No. 07-219

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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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BRIEF OF *AMICUS CURIAE* THE AMERICAN WATERWAYS OPERATORS, GULF INTRACOASTAL CANAL ASSOCIATION, TEXAS WATERWAY OPERATORS ASSOCIATION, AND LOUISIANA ASSOCIATION OF WATERWAY OPERATORS AND SHIPYARDS IN SUPPORT OF PETITIONERS

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The American Waterways Operators, together with the Gulf Intracoastal Canal Association, the Texas Waterway Operators Association, and the Louisiana Association of Waterway Operators and Shipyards, submits this brief as *amicus curiae* in support of the position of Petitioner Exxon Shipping Company, *et al.*, with the written consent of all parties pursuant to Sup. Ct. R. 37.2(a).[1]

INTEREST OF *AMICUS CURIAE*

The American Waterways Operators (AWO) is the national trade association for the nation's inland and coastal tugboat, towboat, and barge industry. AWO's 400 member companies employ more than 30,000 American mariners. The industry owns and operates nearly 4,000 tugboats and towboats and more than 27,000 barges throughout the country. AWO represents the largest segment of the U.S.-flag domestic fleet; its members' vessels operate on the nation's inland rivers; on the Atlantic, Pacific, and Gulf coasts; on the Great Lakes; and in ports and harbors around the country.

[1] Petitioners have submitted a blanket consent to the filing of *amicus* briefs. Respondents' consent to the filing of this *amicus* brief has been filed with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* AWO states that it authored this brief in its entirety and that no other person or entity other than AWO provided monetary support for the preparation or submission of this brief.

Each year, the tugboat, towboat, and barge industry moves more than 800 million tons of cargo and generates more than 350 billion ton-miles of freight transportation. Its vessels make nearly one million voyages annually from over 2,000 bulk cargo docks and terminals and serve 87 percent of all major U.S. cities. AWO's members account for 79 percent of all domestic waterborne freight. Their vessels carry 20 percent of the nation's coal, enough to produce 10 percent of all U.S. electricity used annually, move over 60 percent ($8.5 billion worth) of America's grain exports, and transport approximately 70 billion gallons of petroleum and petroleum products each year.

In short, the tugboat, towboat and barge industry allows the U.S. to take advantage of one of its greatest natural resources – its 25,000 mile waterway system. For over 60 years, AWO has worked to promote a better understanding of the domestic waterborne transportation industry and its contribution to the U.S. economy. To that end, AWO acts as the industry's principal advocate with policymakers and federal officials in Washington D.C., pursuing responsible legislation, regulations, and safety procedures to ensure that the nation's waterway system remains a shared economic resource and national transportation asset for all.

AWO is joined in this *amicus* brief by the Gulf Intracoastal Canal Association (GICA), the Texas Waterway Operators Association (TWOA), and the Louisiana Association of Waterway Operators and

Shipyards (LAWS). GICA is the trade association promoting inland waterways navigation on the Gulf Intracoastal Waterway and its tributaries. Its members include towboat and barge companies, shippers, waterways service providers and others with an interest in inland waterways transportation on the Gulf Coast. TWOA is the Texas trade association for the inland tugboat, towboat and barge industry. Its members provide inland waterways transportation and ship docking assistance in Texas. LAWS is the trade association of the tugboat, towboat, barge and shipyard industries in Louisiana. The members of these regional associations share AWO's paramount interest in maintaining the uniformity and predictability of the federal maritime law principles at issue in this case. For ease of reference, this brief will refer to all of the *amicus* trade associations represented herein collectively as "AWO."

As *amicus curiae*, AWO supports the petition for certiorari of the largest punitive damages award affirmed on appeal in our nation's history. Because of the Ninth Circuit's decision in this case, the owner of a tug and barge company who is blameless now faces the risk of a punitive damages award sufficient to sink his business, based solely on the reckless actions of one of his masters. A significant portion of this country's maritime commerce takes place along the coastline and waterways of the Ninth Circuit. The specter of unpredictable punitive damages awards against non-culpable vessel owners operating within this geographic expanse threatens the economic

stability of the tugboat, towboat, and barge industry. This, in turn, decreases the industry's ability to provide the safe, efficient, and environmentally responsible waterborne transportation on which the country relies. AWO's members therefore have much at stake in this case.

SUMMARY OF THE ARGUMENT

The decision below raises issues of national importance because it exposes vessel owners within a vast geographic area to punitive damages for a master's reckless conduct on proof of vicarious liability alone. By legitimizing a rule of law that conflicts with the law of every other circuit that has considered the issue and departs from 200 years of Supreme Court precedent, the Ninth Circuit's decision undermines the hallmarks of federal maritime law – uniformity and predictability. If the decision is allowed to stand, a non-culpable vessel owner who operates within the Ninth Circuit will face a threat of punitive damages that it will find nowhere else in the United States and that it never faced before in the history of maritime law. Further bolstering the need for review is the fact that the decision was based on prior Ninth Circuit dictum, which itself conflicted with prior Ninth Circuit law. AWO respectfully requests that this Court grant certiorari to resolve the clear circuit conflict and confirm the well-established maritime rule prohibiting vicarious liability for punitive damages.

In addition, the Ninth Circuit's decision presents an important separation of powers issue requiring review by this Court: whether the comprehensive remedial scheme enacted by Congress in the Clean Water Act precludes the Ninth Circuit from adding a judge-made remedy – punitive damages – to those allowed under the statute. In finding that the Clean Water Act did not preempt punitive damages in this case, the Ninth Circuit ignored well-established federal maritime principles of statutory preemption. The court's interpretation of the applicable Supreme Court jurisprudence is contrary to the interpretation of other circuits on this issue and raises important separation of powers concerns. Like the issue of vicarious liability for punitive damages, this issue reaches far beyond marine pollution cases and has enormous impact on the maritime industry.

ARGUMENT

I. The Ninth Circuit's Decision Raises Issues of National Importance Regarding Important Questions of Federal Law.

Judge Kozinski has aptly highlighted the national importance of the issue presented for certiorari:

> The panel's decision exposes owners of every vessel and port facility within our maritime jurisdiction – a staggeringly huge area – to punitive damages solely for the actions of managerial employees. Because of the harsh nature of vicarious liability, ship owners won't be able to protect themselves against

> our newfangled interpretation of maritime law through careful hiring practices. Accidents at sea happen – ships sink, collide and run aground – often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless. For centuries, companies have built their seaborne businesses on the understanding that they won't be subject to punitive damages if they "[n]either directed it, nor countenanced it, nor participated in" the wrong; the panel opinion has thrown this protection overboard.

Pet. App. 290a-291a (citation omitted).[2]

The Ninth Circuit's decision undermines national maritime policies of uniformity and predictability. Maritime courts have long recognized "that maritime law traditionally resists doctrinal change that might balkanize its uniformity and generality." *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983). Indeed, maritime law is "a conceptual body whose cardinal mark is uniformity." *Id.* This uniformity, "with [its] companion quality of predictability, [is] a prized value in the extensive underwriting of marine risks, [and is] best preserved by declining to recognize a new and distinct doctrine without assuring the completeness of its fit." *Id.* Maritime courts have also acknowledged that "the need for predictability in the

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[2] "Pet. App." refers to Exxon's Appendix to its Petition for a Writ of Certiorari which contains the Ninth Circuit decisions in this case that are referenced herein.

commercial maritime arena is arguably greater than in other areas of law and commerce." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995). As stated by the Fifth Circuit,

> This is true because there are already numerous and inherently unpredictable factors stemming from the perils of the sea and the continual – and frequently fortuitous – interaction with enterprises of other nations. It is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application.

Id.

The members of AWO rely upon the predictability and uniformity of the maritime law in order to properly assess and protect against the risks inherent in the marine transportation business. They work to avoid accidents by, among other things, employing careful hiring practices and stringent safety policies. As Judge Kozinski noted, however, accidents and mistakes happen, and vessel owners must be able to evaluate and manage such risks in order to maintain sound businesses. They enter contracts, invest in new equipment, buy insurance, and make countless other decisions based upon time-honored principles of federal maritime law. The uniformity and predictability of federal maritime law is enormously important

to the vessel owner's ability to operate in the national and international world of maritime commerce.

By ignoring 200 years of maritime precedent and placing itself at loggerheads with the First, Fifth, and Sixth Circuits, the Ninth Circuit has upset these twin aims of maritime law. Under the rule announced by the Ninth Circuit, every accident and mistake is now fraught with the possibility that the vessel owner will face unpredictable punitive damages for the actions of its captain or other shipboard officer, even if the vessel owner is blameless. For AWO members, many of whom are family-owned businesses, and most of whom do not have the substantial coffers of a Fortune 500 company, the potential liability for vicarious punitive damages poses a serious economic threat. This threat to maritime commerce is of national importance and should be addressed by this Court. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982) (recognizing that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce").

The Ninth Circuit's decision also undermines the traditional maritime principle that vessel owners should not be subject to unlimited damages when they are not culpable. The Limitation of Liability Act best exemplifies this principle. 46 U.S.C. §§ 30501-11. The Act allows a vessel owner to limit liability for damages to the value of the vessel and its freight, unless the negligence or unseaworthiness that caused the damage was within the vessel owner's privity or knowledge. *Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4

(1st Cir. 1999). Privity and knowledge require "some degree of culpable participation" from the vessel owner. *Id.* For example, there is no privity or knowledge attributed to a corporation for a captain's navigational errors. *In re Hellenic, Inc.*, 252 F.3d 391, 396 (5th Cir. 2001). Further, in situations where "the owner is so far removed from the vessel that he can exert no control over the master's conduct, he should not be held to the master's negligence." *Id.* In those situations, "the owner may rely on the master's skill and expertise." *Id.*

In contrast, the Ninth Circuit's decision allows for vicarious punitive damages without any proof that the vessel owner was at fault. It turns maritime law on its head to say that a court can subject a vessel owner to vicarious punitive damages, yet limit liability under the Limitation of Liability Act if the vessel owner lacked privity or knowledge – *i.e.*, lacked "some degree of culpable participation." The Ninth Circuit's decision is clearly at odds with the purposes behind this important and longstanding maritime statute.

The Ninth Circuit's decision threatens maritime commerce and undermines the uniformity and predictability of maritime law, thus raising issues of national importance. The decision's effect ripples far beyond the limited facts of this case, and affects every vessel owner and operator in the maritime community. As Judge Kozinski pointed out, if maritime law is to be upset, it should only be done by the final arbiter of maritime disputes:

> Shippers everywhere will be put on notice: If your vessels sail into the vast waters of the Ninth Circuit, a jury can shipwreck your operations through punitive damages and the fact that you did nothing wrong won't save you. Such major turbulence in the seascape of the law ought to come, if at all, from the Supreme Court.

Pet. App. 291a.

II. The Ninth Circuit's Decision Conflicts with the Decisions of the Other Circuits, Departs from Supreme Court Precedent, and Rests on Dictum.

When the Ninth Circuit held that a vessel owner is subject to punitive damages for a master's reckless conduct on proof of vicarious liability alone, it departed from Supreme Court maritime precedent, effectively overruled prior Ninth Circuit maritime law, and confirmed the existence of a genuine conflict of law with the other circuits. *See The Amiable Nancy*, 16 U.S. 546, 559 (1818) (holding no punitive damages against vessel owner when principal is "innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree"); *Pac. Packing & Nav. Co. v. Fielding*, 136 F. 577, 579-80 (9th Cir. 1905) (reversing an award of punitive damages against a steamship owner for captain's malice when "no evidence was given tending to show that the defendant corporation ever authorized the master to

commit any of the acts complained of, or ever in any manner ratified them"); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) ("We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident."); *In re P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (en banc) (following *Fuhrman* and holding that in maritime cases "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct"); *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995) (holding that in maritime cases there must at least be "some level of culpability" before a principal can be subject to punitive damages for an agent's reckless acts).

In affirming the district court's issuance of a jury instruction that allowed the jury to impose punitive damages on Exxon solely for vicarious liability, the Ninth Circuit concluded that it was "bound" by *Protectus Alpha Nav. Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), a decision that was complete dictum. Pet. App. 86a. In *Protectus Alpha*, a dock foreman's gross negligence destroyed a plaintiff's ship and cargo at defendant's grain facility on the Columbia River. At trial, plaintiff's argument for punitive damages was that the dock foreman (and another employee) had acted pursuant to the grain facility's company policy:

> Protectus contends that punitive damages should also be assessed against North Pacific because Anderson and Van Skike acted in accordance with company policy. North Pacific insists that Anderson and Van Skike were correct in casting off the ship because of the extreme hazard of an explosion and has commended them. Protectus asserts that a company policy that requires casting off of all burning ships regardless of the circumstances constitutes "deliberate and wanton disregard of the property of the shipowner and the lives of the crew and firemen."

Protectus Alpha Co. v. N. Pac. Grain Growers, Inc., 585 F. Supp. 1062, 1068 (D. Ore. 1984).

Relying on *The Amiable Nancy, Pacific Packing* and *Fuhrman* – the three governing cases on punitive damages awards against maritime companies – the district court in *Protectus Alpha* found that the grain facility's "approval of such conduct was unconscionable and merits the imposition of punitive damages." *Id.* at 1069. Thus, the defendant's own culpability, not that of its employees, subjected it to punitive damages, and the Ninth Circuit should have affirmed the punitive damages award on that basis.

Inexplicably, the Ninth Circuit in *Protectus Alpha* affirmed on a wholly different basis, creating a maritime rule on punitive damages without precedent. The court held that an award of punitive damages against the grain facility was proper on the basis of vicarious liability alone because the foreman was a

managerial employee acting within the scope of employment. 767 F.2d at 1386-87. No one had argued for this rule nor presented briefing on the wisdom of adopting it, because the grain facility did not challenge the finding that its company policy authorized the foreman's actions. *Id.* at 1385; Pet. App. 85a. In light of this undisputed finding of fact, there was no need for the court to consider, much less adopt, a rule that vicarious liability was alone sufficient to justify the award of punitive damages.

In creating this new maritime rule of vicarious liability for punitive damages, the court in *Protectus Alpha* relied solely on the Restatement (Second) of Torts § 909 (1979). It ignored this Court's holding in *The Amiable Nancy* and the Sixth Circuit's decision in *Fuhrman*. Although it admitted that its decision conflicted with its own decision in *Pacific Packing*, it justified this result by hypothesizing that the *Restatement* better reflects modern day corporate America. 767 F.2d at 1386. The court reasoned that its new rule imposed "a reasonable burden on the employer to know its management personnel and choose them wisely." *Id.* But this "reasonable burden" was already in place under traditional maritime law. *See, e.g., Fuhrman*, 407 F.2d at 1148 (6th Cir. 1969) ("Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him."). The Ninth Circuit also reasoned that "no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, no

recovery for more than compensatory damages could ever be had against a corporation if express authorization or ratification were always required." 767 F.2d at 1386. However, this argument was illogical given that this is exactly what the grain facility in *Protectus Alpha* had done.

Thus, the *Protectus Alpha* court's adoption of a strict vicarious liability rule for punitive damages was unnecessary to the decision, and therefore dictum. *See Best Life Assurance Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002) (defining dictum as "a statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . . '") (quoting *Black's Law Dictionary* 1100 (7th ed. 1999)). Dictum is not precedent. *See Fed. Deposit Ins. Corp. v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) ("Judicial assumptions concerning . . . issues that are not contested are not holdings.") (quoting *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990)). Because dictum is not precedent, the Ninth Circuit should not have concluded that it was "bound" by *Protectus Alpha*. *See Williams v. United States*, 289 U.S. 553, 568 (1933) (noting that "obiter dicta . . . ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

In the decision below, the Ninth Circuit conceded the possibility – if not its implications – that *Protectus Alpha* was dictum:

> Arguably *Protectus Alpha*, in relevant part, could have been dictum. Although it was not mentioned in the panel opinion,[3] there was an express company policy that required the foreman to do exactly what he did, and the company expressly ratified what the foreman had done. The district judge held the company liable for punitive damages on that basis, not on the basis that the foreman was a managerial employee. With this finding of fact, which was not challenged on appeal, there was no need to reach the question of whether the company would be vicariously liable for a managerial employee's conduct in the absence of a corporate policy authorizing and ratifying his conduct.

Pet. App. 85a (citations omitted).

Despite this concession, the Ninth Circuit claimed its hands were tied and that any challenge to *Protectus Alpha* had to be left for an en banc hearing "or to a higher court." *Id.* at 85a-86a. The court did not find that the required "irreconcilable conflict" for an en banc hearing existed between *Protectus Alpha* and *Pacific Packing*, although it was a "close" question. *Id.* Failing to find an "irreconcilable conflict," the Ninth Circuit said "[w]e cannot hold that the district

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[3] Contrary to this statement, the panel opinion stated that the damages award against the grain facility was based on the district court's "finding that the grossly negligent actions of [the employees] were done pursuant to North Pacific's policy, and approved by North Pacific after the fact." 767 F.2d at 1385.

court abused its discretion by following our decision in *Protectus Alpha*." *Id.* However, the question was whether a jury instruction correctly stated the law, and the district court's decision was therefore not entitled to deference. *See Navellier v. Sletten*, 262 F.3d 923, 944 (9th Cir. 2001) ("In civil cases, we generally review de novo the question whether a jury instruction misstates the applicable law.").

The Ninth Circuit admitted that there is a genuine inter-circuit conflict with respect to the issue of vicarious liability for punitive damages:

> *Protectus Alpha* was specifically rejected by the Fifth Circuit, and accepted only in part by the First Circuit. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995); *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (en banc). The Sixth Circuit followed *The Amiable Nancy, Lake Shore*, and this circuit's opinion in *Pacific Packing* to hold that "punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident." *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969).

Pet. App. 85a.

Indeed, the cases subsequent to *Protectus Alpha* have rejected it in favor of traditional maritime law. The First Circuit rejected *Protectus Alpha* to the extent that it does not require any culpability on the

part of the principal. 70 F.3d at 704-05. The Fifth Circuit rejected it in favor of the Sixth Circuit's rule that only authorization or ratification of an agent's reckless conduct will justify an award of punitive damages against the principal. *In re P&E Boat Rentals, Inc.*, 872 F.2d at 652. In recognizing the conflict among the circuits and explicitly rejecting *Protectus Alpha*, the Fifth Circuit focused on Supreme Court precedent:

> For reasons that follow, we agree with the position adopted by the Sixth Circuit in *U.S. Steel v. Fuhrman* which is more restrictive than the views on this question expressed by the Ninth Circuit in *Protectus Alpha Navigation Co*. First, the Sixth Circuit view is more faithful to the teaching of the Supreme Court in *THE AMIABLE NANCY* and *Lake Shore & Michigan Southern Railway Co. v. Prentice*. Second, we relied on these Supreme Court cases in *The Complaint of Merry Shipping* in determining that punitive damages are recoverable under the general maritime law. It is appropriate that we look to these same authorities to define the scope of the punitive damage relief that should be accorded under the general maritime law.

Id. (citations omitted).

The Fifth Circuit also noted that the policies behind punitive damages – punishment and deterrence – do not support a rule allowing vicarious punitive damages awards against non-culpable parties. These policy considerations are particularly applicable in the

maritime industry where, unlike shore-side businesses, a vessel owner has limited ability to supervise the master while the vessel is in navigation. The best a vessel owner can do to guard against human error is to implement careful hiring practices and vigilant safety policies. Prior to the decision at issue, if a vessel owner acted reasonably in this regard, it was not subject to punitive damages. Now, the vessel owner who follows careful hiring and safety policies, and does not direct, ratify or participate in culpable conduct, may be punished for the reckless conduct of its master. As Judge Kozinski noted, "nothing has changed in the relationship between ship owner and captain that would justify" the Ninth Circuit's decision. Pet. App. 288a. "The captain has always borne the responsibility for safeguarding his crew and third parties, and this hasn't changed in modern times." *Id.*

Despite the contrary rulings in the First, Fifth, and Sixth Circuits, and the sound policy reasons for distinguishing between maritime commerce and "the reality of modern corporate America," 767 F.2d at 1386, the Ninth Circuit insisted on following *Protectus Alpha*. Pet. App. 86a. In doing so, it also departed from *The Amiable Nancy*, where Justice Story held that it was improper to award punitive damages against a vessel owner when the principal is "innocent of the demerit of th[e] transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree." 16 U.S. at 559. In an effort to justify its decision, the Ninth Circuit concluded that *The Amiable Nancy* had been effectively overruled by

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991). Pet. App. 86a. *Haslip*, however, was a non-maritime case in which the Court addressed the constitutionality of an award of vicarious punitive damages under state common law. The issue in the instant case is whether *federal maritime law* permits the imposition of vicarious punitive damages. Pet. App. 289a. On this issue, the Ninth Circuit should have relied upon *The Amiable Nancy*, not *Haslip*.

In sum, this case presents an important issue of federal maritime law and a clear circuit conflict that must be resolved by this Court. The decision below directly departs from this Court's decision in *The Amiable Nancy* and contradicts the Ninth Circuit's own decision in *Pacific Packing*. The only precedent for the decision below is complete dictum, and therefore is not precedent at all. The issue presented is appropriate for review and this Court should grant the request for certiorari.

III. The Ninth Circuit's Decision Raises a Separation of Powers Issue as to Whether the Comprehensive Remedial Scheme Enacted in the Clean Water Act Preempts a Punitive Damages Award in This Case.

In its decision below, the Ninth Circuit held "that the Clean Water Act does not preempt a private right of action for punitive as well as compensatory damages for damage to private rights." Pet. App. 78a-79a. This decision raises important and interrelated

separation of powers concerns as to (1) whether federal courts may supplement maritime remedies when Congress has legislated in a particular sphere, and (2) the preemptive scope of the Clean Water Act.

First, in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), the Court held that federal courts "are not free to expand remedies at will" in maritime cases where Congress has spoken. *See also* Pet. App. 75a (Ninth Circuit acknowledged that in *Miles* "Congressional limitations were held to prevent an inference of broader remedies in the general maritime law"). Because the Jones Act only allowed for recovery of pecuniary damages in actions for the death of a seaman, it precluded a plaintiff from seeking remedies in a general maritime action beyond those provided by Congress. 498 U.S. at 36-37. Separation of powers concerns led the Court to refuse to create remedies that go "well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.* at 36.

The Court's decision in *Miles* rested in part on a similar decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In *Higginbotham*, the Court held that a plaintiff may not recover damages for loss of society under a general maritime claim for wrongful death, because Congress had not provided for the recovery of such nonpecuniary loss in the Death on the High Seas Act. Invoking the doctrine of separation of powers, the Court reasoned "that we have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Id.* at 626.

Because Congress had directly spoken on the issue of damages in maritime wrongful death cases, "it would [have been] no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

The decision below raises a similar separation of powers issue regarding the propriety of the Ninth Circuit's conclusion that punitive damages are allowed in a general maritime negligence claim for harm caused by marine pollution when the Clean Water Act ("Act") does not provide for them. Similar to the statutes in *Miles* and *Higginbotham*, the Act provides an "ordered system" for the recovery of damages caused by water pollution. To punish and deter polluters and to assure compensation for harm they cause, the Act subjects vessel owners to civil penalties, criminal fines, clean-up costs, and natural resource damages. 33 U.S.C. § 1319(c)-(d); 33 U.S.C. § 1321(b)(6) & (7); 33 U.S.C. § 1321(f). The Act allows a citizen who has "an interest which is or may be adversely affected" to "commence a civil action" for the recovery of "any appropriate civil penalties under section 1319(d) of this title." 33 U.S.C. § 1365(a) & (g). However, the Act does not provide for the recovery of punitive damages against those found liable for marine pollution. Under *Miles* and *Higginbotham,* a federal court cannot supplement a comprehensive remedial scheme with judge-made remedies.

Second, in *Milwaukee v. Illinois,* 451 U.S. 304, 332 (1981), this Court specifically addressed the

preemptive effect of the Clean Water Act. In *Milwaukee*, Illinois tried to enjoin certain Wisconsin municipalities from emitting sewage into Lake Michigan. In finding that the Act foreclosed such a remedy, the Court applied *Higginbotham*, noting that where Congress "spoke directly to a question," federal courts may not provide their own answer. *Id.* at 315 (quoting *Higginbotham*, 436 U.S. at 625). The Court reasoned that its "'commitment to the separation of powers is too fundamental' to continue to rely on federal common law by judicially decreeing what accords with 'common sense and the public weal' when Congress has addressed the problem." *Id.* (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)). Thus, federal courts were not free to apply "often vague and indeterminate nuisance concepts" when Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317.

The case at bar presented a similar question regarding the preemptive effect of the Clean Water Act, as interpreted in *Milwaukee* and its progeny, with respect to punitive damages. *See Middlesex County Sewerage Auth. v. Nat. Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (dismissing plaintiff's damages claim under nuisance law, because under *Milwaukee* "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the" Act); *Conner v. Aerovox, Inc.*, 730 F.2d 835, 842 (1st Cir. 1984) (dismissing plaintiff's maritime law claim for nuisance under

Milwaukee and *Sea Clammers* because those cases "would appear to encompass all federal *judge-made* law of nuisance whether maritime or general federal law") (emphasis in original); *see also Illinois v. Illinois Outboard Marine*, 680 F.2d 473, 478 (7th Cir. 1982) ("The lesson of [*Milwaukee*] is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the Congressional solution.").

The Ninth Circuit answered this question in the negative, concluding that "[t]hough the question is not without doubt . . . the better reading of the Clean Water Act is that it does not preclude a private remedy for punitive damages." Pet. App. 75a. In holding that the Act does not preempt a claim for punitive damages, the court attempted to distinguish *Milwaukee* and its progeny on the ground that allowing a nuisance claim to go forward would have allowed the courts in those cases to impose effluent limitations that conflicted with those set forth by an administrative agency responsible for enforcement of the Act. *Id.* at 76a-78a.

The First Circuit has expressly disavowed this narrow interpretation of *Milwaukee*:

> *Milwaukee II* might have been read to hold no more than that [the Clean Water Act] preempts the authority of a district court to impose under federal common law of nuisance more stringent limitations on effluents than those promulgated by EPA under the Act. But the

> Supreme Court made clear in *Sea Clammers* that this is too narrow a reading of the *Milwaukee II* decision.

Conner, 730 F.2d at 837.

Although the First Circuit decision in *Conner* did not specifically address "whether a negligence action for injuries due to water pollution still sounds in maritime tort after [the Act's] enactment," *Id.* at 838 n. 6, its broader interpretation of the preemptive effect of the Act conflicts with the Ninth Circuit's narrow stance. If *Milwaukee* and its progeny hold that the Act preempts all nuisance claims, then consistency requires a similar result with respect to the Act's preemption of negligence claims for punitive damages. This conflict between the circuits raises a significant federal question implicating separation of powers concerns.

The Ninth Circuit decision ignores important maritime principles and precedent regarding statutory preemption that reach far beyond the limited facts and parties in this case. This Court should grant certiorari to confirm the application of the principle set forth in *Miles* and *Higginbotham*: that the Ninth Circuit was not free to expand the remedies provided by Congress in the Clean Water Act by allowing the imposition of punitive damages.

CONCLUSION

For the reasons set forth above, AWO respectfully requests that the petition for a writ of certiorari be granted.[4]

Respectfully submitted,

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[4] With respect to Petitioner's request that the Court grant certiorari to clarify the extent to which substantive maritime law shapes the standards for determining the appropriate size of punitive damage awards, AWO also joins that request. *See* Exxon's Petition for a Writ of Certiorari at 21-27.

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