruction, the jury could well have decided to punish Exxon *entirely* for recklessness by Hazelwood *imputed to Exxon*, and to impose an award of \$5 billion simply because Exxon could afford to pay that much. *Supra* at 1-5.

But even assuming the award was based on a finding that Exxon recklessly supervised Hazelwood,

¹⁶ Departing from the record yet again, plaintiffs cite two congressional committee reports, issued in July 1989 (four months after the spill), disparaging the initial cleanup efforts as “wholly inadequate.” Br. 10, 67. But those reports were criticizing mainly the problems caused by *Alyeska’s* inadequate response. Also mainly directed to *Alyeska’s* clean-up are Alaska’s complaints (Ak. Br. 2-3), and the isolated comment by an Exxon communications employee plaintiffs cite (Br. 10). These are meaningless compared to the later statements by the court and by the U.S. and Alaska itself about Exxon’s exemplary cleanup efforts. Exxon Br. 5-6.

Plaintiffs also assert tendentiously that “Exxon cleaned up only 13-14% of the oil.” Br. 10. But the very exhibit they cite shows that *natural processes* of evaporation and degradation quickly eliminated 82% of the oil, so that by 1991, only 3-4% remained, which continued to degrade. DX5505A.

and even accepting the most negative inferences about what Exxon knew about his conduct, this award still cannot be justified. Exxon did not intend to cause any harm, and it did not seek profit from its actions. The spill gained Exxon nothing and cost it dearly. Even if Exxon is fairly deemed reckless for its judgment about keeping Hazelwood in command, plaintiffs cannot explain why \$3.4 billion was not already enough to be sure Exxon—and anyone like Exxon—never makes an error like that again.

3. *The Award Improperly Exceeds The Maximum Civil Punishment Congress Prescribed*

Plaintiffs concede (Br. 65), as they did below, that \$80.2 million was the absolute maximum civil amount Congress and the Alaska Legislature deemed necessary to punish and deter anyone who spilled this much oil in Prince William Sound. Exxon Br. 51. The \$2.5 billion punitive damage award obviously cannot withstand comparison to that legislative judgment.

Unable to achieve their desired result with civil penalties, plaintiffs turn to potential *criminal* penalties, despite *State Farm*'s admonition that criminal penalties have "less utility." 538 U.S. at 428. Plaintiffs insist that criminal penalties are relevant because Exxon pleaded guilty, but then ignore the actual penalty deemed appropriate by both Alaska and the U.S., *i.e.*, \$150 million. Plaintiffs also commit the very error *State Farm* warned against, hypothesizing penalties for crimes that are not only "remote," 538 U.S. at 428, but *impossible*: they purport to compute a multibillion dollar maximum penalty by doubling the *same* \$500 million pecuniary loss multiple times for multiple counts (Br. 65), which is

not how sentencing works. If criminal penalties matter here because Exxon pleaded guilty, the only legitimate comparison is the actual penalty deemed appropriate by the public officials responsible for imposing criminal punishment.¹⁷

4. *Because Compensatory Damages Here Were Exceedingly “Substantial,” Punitive Damages Cannot Exceed Them*

If any punitive damages are permissible under maritime law, the award surely cannot exceed the \$500 million in total economic harm caused by the spill. Otherwise this Court’s decision in *State Farm* is meaningless. *State Farm* explains that when wrongful conduct causes only a small amount of loss, a higher ratio of punitive damages to compensatory damages may be appropriate to deter and punish the wrongful conduct. But the “converse is also true”: “When 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.

State Farm addressed the outermost due process limit; the question here is the limit imposed by maritime law, before one reaches the Constitution. The harm here is 500 times what *State Farm* considered “substantial”; unlike in *State Farm*, *id.* at 429, Exxon’s conduct was neither intentional nor aimed at profit. And of course it caused no personal injury. So if there is any meaning at all to *State Farm*’s ob-

¹⁷ Even less justifiably, plaintiffs cite civil penalties adopted *after* the spill. Br. 65-66. Those penalties obviously provided Exxon no notice *before* the spill of what standards would guide the imposition of punishment for wrongdoing, as is required for “law” to have meaning. *State Farm*, 538 U.S. at 417.

servation that a 1:1 ratio can reach the “outermost” constitutional limit, surely maritime law imposes such a limit here, given the importance for maritime law of uniformity, predictability, and protection of maritime commerce. Exxon Br. 46-47.

Plaintiffs say damages were not “substantial” because plaintiffs were aggregated into a class, the “average amount of compensated economic harm per class member ... averaged less than \$15,500,” and class certification supposedly “cannot reduce the permissible ratio of a punitive award.” Br. 60-61. This argument is fundamentally misconceived. Punitive damages are not about how much compensation individual plaintiffs receive—they focus exclusively “on the character of the *tortfeasor’s conduct*.” *Smith*, 461 U.S. at 54. No individual plaintiff has a right to any particular amount of punitive damages, or to any particular “permissible ratio.” *Id.* at 52. The permissible *total* amount for punishment and deterrence cannot vary depending on whether the defendant’s conduct is challenged in one aggregated suit or 32,677 individual suits.

Nor could 32,677 plaintiffs have sued individually and each recovered the same multiple of compensatory damages. 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, 1389-91 (3d Cir. 1993), and at some point they must reduce later recoveries. Class certification here avoided that problem, leaving the focus where it should be—on the question of what total amount of punitive damages, if any, were necessary to punish and deter the conduct that injured the class as a whole.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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**PHASE I JURY INSTRUCTIONS
ON VICARIOUS PUNITIVE DAMAGES**

JURY INSTRUCTION NO. 33

The Exxon defendants, as corporations, may act only through natural persons, and especially through their officers and employees. A corporation is not responsible for the reckless acts of all of its employees. A corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation.

JURY INSTRUCTION NO. 34

An employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business.

JURY INSTRUCTION NO. 36

Since plaintiffs in this case seek punitive damages against corporations, you must consider whether the actions of employees were in violation of direct instructions or policies of the defendant corporations.

Merely stating or publishing instructions or policies without taking diligent measures to enforce them is not enough to excuse the employer for reck-

less actions of the employee that are contrary to the employer's policy or instructions. It is a question of fact whether a corporation has taken adequate measures to enforce corporate policy in a given area. If you find that adequate measures were taken to establish and enforce the policies or directions, then an employee's acts contrary to such policies or instructions are not attributable to the employer, and you should find that the employer's conduct was not reckless.

However, if the employee was a managerial agent, then as stated in Instruction No. 33, the acts of the employee are attributable to the employer whether or not those acts are contrary to the employer's policy or instructions.

**PHASE III JURY INSTRUCTIONS
ON VICARIOUS PUNITVE DAMAGES**

JURY INSTRUCTION NO. 20

In Phase I of the trial, you determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless, and that such conduct was a legal cause of the oil spill. In Phase II of the trial, you awarded sums of money for actual damages to various commercial fishermen to compensate them for the losses legally caused by the oil spill.

The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them. An award of punitive damages may be made only if you find that plaintiffs have shown by a preponderance of the evi-

dence that an award is proper, applying the instructions that I will give you.

JURY INSTRUCTION NO. 30

In evaluating the degree of reprehensibility of a defendant's conduct, you may take into account the nature of the conduct, the duration of the conduct, and defendant's awareness that the conduct was occurring. The 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.

In considering whether an award of punitive damages is appropriate against a corporation, you may consider not just the fact that a corporation may have legal liability for the acts of its employees, but also whether corporate policy makers actually participated in or ratified the conduct that was wrongful, and whether the conduct that was wrongful was carried out by a lower-level employees [sic] and was contrary to corporate policies. If you find that corporate policy makers did not actually participate in or ratify the wrongful conduct, this is a factor that you may consider in mitigation or reduction of any award of punitive damages that you might otherwise find proper. Similarly, if you find that wrongful conduct was contrary to company policies, you may take this factor into account in mitigation or reduction of any award of punitive damages that you might otherwise find proper.

In considering whether an award of punitive damages is appropriate against a corporation, you may also consider the number of corporate employees who played some role in the conduct you are con-

sidering, the duties and responsibilities of such employees, the nature of their participation in or failure to prevent the wrongful conduct, and whether the wrongful conduct and the participation of the employees in such conduct was in conformity with corporate policies.

If you find that a number of Exxon defendants' employees participated in or failed to prevent the wrongful conduct and that those employees held positions involving significant duties and responsibilities within the corporation, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in increasing any award of punitive damages that you might otherwise find proper.

In the alternative, if you find that only a limited number of corporate employees participated in or failed to prevent the wrongful conduct and that these employees had lesser duties or responsibilities within the corporation, and that the wrongful conduct was not in conformity with corporate policies, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in mitigation of any award of punitive damages that you might otherwise find proper.
