No. 07-219

In the Supreme Court of the United States

EXXON SHIPPING COMPANY, ET AL., PETITIONERS,

v.

GRANT BAKER, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* TRANSPORTATION INSTITUTE AND OVERSEAS SHIPHOLDING GROUP, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Transportation Institute was established in 1967 as a Washington-based, non-profit organization dedicated to maritime research and promotion. The Institute advocates and works for sound national maritime policy to help maintain America's political and economic strength and national security. The Institute is comprised of companies that participate in the nation's deep sea foreign and domestic shipping trades, and barge and tugboat operations on the Great Lakes and on the 25,000 mile network of America's inland waterways. Many of the Institute companies' vessels are contracted to the U.S. military services. All Transportation Institute companies operate U.S.-flagged vessels crewed by American citizens, and the Institute recognizes that an adequate and well-trained work force of seafarers and other maritime employees is essential to the maritime industry.

The Transportation Institute believes that a balanced, competitive, and efficient waterborne transportation system is indispensable to America's economy and security. A privately-owned, citizen-crewed, U.S-flagged merchant fleet has been the foundation for the commercial and military success of this nation in times of peace and of war. It is imperative for the United States to maintain a strong maritime capability in order to protect its economic and national-security interests. Excessive punitive damages awarded against U.S.-flag vessel owners, especially if imposed vicariously and outside the congressional statutory scheme, such as the staggering $2.5 billion punitive-damages award at issue in this case, threaten the continued viability of the U.S. fleet that the Transportation Institute promotes in the interests of U.S. commerce and national defense.

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[1] Respondents have consented to the filing of this brief, and their written consent is being submitted to the Clerk of this Court. Petitioners have already filed a blanket consent with the Clerk. Pursuant to S. Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

Overseas Shipholding Group, Inc. ("OSG") is one of the world's leading bulk shipping companies engaged primarily in the ocean transportation of crude oil and petroleum products. The company owns or operates a modern fleet of 108 vessels; 87 operate in the international market and 21 in the U.S. Flag market. Thus, OSG owns and operates vessels in both domestic and international maritime commerce. OSG is the only major global tanker company with a significant U.S. Flag fleet. Its fleet includes crude oil tankers, product carriers, and articulated tug barges and dry bulk and car carriers. OSG's vessel operations are organized into strategic business units and focused on four market segments: crude oil, refined petroleum products, U.S. Flag vessels, and gas.

Within its U.S. Flag Fleet operations, the company participates, among other things, in the Alaska North Slope Crude Oil Transportation through its 37.5% equity interest in Alaska Tanker Company, LLC, a joint venture that was formed in 1999 among OSG, BP p.l.c., and Keystone Shipping Company, to support BP's Alaskan crude oil transportation. In addition, since 1996, OSG has participated in the Maritime Security Program, which ensures that militarily useful U.S. Flag vessels are available to the U.S. Department of Defense in the event of war or national emergency.

As the second largest publicly traded tanker company in the world, OSG is substantially concerned that excessive punitive damages, imposed vicariously for the reckless behavior of a vessel's master, would adversely affect the financial position of the company and the entire maritime industry and thus undermine the commercial and national-security interests of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have demonstrated that the Ninth Circuit's decision is wrong in several important respects. *Amici* fully agree with that analysis.

Petitioners also have demonstrated that the rulings below conflict with the decisions of this Court and of other courts of appeals. *Amici* agree that this conflict calls for this Court's

intervention. Indeed, not only is such a conflict a recognized ground for the Court's review, but the need for uniformity is particularly compelling in the area of maritime law and provides a further substantial reason for the petition to be granted. *See, e.g.*, *The Lottawanna*, 88 U.S. 558, 575 (1875) ("[it] is unquestionable [that] the Constitution must have referred to a system of [maritime] law ... operating uniformly in ... the whole country" in order to achieve "the uniformity and consistency at which the Constitution aimed").[2]

Finally, petitioners have demonstrated that the questions presented here are of profound importance to the entire maritime industry. *Amici* fully agree with this showing as well, and it is to this concern that *amici* address themselves in this brief.

For more than 200 years, federal maritime law has protected and promoted the U.S. maritime industry in order to further our country's economy and national security. The Ninth Circuit's decision is contrary to established maritime law and inimical to federal maritime policies. If the law is to be changed, it should be done by Congress, not by the courts. Furthermore, a substantial part of our nation's international and domestic maritime commerce occurs within the Ninth Circuit, thereby underscoring the importance of, and exacerbating the adverse effects of, the court of appeals' holding. Accordingly, this Court should grant review and reverse the judgment below.

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[2] In 1815, Justice Storey, sitting as circuit justice, explained "[t]he advantages resulting to the commerce and navigation of the United States from a uniformity of rules and decisions in all maritime questions." *De Lovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3776). This Court consistently has recognized the overarching need for uniformity in maritime law. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970).

ARGUMENT

I. FEDERAL MARITIME LAW SERVES TO FOSTER THE U.S. MARITIME INDUSTRY AND PROTECTS THE INDUSTRY FROM UNDUE LIABILITY.

The U.S. maritime industry is unique in this country and unlike any other economic sector that has been before the Court in previous punitive-damages cases. In brief, it is long-established federal policy to promote this industry in order to further our nation's economic and national-security interests (*see* Section II, *infra*) and to protect the industry from undue liability under federal maritime law. For this reason, "[a]dmiralty and maritime law includes a host of special rights, duties, rules, and procedures." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001).

From the founding of the Republic, maritime law has served "primarily to encourage the development of American merchant shipping." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957). Thus, "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (internal quote and citation omitted). *See also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004). "Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability." *Aktiengesellschaft Volkswagenwerk v. Fed. Mar. Comm'n*, 390 U.S. 261, 297 (1968) (Douglas, J., dissenting in part).[3]

In particular, "[l]imitation of liability [of carriers] is an important theme of admiralty law" and "is accepted as necessary to serve the needs of commercial practicality as well as the shipowner." 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 15-1, at 136 & n.1 (4th ed. 2004). "[L]imitation of liability" has "long" been a principal feature of "[t]he law of the sea." *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*,

[3] The relevant statutes and specific policies are discussed in Section II, *infra*.

409 U.S. 249, 270 (1972). Furthermore, this principle of limited liability "springs from the general maritime law"; "[i]t was not recognized either by the [general] common law or by the civil law." 3 BENEDICT ON ADMIRALTY § 4, at 1-31 (7th ed. 2005). *See The Main v. Williams*, 152 U.S. 122 (1894).

As petitioners explain, maritime law is a form of federal common law. Accordingly, it should reflect federal policies and be consonant with the laws of Congress. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994). Maritime law accordingly looks to Congress for "'policy guidance.'" *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994). As Justice Harlan explained, courts in developing federal maritime common law take account of the "legislative establishment of policy," and such policy becomes part of the "decisional law." *Moragne*, 398 U.S. at 390-91; *see also id.* at 392-93, 395 (referring to "the general policies of federal maritime law"). *See also, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (courts fashion federal common law "from the policy of our national ... laws"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Furthermore, the federal interest in maritime commerce is exceptionally broad (*see, e.g., United States v. Locke*, 529 U.S. 89, 108-09 (2000)), and that is reflected in maritime law as well.

Finally, although not an invariable rule, the Court has recognized the wisdom of entrusting to the legislature rather than to the judiciary fundamental changes in maritime law. *See, e.g., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272-73 (1979); *Halcyon Lines v. Haenn Ship, Ceiling & Refitting. Corp.*, 342 U.S. 282, 285-86 (1952). In this case, it is Congress that is in the better position to determine the applicable facts and weigh the policy and economic considerations in order to decide whether longstanding maritime law should be radically and abruptly upset in the manner done by the Ninth Circuit's decision. If the maritime law of punitive damages is to be fundamentally altered, Congress is the appropriate branch to do so.

In fact, the need to leave the matter to Congress is especially strong in this case. While the issue may not be entirely clear, it appears that the insurability of maritime carriers against punitive damages is governed by state law. *See Taylor v. Lloyds Underwriters of London*, 972 F.2d 666, 668-69 (5th Cir. 1992). The law on the insurability of punitive damages varies widely among the states (including insurability both where the carrier itself has engaged in wrongful conduct and where, as here, it is held vicariously liable in punitive damages for the acts of its non-managerial employees). *See* Lorelie S. Master, *Punitive Damages: Covered or Not?*, 55 BUS. LAW. 283 (1999). If punitive damages are insurable, it would be grievously unfair and economically unjustified suddenly to impose punitive-damages liability on carriers without an opportunity for them to seek coverage. If, however, punitive damages are not insurable, the entire weight of the dire consequences of the Ninth Circuit's decision (as discussed below) would fall on the maritime industry. In either event, therefore, because Congress can better resolve these matters and balance the competing claims, it rather than the judiciary is the proper body to decide whether the maritime law of punitive damages should be modified.

II. THE DECISION BELOW IS INCOMPATIBLE WITH MARITIME LAW AND ESTABLISHED FEDERAL POLICIES DESIGNED TO PROTECT THE U.S. MARITIME INDUSTRY IN ORDER TO FURTHER THE COMMERCIAL AND NATIONAL-SECURITY INTERESTS OF THE UNITED STATES.

A. Maritime Law And Federal Policy Protect The U.S. Maritime Industry For Economic And National-Security Reasons.

From the inception of our nation, maritime law, including congressional enactments, provided special aid and assistance to the U.S. maritime industry. This longstanding maritime policy reflects both the commercial and the national-security interests of the United States. In particular, in order to promote a strong U.S. maritime industry, maritime law has furthered the interests of carriers, shipbuilders, seafarers and other maritime

employees, and consumers. Moreover, as experience has tellingly borne out, our national security requires a strong maritime industry, including an adequate number of vessels, a domestic capacity to build and repair such vessels, and sufficient workers to crew the ships and to build and repair them. *See Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982) ("[i]t has long been recognized that an adequate merchant marine, with U.S.-flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country").

Preliminarily, to put the following discussion in context, a number of the statutes discussed below involve "cabotage" or shipments between ports in the United States. A cabotage statute advantaging U.S. carriers was among the initial enactments passed by the First Congress, and this legislative policy continues unbroken to the present. Some 50 other countries also have cabotage statutes protecting their own carriers within their domestic commerce. *See* Robert L. McGeorge, *United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy*,11 NW. J. INT'L L. & BUS. 62, 62-63 (1990) ("[t]he right of a nation to exclude foreign vessels from its domestic maritime trade is accepted without question in the international community; and most coastal nations, including the United States, have adopted cabotage laws to enforce that right"); Transportation Institute, *The Jones Act: An American Tradition* 2 (1996).

In the United States, the cabotage statute requires that waterborne shipments between U.S. ports be made by ships that are U.S.-owned, U.S.-flagged, U.S.-built, and U.S.-crewed. This preference is needed because "[t]he American merchant marine as a whole seemingly cannot now or in the foreseeable future operate in free competition; our ships are too expensive and our wages too high for that." Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY § 11-5, at 968 (2d ed. 1975); *see also id*,. § 11-6, at 970. Accordingly, to ensure the existence and viability of U.S. carriers in the interest of our country's

economy and national security, this congressional cabotage policy is necessary. *See Indep. U.S. Tanker Owners*, 690 F.2d at 911 ("[s]ince the earliest days of the Republic, preferential legislation has mandated that only U.S.-built and U.S.-flag vessels can be operated in commerce between points in the United States").[4]

1. The Acts of 1789-1817.

"In 1789, in the second law passed under the new Constitution, Congress enacted a discriminatory tax on foreign vessels in the coasting trade, making it impractical economically for them to operate [between U.S. ports]." Gilmore & Black, *supra*, § 11-4, at 963 n.34. *See* 1 Stat. 27 (1789). Following independence, "the maintenance of the shipbuilding industry, and the creation of an operating merchant marine, were among the most urgent tasks facing the Congress and the nation." Gilmore & Black, *supra*, § 11-4 at 963. Thus, the "coastwide trade was early reserved to domestic vessels." *Id. See also* 1 Stat. 287 (1792).

In 1817, Congress expressly prohibited foreign carriers from transporting goods between two U.S. ports. *See* Act of March 1, 1817, ch. 31, § 4, 3 Stat. 351. This provision was part of a broader statute designed to protect the domestic maritime industry. *See also* Limitation of Shipbuilders' Liability Act of 1851, Act of Mar. 3, 1851, ch. 43, 9 Stat. 635, currently codified at 46 U.S.C. §§ 30501 *et seq.*, *discussed in* 2 Schoenbaum, *supra*, § 15-1, at 137 ("[t]he announced purpose of the law is to encourage shipbuilding and to induce the investment of money in the shipbuilding industry").

2. The Jones Act of 1920.

This early federal cabotage policy – which provided that "the coastwise trade was prohibited outright to foreign ships" – "has lasted down to now." Gilmore & Black, *supra*, § 11-4, at 963 n.34. This policy is currently embodied in the Jones Act of 1920, (Section 27 of the Merchant Marine Act of 1920).

[4] A similar cabotage policy applies to air carriers for flights between airports within the United States.

Pub. L. No. 66-261, 41 Stat. 988 (1920), currently codified at 46 U.S.C. §§ 50101 *et seq.*. Enacted in the aftermath of World War I, the restriction of cabotage trade to U.S. carriers was justified in terms of the critical need "to develop and encourage a merchant marine" in order to serve "the national defense" and "foreign and domestic commerce":

> It is necessary for the *national defense* and for the proper growth of its foreign and domestic *commerce* that the United States shall have a merchant marine of the best equipped and most suitable types of vessels *sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency*, ultimately to be owned and operated privately by citizens of the United states; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine.

46 U.S.C. app. § 861, currently codified at 46 U.S.C. § 50101 (emphasis added). *See also* S. Rep. No. 66-573, at 1 (1920) (national policy favors "an American merchant marine, built in American shipyards by American labor, manned by American seamen, flying the American flag"; "[w]e need such a fleet, not only for our commercial growth, but for the Nation's defense in time of war and the stability of domestic industry in time of peace").

3. The Merchant Marine Act of 1936.

The next important expression of congressional policy was the Merchant Marine Act of 1936. Adopted in the shadow of World War II and in the midst of the Great Depression, the Act declared that "[i]t is the policy of the United States to encourage and aid the development and maintenance of a merchant marine . . . for the national defense and the development of the domestic and foreign commerce of the United States":

> **(a) Objectives.**—It is necessary for the *national defense* and the development of the domestic and foreign *commerce* of the United States that the United States have a merchant marine—

> **(1)** sufficient to carry the waterborne domestic *commerce* and a substantial part of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic and foreign commerce at all times;
> **(2)** capable of serving as a *naval and military auxiliary in time of war or national emergency*;
> **(3)** owned and operated as *vessels of the United States by citizens of the United States*;
> **(4)** composed of the best-equipped, safest, and most suitable types of vessels and *manned with a trained and efficient citizen personnel*; and
> **(5)** supplemented by efficient *facilities for building and repairing vessels*
>
> **(b) Policy.**—It is the policy of the United States to encourage and aid the development and maintenance of a merchant marine satisfying the objectives described in subsection (a).

46 U.S.C. § 50101 (emphasis added). "The Merchant Marine Act of 1936 is designed to develop and maintain an adequate and well-balanced American merchant marine and shipyard industry." 1 Schoenbaum, *supra*, § 10-2 at 582. *See also* The Shipping Act of 1984, Pub. L. No. 98-237, currently codified at 46 U.S.C. §§ 40101 *et seq.* (purposes of the Act include commerce and national security).

4. The Maritime Security Act of 1996.

Most recently, the Maritime Security Act of 1996 continues to recognize the importance of the U.S. maritime industry to commerce and national security. It provides that "[t]he Secretary of Transportation shall establish a fleet of active, commercially viable, militarily useful, privately owned vessels to meet national defense and other security requirements and maintain a United

States presence in international commercial shipping." 46 U.S.C. § 53102.

5. Overview of U.S. maritime industry and national security.

For more than two centuries, the privately-owned U.S. merchant marine has played a crucial role in the defense and security of the nation. Without this support, the government (and taxpayers) would have to assume the burden of providing and maintaining this maritime capability – a responsibility that would run into billions of dollars annually. *See, e.g.*, Reeve & Associates, *The Role of the United States' Commercial Shipping Industry in Military Sealift* 4-5 (Aug. 2006). "[T]he privately-owned United States-flag commercial shipping fleet has proven to be the most cost-effective means for the U.S. military to acquire sealift capability." *Id.* at 3. Between the alternatives of government operation of maritime capabilities and government support of a private merchant marine, the country consistently has chosen the latter course. *See* Gilmore & Black, *supra*, § 11-5, at 968.

In modern times, the U.S. maritime industry has aided the military effectively and with distinction. *Id.* In the early part of the 20th century, "World War I thrust upon the country the necessity of building up a merchant marine," and "[o]ur entry into the war vastly increased the importance of [this effort.]" *Id.* at 965-66.

Following the war, the industry underwent a decline. "[I]n 1933 the Black Committee of the Senate uncovered extensive abuses in the operation of . . . the merchant marine in general." *Id.* at 966.

> Thoroughly convinced that strategic factors, if not economic ones, imperatively called for the maintenance of a healthy shipping industry, Congress, under the then persuasive stimulus of an urgent plea from President Franklin Roosevelt, passed the Merchant Marine Act of 1936.

Id. As the Act itself makes clear (*see* pages 9-10, *supra*), it "gives weight both to the economic and to the strategic factors that

have pulled at shipping policy through the ages." *Id.* at 967.

The Merchant Marine Act and concerted military and civilian wartime programs enabled the United States to meet "the unprecedentedly acute shipping problem created by [World War II]." *Id.* This successful policy "continued through the Viet Nam war, when great ocean transport was required." *Id.* at 968.

The U.S. maritime industry has continued to perform this essential responsibility in more recent days. For example, in 1989, President George H.W. Bush reaffirmed that "[s]ealift is essential both to executing this country's forward defense strategy and to maintaining a wartime economy," and therefore "[t]he U.S.-owned commercial ocean carrier industry . . . will be relied upon to provide sealift in peace, crisis and war." *National Security Sealift Policy*, National Security Directive 28, approved by President Bush, Oct. 5, 1989.

The Persian Gulf War of 1991 "was the first time in decades that the merchant marine was called upon to serve in a full mobilization capacity." Transportation Institute, *The U.S.-Flag Merchant Marine*, ch. 6, at 1 (Mar. 2007). U.S.-flag ocean liners carried 29% of the dry cargo to the region – more than any other category of transport. *Id.*

Most recently, the U.S. maritime industry has been used to support our military in Operations Enduring and Iraqi Freedom. As military officials testified to Congress:

> Here is the big picture – in the largest and most demanding test of our total lift capability since Operation Desert Shield/Desert Storm, USTRANSCOM [United States Transportation Command] delivered the necessary combat power to Iraq faster and more efficiently than ever before. The men and women of USTRANSCOM, in concert with our service partners and commercial teammates, have performed brilliantly.

Statement of General John W. Handy, USAF Commander, United States Transportation Command; Vice Admiral David L. Brewer III, USN Commander, Military Sealift Command;

and Major General Ann E. Dunwoody, USA Commanding General, Surface Deployment and Distribution Command, Before the Senate Armed Services Seapower Subcommittee on the State of the Command, 108th Cong. 4 (2004) (hereafter "*Statement*"). USTRANSCOM includes "both military and commercial transportation assets" and "relies on its commercial transportation industry partners and associated labor organizations to provide significant transportation capability during contingencies." *Id.* at 2, 6; *see also id.* at 36-37. In the Iraqi conflict, more than 90% of cargo was carried aboard U.S.-flag vessels crewed by 3,900 commercial mariners and 3,800 civil service mariners. Transportation Institute, *The U.S. Flag Merchant Marine*, ch. 6, at 1. During this engagement, the U.S. military was able to reduce its use of foreign-flag vessels from 22.6% of total dry cargo in Operations Desert Storm/Desert Shield to 3.4%; "[a] key factor behind the increase in the United States' overall level of self-sufficiency for military sealift was the increase in the U.S. commercial liner shipping industry's contribution to the sealift mission that rose from 21.2 percent in 1990-1991 to 49.3 percent for all dry cargo." Reeve & Associates, *supra*, at 11-12. And in his live testimony to Congress, Admiral Brewer reiterated that civilian maritime vessels were "extremely important" and "extremely critical in terms of readiness"; "[w]e cannot exist without [them]." *Hearing to Receive Testimony on the Posture of the U.S. Transportation Command Before the Senate Armed Services Seapower Subcommittee* 108th Cong. 73 (2004)(hereafter "*Hearing*"). He and Senator Talent agreed that "[i]t is an amazing civilian-military synergy." *Id.* at 74.

However, military officials have expressed "concern" about "the continued availability of a sufficient number of qualified civilian mariners." *Statement*, *supra*, at 12. Accordingly, they "support the maintenance of a viable U.S. mariner pool." *Id.* As Admiral Brewer testified, "without [the maritime trades, departments, and unions] we could not have fought the war." *Hearing*, *supra*, at 74.

In sum, it remains "orthodoxy" that the United States "cannot sustain its responsibilities as a world power without a merchant marine." Gilmore & Black, *supra*, § 11-5, at 968. "From World War II on, some 95% of all military equipment and material sent to crisis and combat theaters was carried by sea." Transportation Institute, *The U.S. Merchant Marine and National Defense* 9 (1996). "The U.S. Merchant Marine . . . is recognized as 'The Fourth Arm of National Defense.'" Maritime Cabotage Task Force, *About the U.S. Maritime Cabotage Laws*, http://www.mctf.com/about_cabotage.shtml (last visited Sept. 19, 2007).

6. Overview of U.S. maritime industry and economic interests of the United States.

The predicate for the U.S. merchant marine to assist in national defense is a healthy and sustainable maritime industry. The vessels themselves, the shipyards that build and repair the vessels, and the seafarers who crew the ships and other maritime labor are the tripod of the industry. *See, e.g.*, Gilmore & Black, *supra*, § 11-6, at 971 (under the Merchant Marine Act of 1936, "the maintenance of the shipbuilding industry . . . was thought to be as important as the maintenance of operational shipping").

The U.S. maritime industry is highly sensitive to economic conditions and susceptible to downturns. Over the last century, the industry has often been in "deplorable condition." Gilmore & Black, *supra*, § 11-7, at 974 ("deplorable condition" has been "chronic"). Thus, economic considerations – including exorbitant liability awards – critically affect the strength and viability of the industry.

The Jones Act remains a key federal policy and has been supported by recent Presidents both Republican and Democratic. For instance, in the 1980 campaign, President Reagan stated that "I can assure you that a Reagan Administration will not support legislation that would jeopardize this long-standing policy embodied in the Jones Act . . . or the jobs dependent on it." *See* Terrence Moran, *Well Heeled Shipping Lobby Sails to Victory*, LEGAL TIMES, Jan. 11, 1988. In 1997, President Clinton likewise stated that "[m]y Administration . . . continues to

support the Jones Act as essential to the maintenance of the nation's commercial and defense maritime interests." Maritime Cabotage Task Force, *Statements of Support*, http://www.mctf.com/statements.shtml (last visited Sept. 19, 2007). And in 2000, President George W. Bush stated that "[p]rograms that have contributed to the growth of our domestic fleet, such as the Jones Act, . . . should be maintained." *See* Chris Dupin, *The New Administration: Bush Backs Maritime Security Program, Jones Act*, JOURNAL OF COMMERCE, Dec. 14, 2000.

The U.S. maritime industry makes a significant contribution to our nation's economy. For example, the water transportation industry produces annual gross output of approximately $36 billion. Bureau of Economic Analysis, United States Dep't of Commerce, *Gross Domestic Products by Industry*, http://www.bea.gov/industry/gpotables/gpo_action.cfm (last visited Sept. 19, 2007). The U.S. water transportation system carries more trade, in terms of both tonnage and value, than any other mode of transportation: 78 percent of the weight and 41 percent of the value of U.S. merchandise trade. Bureau of Transportation Statistics, United States Dep't of Transportation, *Introduction and Overview*, http://www.bts.gov/publications/americas_freight_transportation_gateways/introduction_and_overview/index.html (last visited Sept. 19, 2007).

Furthermore, the Jones Act fleet consists of more than 44,000 vessels, carries more than 1 billion tons of cargo and 80 million passengers annually, and employs 80,000 seafarers and more than 40,000 other maritime workers. *See* Transportation Institute, *The Jones Act: An American Tradition* 6-7 (1996). Jones Act carriers transport 17% of the country's intercity freight (in ton-miles). *See* Maritime Cabotage Task Force, *About the U.S. Maritime Cabotage Laws*, http://www.mctf.com/about_cabotage.shtml (last visited September 19, 2007). Jones Act ships serve some 40 states and 90% of the U.S. population. United States Dep't of Transportation, Maritime Administration, *Domestic Shipping Overview*, http://www.marad.dot.gov/programs/dom_ship.html (last visited Sept. 19, 2007). And Alaska in particular benefits greatly from this system, ranking

third among the states in originating tonnage. *See* Transportation Institute, *The Jones Act: An American Tradition* 5. *See also id.* at 6 ("[s]ince their existence depends on reliable and efficient transportation services, the economies of Alaska, Hawaii, and Puerto Rico rely heavily on domestic ocean vessels").[5]

The significant contribution of the maritime industry to our nation's commerce comes in substantial part from ports within the Ninth Circuit. For example, the largest gateway (measured in dollar value) in the United States' international merchant trade – including water, land, and air gateways – is the Port of Los Angeles. Bureau of Transportation Statistics, United States Dep't of Transportation, *Introduction and Overview*, http://www.bts.gov/publications/americas_freight_transportation_gateways/introduction_and_overview/index.html (last visited Sept. 19, 2007). The Port provides a gateway for $122 billion annually in oceanborne cargo and alone is responsible for nearly one quarter of the nation's $533 billion international merchandise trade. *Id.* Moreover, five of the top ten maritime ports in the United States—which collectively account for 90% of the U.S. international container trade—are located within the Ninth Circuit: Los Angeles, Long Beach, Tacoma, Oakland, and Seattle. Bureau of Transportation Statistics, United States Dep't of Transportation, *TABLE 8. U.S. Maritime Freight Gateways, Ranked by Value and Weight*, 2003, http://www.bts.gov/publications/americas_freight_transportation_

[5] A recent study illustrates the economic importance of U.S. maritime carriers. In June 2005, *amicus* Overseas Shipholding Group ordered 10 new Jones Act tankers to be built at the Aker Philadelphia Shipyard. The study estimated that this order would (1) on a national basis, increase gross domestic output by $9.65 billion, labor compensation by $2.22 billion, and average annual employment by 2,401; and (2) on a local basis, increase Philadelphia's gross economic output by $1.29 billion, labor compensation by $490 million, and average annual employment by 1,217 workers. *See* PriceWaterhouseCoopers, *Economic Impact of OSG's U.S. Flag Fleet Expansion* E-1 (Sept. 4, 2007).

gateways/intro duction_and_overview/html/table_08.html (last visited Sept. 19, 2007); United States Dep't of Transportation, Maritime Administration, *U.S. Water Transportation Statistical Snapshot* 4 (May 2007).

In addition, waterborne carriers enjoy significant advantages over other modes of transport. For example, while Jones Act ships carry 17% of the nation's intercity cargo in ton-miles, it charges only 1.7% of the freight bill, demonstrating that it is a highly efficient means of carriage. *See* Maritime Cabotage Task Force, *supra*. Likewise, marine vessels offer significant environmental advantages, emitting less carbon monoxide, nitrous oxide, and particulate matter than on-road vehicles, railroads, and aircraft. *See* Bureau of Transportation Statistics, United States Dep't of Transportation, Tables 4-40, 4-41, 4-43 (2002), http:/www.bts.gov/publications/national_transportation _statistics/2002index//html (last visited Sept. 19, 2007). Water transportation ranks second among shipping alternatives in energy costs (energy costs per dollar of gross output). *See* U.S. Department of Transportation, Maritime Administration, *U.S. Water Transportation Statistical Snapshot* 14 (May 2007). Waterborne transport also is the safest means of shipment. *See*, *e.g.*, Ontario Marine Transportation Forum, *Fact Sheet*, http://www.omtf.org/subfiles/factSheet.pdf (last visited Sept. 19, 2007). And maritime traffic relieves the problems of congestion, energy consumption, pollution, and aging infrastructure on our nation's roads, particularly on the East and West Coasts. *See* United States Dep't of Transportation, Maritime Administration, *Domestic Shipping*, http://www.marad.dot.gov/ programs/dom_ship.html (last visited Sept. 19, 2007); Renewable Energy and Energy Conservation Tax Act of 2007, H.R. 3221, 110th Cong., 1st Sess. (2007) (a bill, passed by the House of Representatives, "to focus public and private efforts to use the waterways to relieve landside congestion along coastal corridors"); Transportation Energy Security and Climate Control Mitigation Act of 2007, H.R. 2701, 110th Cong., 1st Sess. (2007); National Ports and Highway Institute, Louisiana State University, *High Speed Ferries and Coastwide Vessels:*

Evaluation of Parameters and Markets for Application (2000), available at http://www.market.data90V/MHI/Documents/High_Speed_Ferries_Report-Part1.pdf (last visited Sept. 19, 2007) (project sponsored by the Maritime Administration of the U.S. Department of Transportation to examine the development of coastwide shipping to advance waterborne trade and relieve highway congestion).

Despite its economic importance, the U.S. maritime industry is relatively small under modern corporate standards. The weighted average market capitalization of companies in the U.S. water transportation industry is $ 1.9 billion. *See* Reuters, *Company Ranks*, http://www.investor.reuters.com/IndSectList.aspx?indtrgpage=%2findustries%2findhighlights%2findcmprank%2findview10&sectorcode=TRANSP&target=%2findustries%2findhighlights%2fbrowseindustries%2findbysectors&indscrpage=%2findustrie s%2findhighlights%2findcmprank%2findview10 (last visited Sept. 19, 2007). This, along with the weighted average market capitalization for the trucking industry, is the lowest of all domestic transportation industries. *Id.* (air courier-$59.4 billion; railroad-$23.5 billion; airline-$7.5 billion; trucking-$1.9 billion). Furthermore, it is dwarfed by the weighted average market capitalization of companies in numerous other industries. *Id.* (pharmaceuticals-$119.5 billion; auto and truck manufacturers-$95.8 billion; tobacco-$93.4 billion). By comparison, the average capitalization of the 500 largest domestic corporations is $9.2 billion. *See Fortune 500 Largest U.S. Corporations*, F-25 (totals), FORTUNE, Apr. 30, 2007. *Amicus* Overseas Shipbuilding Group is the second largest publicly traded tanker company in the world, and its capitalization is $2.2 billion. *See* Overseas Shipbuilding Group 10-Q for quarter ending June 30, 2007. Similarly, the two largest liquid cargo barge operators in the inland marine industry (American Commercial Lines and Kirby Corporation) have a capitalization of, respectively, $1.3 billion and $2.2 billion. *See* American Commercial Lines 10-Q for quarter ending June 30, 2007; Kirby Corp. 10-Q for quarter ending June 30, 2007. Furthermore, a significant number of

maritime companies are relatively small, many operating a single vessel.

In light of these characteristics, the U.S. maritime industry is intensely concerned about the effects of enormous punitive damages on the overall industry and its members.

B. The Ninth Circuit's Decision Is Inconsistent With Maritime Law And Inimical To Federal Maritime Policies.

In light of the foregoing, the Ninth Circuit's decision should not be allowed to stand. The ruling below is directly contrary to U.S. maritime law and federal maritime policy.

The burden on U.S. carriers of exorbitant punitive damages – imposed here on the basis of vicarious liability and in addition to the penalties and remedies provided in federal statutes – is self-evident. As explained above, U.S. carriers are not heavily capitalized, and many are relatively small companies operating only one vessel. Moreover, it is not clear that companies can insure against punitive damages. *See* page 6, *supra*. Nor is it clear that insurance, even if permitted, would be reasonably priced or adequate in coverage; for example, at the present time, the maximum total amount of protection and indemnity (P&I) coverage available is $1 billion per incident – which must cover *all* the liabilities of the carrier, including (if upheld here) punitive damages. In these circumstances, awards of punitive damages like the one at issue in this case pose a clear and serious threat to U.S. carriers.

In turn, this would threaten the rest of the U.S. maritime industry. If the business of U.S. carriers declines, there will be fewer jobs for seafarers. Similarly, if new ships are not ordered or older ones taken out of service, there will be less work for the shipyards that build and repair such vessels.

The consumers of goods transported by U.S. carriers – which ultimately means the entire U.S. economy – will suffer as well. As U.S. carriers' cost of doing business rises, two consequences can be expected. First, consumers will pay

more for the waterborne transportation of goods. Second, some shipments will shift to other modes of transport, such as trucks. *See* Transportation Institute, *The Jones Act: An American Tradition* 11 (1996) ("[i]n virtually every market, rising maritime shipping rates trigger customers to shift cargoes to other modes of transportation"). This reduction in business will, contrary to federal policy, harm U.S. maritime carriers and the entire industry as well as increase pollution, aggravate traffic congestion, and reduce safety.[6]

To be sure, the adverse implications of the Ninth Circuit's decision for the U.S. maritime industry – and in turn for the U.S. economy and national security – cannot be foreseen with absolute certainty or precision. But they are sufficiently foreseeable to conclude that the ruling below cannot be reconciled with U.S. maritime law and federal maritime policy. In the end, it should be left to Congress, rather than undertaken by the courts, to decide whether the law of punitive damages should be transformed in light of these longstanding economic and national-security concerns. Accordingly, the Court should grant the petition and reverse the judgment of the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] The harm to consumers also will occur if foreign carriers are subjected to punitive damages for accidents in the waters of the Ninth Circuit. Furthermore, foreign carriers will routinely be in a better position than American carriers; they are unlikely to have assets in the United States that can be attached to satisfy a large punitive-damages judgment, and most foreign courts will not enforce a U.S. punitive-damages judgment. By contrast, the entire assets of U.S. carriers are exposed. Moreover, domestic carriers are less likely to be able to insure against punitive damages.

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