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SUPREME COURT, U.S.

No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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INTRODUCTION

This is a one-of-a-kind case that, in context, has resulted in an unexceptional judgment. Unlike any other shipowner of which we are aware, Exxon placed a relapsed alcoholic, who it knew was drinking aboard its ships, in command of an enormous vessel carrying toxic cargo across treacherous and resource-rich waters. And unlike any previous shipping disaster, Exxon's wrongdoing inflicted such widespread harm to private parties' interests that the district court, at Exxon's request, certified a mandatory punitive damages class to protect Exxon from the threat of multiple punitive damage verdicts. The 83-day trial and subsequent appeals established that 32,677 claimants suffered an average of about $15,500 in economic harm and awarded them an average of approximately $76,500 each in punitive damages – a sum that is just less than five times their average individual economic harm. Viewed collectively, the aggregated judgment is $2.5 billion, which represents barely more than three weeks of Exxon's current net profits.[1]

Exxon now seeks *certiorari* to challenge the court of appeals' analysis of the case's unique facts, intricate procedural history, and idiosyncratic legal issues.

STATEMENT

1. In 1973, Congress authorized the Trans-Alaska Pipeline to allow oil companies, including Exxon, to bring crude oil from Alaska's North Slope to market in the lower 48 States. From the pipeline's terminus in Valdez, Alaska, oil companies would load oil tankers and set sail through the "icy and treacherous waters" of Prince William Sound, Pet. App. 22a (quotation omitted), before proceeding south.

The opening of the Port of Valdez promised Exxon the opportunity to reap enormous economic returns. At the same

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[1] *See* Exxon Mobil 2006 Annual Report, at 5, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf.

time, Exxon took on a well-documented responsibility to respect the resources on which Alaskans depend. The waters of the Sound were "pristine" and "valuable [for their] fishing resources." Pet. App. 41a, 155a. The proceedings leading to the authorization of the pipeline emphasized that "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities." 3 U.S. Dep't of Interior, Final Envtl. Impact Stmt., Proposed Trans-Alaska Pipeline, at 370 (1972) (C.A. 2004 Supp. ER 1775).

Like the rest of the industry, Exxon knew that "a major spill in the Valdez area would cause [an] incalculable disaster to the rich fisheries," as well as to Native Alaskans' subsistence living. C.A. 2004 Supp. ER 1797; *see also* Pet. App. 122a, 232a. Equipment adequate to contain such a spill did not exist in Alaska. The official contingency plan for the area acknowledged that any spill exceeding 200,000 barrels (8.4 million gallons) could not be contained; Exxon, like others, knew that oil from such a spill would "persist for years." C.A. 2004 Supp. ER 913-15, 1114.

Exxon Shipping Company ran Exxon's transportation operations out of the Port of Valdez, and an alcoholic culture pervaded the company.[2] Supertanker crews held parties on board ship; drank together in port; "destroyed" confiscated liquor by drinking it; and violated rules that forbade returning to duty within four hours of drinking.[3] Although on paper Exxon had a policy that prohibited drinking aboard ship, it did not enforce the policy, and Exxon's crews were "pretty

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[2] Petitioners stipulated that Exxon Corporation (now Exxon Mobil Corporation) and its subsidiary Exxon Shipping Company would be treated as one entity and that the acts and omissions of each would be chargeable against both. Pet. 5; Stipulation and Order re: Certain Trial and Evidentiary Issues (No. 1), Dkt. 4365. Except where context requires, this brief refers to the two entities collectively as "Exxon."

[3] Tr. 144-54, 352-54, 365-66, 383-85, 415-18, 875, 1696, 1710-12, 2221, 2223-24; C.A. 2004 Supp. ER 978-88.

conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you."[4]

Exxon put Captain Joseph Hazelwood in command of the EXXON VALDEZ, one of the supertankers that regularly transited Prince William Sound. Hazelwood was a relapsed alcoholic, and Exxon knew it. "[T]he highest executives in Exxon Shipping knew Hazelwood had an alcohol problem, knew he had been treated for it, and knew that he had fallen off the wagon and was drinking on board their ships and in waterfront bars." Pet. App. 64a. Exxon began receiving reports of Hazelwood's relapse in the spring of 1986, less than a year after he returned to duty following a 28-day alcohol treatment program. Pet. App. 63a, 121a, 154a-155a. At that time, an Exxon employee warned Exxon's port captain that Hazelwood "had fallen off the wagon." Tr. 2490; Pet. App. 121a. The report was relayed to the President of Exxon Shipping, who was told that Hazelwood was "acting kind of crazy or kind of strange." Tr. 2914-16. Multiple reports of Hazelwood's relapse continued until just two weeks before the grounding of the EXXON VALDEZ. At that time, Hazelwood's supervisor received a report that Hazelwood had been drinking and making insulting comments about another Exxon captain, including hurling curses at the other captain over the ship's radio. It was apparent that "something was wrong with" Hazelwood. Tr. 2140-53, 2189-96. Thus, as the district court later explained:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving. Exxon repeatedly allowed Captain Hazelwood to sail into

[4] Tr. 800, 1070, 1631, 1707-08, 2153, 2175, 2183, 2207, 3456; C.A. 2004 Supp. ER 1321.

> and out of Prince William Sound with a full load of crude oil.[5]

Pet. App. 154a; *see also* Pet. App. 64a, 83a, 89a-91a, 121a-122a, 155a-157a. To make matters worse, Exxon "routine[ly]" staffed its ships, including Hazelwood's, with overworked and fatigued crews. Pet. App. 90a, 254a.

On the night of March 23, 1989, the EXXON VALDEZ departed Valdez almost fully loaded with 53 million gallons of crude oil. Hazelwood was the captain and the only officer on board licensed to navigate through the critical parts of Prince William Sound. Predictably, he also was drunk – "so drunk that a non-alcoholic would have passed out." Pet. App. 87a. Before boarding the ship, Hazelwood had consumed "at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars." Pet. App. 64a. Once underway, Hazelwood pointed the vessel toward Bligh Reef, a "known and foreseen hazard," Pet. App. 61a, and then left the bridge and descended to his cabin, leaving control to the "fatigued" third mate. Pet. App. 64a. Shortly thereafter, with the third mate left to perform both his own job and Hazelwood's, the tanker ran aground on the reef. Although Exxon tells this Court that the "immediate cause of the grounding" was the third mate's failure to execute a turn to avoid the reef, Pet. 3, Exxon stipulated in the district court that Hazelwood "was negligent in leaving the bridge on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence." Tr. 5.

The reef ripped open the ship's hull, releasing 11 million gallons of crude oil into the Sound, causing the "most notorious oil spill in recent times." *United States v. Locke*, 529 U.S. 89, 96 (2000). Wind and water spread the oil across 600 linear miles (roughly the distance from Cape Cod, Mass-

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[5] Westlaw's electronic version of this opinion, from which Exxon's Appendix apparently is drawn, omits nine words from this quotation.

achusetts to Cape Lookout, North Carolina) and over 10,000 square miles of the surrounding saltwater ecosystem.

"In keeping with its legal obligations, Exxon undertook a massive cleanup effort." Pet. App. 124a (citing 33 U.S.C. § 1321). But the jury could have concluded that Exxon directed its efforts more at appearances than effects. Exxon cleaned up only 14 percent of the oil. *See* Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, *available at* http://www.evostc.state.ak.us/Habitat/lingering.cfm (last visited Sept. 18, 2007). Audiotape captured an Exxon official demanding cleanup equipment as follows: "I don't care so much whether it's working or not but . . . it needs to be something out there that looks like an effort is being made. . . . I don't care if it picks up two gallons a week. Get that shit out there . . . and . . . standing around where people can see it." C.A. 2004 Supp. ER 1096.

As the courts below observed, the oil spill "disrupted the lives (and livelihood) of thousands of [people in the Prince William Sound area] for years." Pet. App. 24a. It made it likely that any "fish harvested [would be] adulterated by oil," Tr. 4495-96, requiring the State of Alaska to close fishing seasons in 1989, reduced harvests in later years, and caused fish prices to drop. It damaged approximately 1,300 miles of shoreline, much of it privately owned. It destroyed the subsistence activities of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. As would be expected from a disaster that cripples an entire regional economy, "[t]he social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a.

2. Thousands of private claimants sued Exxon. While state and federal governments separately sought civil and criminal penalties against Exxon for the oil spill's effect on the environment, this consolidated case was (and is) the only proceeding addressing harm to "private economic and quasi-economic interests." Pet. App. 2a. And because Exxon quickly entered into settlements with the governments, this litigation provided the first opportunity for an adversarial proceeding to develop the facts fully. Pet. App. 174a n.111.

As the Ninth Circuit later observed, the district court "did a masterful job of managing this very complex case." Pet. App. 67a. After years of discovery, it tried the case in 1994 to a jury in three phases over 83 trial days (reported in 7,714 pages of transcript), with 155 witnesses and 1,109 exhibits. Because counsel advised Exxon that it "will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood," App. 43a, Exxon did not seek to limit its liability under the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181 *et seq.*

In the first trial phase, the jury found that Hazelwood and Exxon had each been reckless, which allowed the punitive damage claims to proceed. Pet. App. 67a.

In the second phase, the jury awarded $287 million in compensatory damages for economic harm to fishermen in the major commercial fisheries. Pet. App. 160a. Other proceedings addressed harm to other victims, including fishermen in other fisheries, fish processors, other area businesses, landowners, Native Alaskans, municipalities, and others. In post-trial proceedings, the district court and the court of appeals determined that class members suffered economic harm exceeding $500 million. Pet. App. 38a, 160a-163a. Unlike plaintiffs in an ordinary modern tort action, however, these plaintiffs could not recover damages for all their harm: maritime law retains narrow nineteenth-century conceptions of compensatory damages that preclude recovery for certain kinds of economic harms or for any

emotional and psychological injuries. *See generally Union Oil Co. v. Oppen*, 501 F.2d 558, 565-71 (9th Cir. 1974).

In the third phase, the jury was asked "to determine liability for and the amount of punitive damages, if any, for all plaintiffs." Third Amended Revised Trial Plan, Dkt. 4798, at 4. At Exxon's request, the district court certified a mandatory punitive damages class of 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, and others, encompassing "all persons or entities who possess or have asserted claims for punitive damages against Exxon ... which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill." Pet. App. 126a. Accordingly, unlike any other punitive damages trial before or since, this case would determine, once and for all, the total amount of any punitive liability. *See* Pet. App. 126a, 146a-147a.

The Phase III instructions told the jury that "[t]he 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." App. 17a.[6] Exxon therefore urged that it should not have to pay punitive damages because even if it had been reckless, it did not act reprehensibly. Tr. 7602-03. After "unusually detailed" instructions that "embodied" "the very same concepts" later elaborated in this Court's due process cases, Pet. App. 127a, 146a, the jury returned a verdict for $5 billion against Exxon.

3. The Ninth Circuit issued an opinion in 2001 affirming the jury's compensatory verdict and its decision to award punitive damages against Exxon, confirming that Exxon's knowledge of Hazelwood's relapse and the attendant risks rendered its conduct reprehensible. Pet. App. 97a. Nevertheless, the court of appeals remanded for the district court to reconsider the size of the punitive award in light of this

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[6] The Appendix to this brief reproduces the Phase III jury instructions (App. 1a-25a), which Exxon's petition unaccountably omits.

Court's intervening decisions in *BMW v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Pet. App. 104a.

4. On remand, the district court analyzed the voluminous record and concluded that "a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of . . . its right to due process." Pet. App. 221a. However, because the Ninth Circuit had asked it not only to apply *BMW*'s guideposts "in the first instance," Pet. App. 95a, but also to reduce the award, Pet. App. 104a, the district court cut the amount to $4 billion. Pet. App. 223a.

5. Exxon appealed, and the plaintiffs cross-appealed. While the cross-appeals were pending, this Court further elucidated the due process principles governing punitive damages in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Accordingly, the Ninth Circuit again remanded the case to the district court, so it could reconsider its latest decision in light of *State Farm*.

In an eighty-one page opinion that painstakingly applied this Court's guidance, the district court again concluded that the $5 billion jury verdict satisfied due process. It based this conclusion on findings that: (1) Exxon's conduct was "highly reprehensible"; (2) the ratio of punitive damages to concrete economic harm was 9.74 to 1,[7] which lies within the "single-digit" guidepost endorsed in *State Farm* and falls still lower once non-economic and potential harms are taken into account; and (3) "comparable criminal and civil penalties could have exceeded $5 billion." Pet. App. 179a. But because the Ninth Circuit's second remand order had not disturbed its direction to reduce the verdict, the district court entered a new judgment setting punitive damages at $4.5 billion – representing roughly a 9 to 1 ratio between punitive damages and economic harm. Pet. App. 179a-180a.

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[7] The district court found that the economic harm totaled $513 million. Pet. App. 163a. The Ninth Circuit later adjusted that calculation downward to $504 million, Pet. App. 38a, making the ratio 9.92 to 1.

6. Both sides again cross-appealed. A divided Ninth Circuit reduced the award to $2.5 billion. The majority accepted the district court's factual findings, but concluded that Exxon's actions, including its mitigation efforts immediately following the spill, placed its misconduct in the "mid" or "higher realm" of reprehensibility, "but not in the highest realm." Pet. App. 31a. Unlike the district court, the panel majority interpreted *State Farm* as "reserv[ing] the upper echelons of constitutional punitive damages (a 9 to 1 ratio) for conduct done with the most vile of intentions." Pet. App. 24a. Accordingly, the majority settled on a 5 to 1 ratio to economic harm, without accounting for the additional non-economic harm and potential harm. Pet. App. 40a.

Judge Browning dissented. Pet. App. 42a. He concluded that Exxon's conduct was "highly, if not extremely reprehensible" and that its post-tort actions did not retroactively diminish the reprehensibility of what it did. Pet. App. 46a, 52a. He reasoned that a ratio higher than 5 to 1 was permissible in view of the uncompensated harm and potential harm. Pet. App. 53a, 55a. He "therefore agree[d] with the district court's assessment that there is no principled means by which this award should be reduced." Pet. App. 56a.

7. Exxon petitioned for rehearing en banc. The Ninth Circuit denied the petition, with two of its twenty-three non-recused active judges dissenting. Without even a nod to the district court's and the panel's extensive factual findings detailing Exxon's failure to remove Hazelwood from command despite multiple reports of his relapse, Judge Kozinski argued that Exxon should not have to pay punitive damages at all because it merely had "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a.[8] Judge Bea argued that a 5 to 1 ratio was excessive on the facts. Pet. App. 293a.

[8] In 1995, shortly after the jury's verdict, and before the Ninth Circuit commenced review, Judge Kozinski publicly criticized the verdict in a widely circulated op-ed piece that questioned the common law system of

8. In the 13 years during which Exxon has pursued its post-verdict challenges, about 20 percent of the class has died. Exxon, however, has more than recouped the $2.5 billion judgment by operation of the differential between its internal rate of return and the statutory judgment rate.

REASONS FOR DENYING THE WRIT

Exxon's portrait of this litigation bears no resemblance to the case that the parties tried in 1994. At trial, the evidence showed that over a span of years Exxon's highest executives condoned placing an alcoholic who they knew had relapsed at the helm of an oil supertanker that regularly transited the resource-rich waters of Prince William Sound. The catastrophe that predictably resulted "disrupted the lives of thousands of people who depend on Prince William Sound for their livelihoods." Pet. App. 31a. The jury awarded punitive damages proportionate to the harm.

None of Exxon's arguments for further review has force. "Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where [a] defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995). This is such a case. In any event, Exxon has waived, or is estopped from raising, most of the arguments it presses. Many are fact-bound and depend on distorting this case's complex procedural history and voluminous record. Others pertain to issues that rarely arise, including one that will never arise again. And none of the questions presented implicates any conflict among the

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allowing private plaintiffs to recover punitive damages. The piece bracketed this verdict with such widely criticized punitive damage verdicts as that in the McDonald's "hot coffee case." Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18, *available at* http://alex.kozinski.com/articles/Case_of_Punitive_Damages.pdf. Judge Kozinski nevertheless did not recuse himself from the en banc proceedings here. *See* 28 U.S.C. § 455(a).

circuits or any tension between the decision below and this Court's precedent. After more than eighteen years, it is "time for this protracted litigation to end." Pet. App. 42a.

I. Exxon's Vicarious Liability Argument Does Not Warrant Review.

Exxon first asks this Court to consider whether a shipowner may be held vicariously liable for punitive damages under maritime law based solely on "the conduct of a ship's master at sea," even when the conduct runs counter to policies "enforced by the owner." Pet. i. But this case does not present any vicarious liability issue. The jury instructions during the punitive damages phase of this multi-phased trial required the jury to base any award against Exxon on its own corporate conduct, and Exxon never seriously pressed the proposition that Captain Hazelwood's actions violated company polices that it enforced. Even if this case did raise the question Exxon posits, it still would not merit this Court's review because waiver and harmless error principles render any supposed error irrelevant; the issue hardly ever arises; the Ninth Circuit's decision does not implicate any conflict; and the jury instruction that Exxon challenges was correct under the circumstances.

1. This case does not present any vicarious liability issue because the phase of this multi-phase trial in which punitive damages were assessed focused exclusively on Exxon's corporate conduct, and the jury awarded punitive damages on that basis. The parties tried this case in three separate phases. Pursuant to that agreed plan, Phase I of the 1994 trial considered whether reckless conduct had caused the grounding of the EXXON VALDEZ. Consistent with *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), a Phase I instruction told the jury that 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." Pet. App. 301a. Thus, the jury was allowed to find Exxon reckless based on

the conduct of Hazelwood's superiors – the managerial agents who left him in command despite knowing that he had relapsed – or on Hazelwood's own conduct, as Exxon never disputed that it gave Hazelwood the responsibilities of a managerial agent. Pet. App. 264a n.8. The jury found both Exxon and Hazelwood reckless. Pet. App. 303a.

But the Phase I verdict did *not* impose punitive damages. Phase III of the trial dealt with that issue from scratch, using instructions that never mentioned vicarious liability. The Phase III instructions emphasized that the Phase I verdict "does not mean that you are required to make an award of punitive damages against either" Exxon or Hazelwood. App. 12a. The court explained that "[t]he 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." App. 17a. The court gave twenty instructions covering every nuance of evolving punitive damages jurisprudence, directing the jury to consider the relevant factors separately as to "each of" Exxon and Hazelwood. App. 11a-21a. The verdict form, using language that Exxon proposed, contained separate interrogatories for Exxon and Hazelwood. As to each, the jury was first asked to decide *whether* punitive damages should be awarded against that defendant. App. 26a. Only if the jury answered "yes" would it decide what amount of punitive damages was necessary to punish and deter that defendant. *Id.*

In line with the jury instructions, the Phase III closing arguments focused on whether *Exxon's* conduct warranted punitive damages. Plaintiffs' counsel never mentioned vicarious liability. *See* Tr. 7556-88, 7629-44. Exxon's counsel likewise focused on the conduct of Hazelwood's superiors, not Hazelwood. Tr. 7600-05. He stressed to the jury that the Phase I recklessness verdict "does not mean that you are required to make an award of punitive damages," Tr. 7603, and, echoing the verdict form, noted that the "first

issue you have is, should you award punitive damages at all." *Id.* Exxon emphasized the Phase III instruction that the earlier recklessness finding did not necessarily mean that Exxon's conduct was sufficiently reprehensible to warrant punitive damages, *id.*, and argued that while Exxon may have acted recklessly, it did not act reprehensibly:

> I don't know why precisely you found us reckless, *and it's not relevant*, you may have found that returning Captain Hazelwood was such a bad judgment, that was reckless, so be it. And we tried to monitor Captain Hazelwood. I suspect we didn't do the world's best job of monitoring Captain Hazelwood, and as I think about it now, it's probably impossible to monitor the master of a seagoing vessel. . . . [W]e tried, and we may have made bad mistakes in there and that may be why you found us reckless, but we didn't ignore – we didn't ignore the risk.

Tr. 7602 (emphasis added).

This Court presumes that juries follow their instructions, especially when counsel's arguments reinforce them. *Buchanan v. Angelone*, 522 U.S. 269, 278-79 (1998). Accordingly, the verdict assessing punitive damages against Exxon means that the jury found that "the corporation, not just [Hazelwood], was reckless." Pet. App. 83a. The subsequent *de novo* reviews of the punitive damage verdict similarly emphasized that "the relevant misconduct" and the "critical factor" supporting punitive damages was "Exxon's keeping Hazelwood in command with knowledge of Hazelwood's relapse," Pet. App. 22a, 155a-156a, and confirmed that the verdict was supported by the evidence: "The evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." Pet. App. 83a. *See also* Pet. App. 64a, 89a-91a, 121a-122a, 154a-157a.

The question Exxon frames also is not presented here because Exxon's discussion of its purported policies likewise lacks any basis in this record. The Phase III instructions told the jury it could consider whether the "wrongful" "conduct . . . was contrary to corporate policies" in deciding whether to award punitive damages. C.A. 2004 Supp. ER 880-81. During Phase III testimony, however, Exxon discussed only one policy: the requirement that two officers man the bridge when transiting Prince William Sound, Tr. 7400-01, which Exxon enforced inconsistently at best. Tr. 1066-67, 1080, 1111, 3666-67. In its closing, Exxon did not claim diligence in enforcing *any* policy, Tr. 7588-7628; instead, it conceded that it "didn't have a written detailed policy" to monitor alcoholics returning to duty, Tr. 7613; *see also supra* at 2-3 & n.4, and acknowledged criticism that the policy of two officers on the bridge "was ambiguous." Tr. 7616. Exxon did not even argue to the Ninth Circuit that it enforced any alcohol policy; it argued instead that the Americans with Disabilities Act prevented it from doing so – a claim the Ninth Circuit easily rejected, and which Exxon does not pursue here. Pet. App. 89a; Exxon 1997 C.A. Br. 65.

2. Even if one could ignore the structure of this trial and suppose that the Phase I managerial-agent instruction caused the punitive verdict against Exxon in Phase III, any problem with the instruction lacks significance because it would not warrant a new trial. This is so for three independent reasons.

First, "[i]n the absence of a pertinent objection to the charge or a request for a specific interrogatory a general verdict is upheld where there is substantial evidence supporting any [permissible] ground of recovery in favor of an appellee." *Union Pac. R.R. Co. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968) (quotation omitted); *accord Kossman v. Northeast Ill. Reg. Commuter R.R. Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987). Exxon never requested an interrogatory in Phase III to pinpoint whose

conduct supported the punitive award against Exxon, and Exxon does not dispute (nor could it) the Ninth Circuit's conclusion that the record contains evidence sufficient to find that the corporation itself acted recklessly in placing Hazelwood in charge of the EXXON VALDEZ. *See* Pet. App. 88a-90a. Accordingly, Exxon has waived any ability to seek reversal now on the ground that "it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground." Pet. 13.

Second, it is a settled rule that when two theories of liability are submitted to a jury but one is improper, the error is harmless if "the 'entire focus' of the plaintiff's case" was on the proper theory. *Muth v. Ford Motor Co.*, 461 F.3d 557, 564-65 & n.15 (5th Cir. 2006) (collecting cases). This rule applies here. Phase III focused on Exxon's conduct, and plaintiffs never urged the jury to award punitive damages against Exxon based on Captain Hazelwood's recklessness.

Third, even when jury instructions improperly allow a jury to presume that a defendant acted with a requisite level of culpability, the error is harmless when the evidence of culpability was so strong that the jury would have found it anyway. *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *see also Neder v. United States*, 527 U.S. 1, 8-16 (1999); *Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1989) (jury's punitive award showed that failure to require jury to find *mens rea* element of underlying claim was harmless). Though not couched in terms of harmless error, that is exactly what the Ninth Circuit concluded here, finding that "Exxon is not in the position of the owners in *The Amiable Nancy* [16 U.S. (3 Wheat.) 546 (1818)] or *Lake Shore* [*& Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893)]" because "[t]he evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence." Pet. App. 83a. Lest there be any doubt, the *de novo* due process reviews below have

detailed that "[p]lacing a relapsed alcoholic in control of a supertanker" carrying tens of millions of gallons of oil through one of the Nation's most productive commercial fisheries was not only reckless but "highly reprehensible." Pet. App. 31a; *see also* Pet. App. 22a, 26a-30a, 121a-122a, 147a-157a.[9]

3. Even if this case presented the issue that Exxon postulates, that issue would not merit this Court's review because it hardly ever arises. Exxon cites only two cases over the past *one hundred fifty years* in which a court has found it necessary to decide whether a shipowner may be held liable for punitive damages based solely on the reckless actions of a "ship's master at sea." Pet. i.[10] This paucity of precedent reflects the fact that the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181 *et seq.*, limits a vessel owner's liability to the value of the owner's interest in the vessel – an amount that does not leave room for a significant punitive award – whenever the vessel causes damage "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001). A corporate owner lacks "privity or knowledge" with respect to

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[9] A memorandum that Exxon's own attorneys authored just two months after the shipwreck confirms that remanding based on an alleged error in giving the vicarious liability instruction in Phase I would not achieve anything besides delay. The memo explains that there is "no room for reasonable doubt that Exxon Shipping will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood." App. 43a. In other words, Exxon's own lawyers understood that it could never convince a jury that it merely had "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a (Kozinski, J., dissenting from denial of rehearing).

[10] Those cases, more fully discussed *infra*, are *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), and *Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577 (9th Cir. 1905). The Sixth Circuit in *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), discussed the issue, but its comments were *dicta* because the captain had a "good faith" reason to believe he had taken "the best course of action under the circumstances for the benefit of all concerned." *Id.* at 1147. *Protectus* itself involved the reckless actions of a "dock foreman," not a master. 767 F.2d at 1381.

an employee's actions unless the employee was an "executive officer, manager or superintendent" of the corporation "whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943); *accord Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 230-31 (7th Cir. 1993), *aff'd sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). Accordingly, for Exxon's question to arise: (1) a serious tort must occur involving a ship; (2) the damage must be solely attributable to reckless acts of the ship's master at sea; (3) the vessel must have a corporate owner; and (4) the master must be an executive officer, manager, or superintendent of the owner and be acting within his scope of authority within the meaning of the Limitation Act.

This constellation of circumstances hardly ever arises. Shipping calamities are rare, and those caused by captains' recklessness are rarer still. And in contrast to Exxon, which "enlarge[d] the responsibilities and authority of its senior fleet officers" with a "major shift of responsibility and authority from the shoreside staff to the shipboard teams," C.A. 1997 Supp. ER 257, 259; *see also* Pet. 6; Tr. 2934-36, 3866, shipowners do not typically give their captains sufficient authority to make their actions binding under the Limitation Act criteria. *See* 3 BENEDICT ON ADMIRALTY § 42, at 5-17 & n.4 (7th ed. 2005).

4. Nor do the facts of this case implicate any conflict respecting punitive liability and ship masters. Both courts outside the Ninth Circuit that have considered the issue – courts that Exxon contends correctly state the law (Pet. 12) – have held that punitive damages "may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him." *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) (denying punitive damages because "the evidence does not show that Captain Joppich was an unfit master"); *see also CEH, Inc. v.*

F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (upholding punitive award because the owner "fail[ed] to supervise" the captain under circumstances the owner should have known could lead to problems).[11] That, at a minimum, is what happened here. "[T]he highest executives in Exxon Shipping knew Hazelwood . . . had fallen off the wagon." Pet. App. 64a. Exxon "knew that he was going on board to command its supertankers after drinking, yet let him continue to command the EXXON VALDEZ." Pet. App. 89a; *see also* Pet. App. 83a, 89a-91a, 121a-122a, 154a-157a, 255a-256a.

As in *CEH*, the Court "need not resolve," 70 F.3d at 705, whether *Protectus* correctly held that a shipowner may be liable for punitive damages based *solely* on the recklessness of a managerial agent. This case involved much more.

5. Even though irrelevant to this case's outcome, the Phase I instruction based on *Protectus* was correct under the circumstances. Because a corporation is inanimate, its liability for damages, whether punitive or compensatory, *must* be vicarious. *Coryell*, 317 U.S. at 410-11. The question is simply how high ranking an agent must be before a court will impute the agent's conduct or knowledge to the corporation. Thus, this Court explained in *Lake Shore* that a corporation could be held liable in punitive damages for the misconduct of "[t]he president and general manager, or, in his absence, the vice president in his place." 147 U.S. at 114.

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[11] Exxon also cites *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989), and *The State of Missouri*, 76 F. 376 (7th Cir. 1896), as pertaining to this question. But the Fifth Circuit in *P&E* considered only whether it should drop "the punitive damages hammer on the principal for the wrongful acts of the simple agent or lower echelon employee," not a ship's master. 872 F.2d at 652. Even then, the Fifth Circuit suggested that such damages might be available when, as here, the corporation failed to "formulate[] policies and direct[] its employees properly." *Id.* In *Missouri*, none of the damages were "other than compensatory," 76 F. at 380, so the Seventh Circuit did not decide what standard might have governed punitive recoveries in maritime cases during that era.

Allowing corporate liability based on the misconduct of modern managerial agents comports with *Lake Shore*, scaled to our commercial era. At least in large modern corporations, such as Exxon, managers have as much authority as did typical presidents and vice-presidents in the nineteenth century. Recognizing this development, almost every state has adopted the rule, embodied in the Restatement (Second) of Torts § 909, that corporations may be liable in punitive damages for the misconduct of their managerial employees; a majority of courts has gone further, holding corporations responsible for punitive damages based on the acts of *any* agent. *See American Soc'y of Mech. Engineers, Inc., v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 541-45 (1999) (adopting Restatement for Title VII claims subject to the defense, based on Title VII considerations, that the manager's actions were contrary to the employer's good-faith efforts to comply with the statute). As the First Circuit has observed, the Restatement test reflects an "appropriate evolution of" maritime law. *CEH*, 70 F.3d at 705.[12]

II. The Question Whether Statutory Law in 1989 Inhibited Respondents' Ability To Recover Punitive Damages Does Not Merit This Court's Attention.

Exxon long ago waived its argument that the Clean Water Act ("CWA") forecloses punitive damages here. In any event, the question does not present any conflict of authority; the court of appeals correctly resolved it; and the question does not have ongoing significance.

1. As the Ninth Circuit noted, Exxon never raised its CWA argument until October 23, 1995, thirteen months after trial had concluded. On that date, Exxon filed a so-called

[12] Given Exxon's argument that maritime common law should reflect federal statutory policies, it is worth noting that the Oil Pollution Act of 1990 requires corporations to pay civil penalties that can run into the hundreds of millions of dollars whenever gross negligence by *any agent* causes an oil spill. 33 U.S.C. § 2704(c)(1); *see* Pet. App. 104a.

"renewed motion" "pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, for an order that the judgment to be entered on the special verdict of the jury . . . shall not include an award of punitive damages." App. 30a. Plaintiffs countered that the filing was "thrice untimely," in part because motions for judgment as a matter of law must be filed under Rule 50(b), *see* 9A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2513, at 235 (2d ed. 1995), and the stipulated deadline for filing any motion under that rule had passed many months before. App. 33a. In addition, Exxon never made a Rule 50(a)(2) motion on this ground during trial, which is a prerequisite to a post-trial motion for a judgment as a matter of law under Rule 50(b). App. 33a. The district court summarily denied Exxon leave to file its motion. Pet. App. 73a-74a; App. 35a.[13]

When Exxon advanced its CWA argument in the court of appeals, plaintiffs argued that it was waived because Exxon filed its October 23, 1995 motion beyond the deadline for post-verdict motions. Pltfs. 1997 C.A. Br. 79. Exxon responded that its motion had been timely made "under Rules 49(a) and 58(2)." App. 37a. Calling the circumstances "ambiguous," the Ninth Circuit elected to reach the issue on the ground that it presented a significant question of law and "Exxon clearly and consistently argued statutory preemption" in the district court – albeit under the Trans-Alaska Pipeline Authorization Act, *not* the CWA. Pet. App. 73a-74a.

The Ninth Circuit erred in reaching the merits of this issue. Exxon does not dispute that it filed its CWA motion beyond the deadline for filing a motion under Rule 50(b) for judgment as a matter of law. App. 37a. And Exxon's resort to Rules 49(a) and 58(2) cannot salvage its tardy filing. Rule 49(a) describes how to submit special verdicts to juries, and

[13] Deluged by motions, the district court had imposed a stay on motion practice, requiring the parties to seek leave to file new motions. As a technical matter, therefore, the district court denied Exxon's request to lift the stay in order to file its motion. App. 35a; *see also* App. 28a.

Rule 58(2) (now recodified as Rule 58(a)(2)(B)) is purely ministerial, directing district courts to "approve the form of the judgment" right after the clerk has prepared it. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989). No case suggests that either rule provides a platform for making an untimely substantive motion for judgment as a matter of law.

Although lower courts sometimes choose to glide over waiver problems to affirm on other grounds, this Court takes filing deadlines seriously. *See, e.g., Bowles v. Russell*, 127 S. Ct. 2360 (2007); *Burton v. Stewart*, 127 S. Ct. 793 (2006) (per curiam). And, contrary to the Ninth Circuit's *sua sponte* suggestion, which even Exxon did not have the temerity to advance, a party cannot preserve a preemption-type argument by arguing that *an entirely different federal statutory scheme* precludes relief that a plaintiff seeks. *See, e.g., Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993). Exxon's CWA argument is not properly before this Court.

2. Even if Exxon had preserved this issue, it would not merit review because no conflict, or even confusion, over the issue exists. In the thirty-five years since Congress passed the CWA, no court has suggested that the statute forecloses punitive damages in private tort actions arising from oil spills. To the contrary, several circuits have recognized the availability of punitive damages for private tort claims arising from polluting water with substances regulated by the CWA, without mentioning any colorable argument standing in their way. *See, e.g., Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (polluting stream with acidic water); *Knabe v. National Supply Div.*, 592 F.2d 841, 844-45 (5th Cir. 1979) (dumping industrial waste); *Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 722-23 (2d Cir. 1977) (spilling oil). The only published opinion besides this case to consider the question explicitly agreed that the CWA imposes no barrier to recovering punitive damages

pursuant to such a tort claim. *Poe v. PPG Indus.*, 782 So.2d 1168, 1175-78 (La. Ct. App. 2001).

3. Exxon cannot avoid the absence of any authority questioning the availability of punitive damages under these circumstances by manufacturing a generalized question about whether maritime common law allows plaintiffs to recover punitive damages when federal statutes "controlling" the defendant's conduct do not provide for any such damages. Pet. i. This formulation conflates two analytically distinct lines of cases: (a) those dealing with rights, and (b) those dealing with remedies. Neither supports Exxon's claim that a conflict exists or even its position on the merits.

a. A federal statutory scheme can preclude punitive damages if the plaintiff's underlying *substantive cause of action* would "interfere[]" or be "incompatible" with the scheme's operation. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (CWA, which sets standards for effluent discharges, forecloses common-law nuisance action that might result in different effluent standard); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981) (same); *Conner v. Aerovox, Inc.*, 730 F.2d 835, 839-42 (1st Cir. 1984) (same).

But nothing about respondents' private tort claim risks interference with the CWA's provisions allowing the federal government to impose penalties on oil spillers to recoup its cleanup costs. Indeed, the CWA "le[aves] . . . room" for tort claims arising from water pollution. *Int'l Paper*, 479 U.S. at 492. So this case bears no resemblance to *Sea Clammers* or *Conner*. Exxon, in fact, does not even argue (nor did it ever suggest in the Ninth Circuit) that the CWA forecloses respondents' substantive cause of action.

b. A federal statutory scheme also might preclude punitive damages by providing a comprehensive set of *remedies* for a given cause of action. In general, a plaintiff who brings a legitimate cause of action may seek the full

panoply of remedies. *Int'l Paper*, 479 U.S. at 498 n.19; *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). But when a plaintiff asserts a common law claim within the ambit of a congressionally-prescribed "comprehensive tort recovery regime to be uniformly applied," the plaintiff may not seek remedies beyond what that statutory scheme provides. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996); *see also Dooley v. Korean Air Lines*, 524 U.S. 116, 121-24 (1998) (Death on the High Seas Act sets forth exclusive remedies for survival actions arising from deaths on high seas); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) (Jones Act remedies for wrongful death actions govern suit for seaman's wrongful death caused by unseaworthiness); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978) (DOHSA sets forth exclusive types of recoverable damages for wrongful death actions arising from deaths on high seas); *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) (limiting government suits for cleanup costs to governmental remedies provided for such actions in the CWA); Pet. 18 (citing federal cases precluding punitive damages in claims for wrongful death, survival, and violation of Jones Act). Accordingly, when Exxon asks in its question presented whether common law remedies beyond those provided in a "controlling statute" are available, it begs the only possible question here – namely, whether the CWA's remedies actually "control" respondents' cause of action.

As the Ninth Circuit recognized, the CWA does *not* prescribe a comprehensive recovery regime covering private tort claims arising from oil spills, so cases such as *Miles* and *Oswego* do not govern. Pet App. 75a, 78a-79a. The CWA deals with "punishing harm [that pollution causes] to the environment," while leaving untouched common law remedies to address the interests respondents assert regarding harm to "private economic and quasi-economic resources." Pet. App. 79a. Indeed, the savings clause in the CWA's section relating to oil spills preserves all legal "liability" and

"obligations" of vessel owners arising from damage to private property "resulting from a discharge of any oil." 33 U.S.C. §§ 1321(*o*)(1) & (2); *see also id.* § 1365(e); *Askew v. American Waterways Opers., Inc.*, 411 U.S. 325, 329 (1973) (identically worded prior version of § 1321(*o*) allowed state regulation). Respondents thus stand in the same position as the plaintiffs in *Yamaha*, where this Court held unanimously that parents bringing a common law tort action for the wrongful death of their daughter, who had died riding a jet ski in territorial waters, could seek punitive damages because "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." 516 U.S. at 215.

4. Even if doubt existed over whether the CWA left room for punitive damages in cases involving oil spills occurring before 1990, there would be no reason for this Court to consider the issue because no dispute over the question will ever arise again. In response to the disaster at issue here, Congress enacted the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702 *et seq.*, establishing steep civil penalties for at least some of the harm that oil spills cause to economic and quasi-economic interests. Pet. App. 104a. Since OPA's passage, the question whether *the CWA* forecloses private plaintiffs who bring maritime tort claims based on oil spills from recovering punitive damages has been overtaken by the question (not presented here because OPA is not retroactive) whether *OPA* forecloses such claims seeking such damages.

In *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000), the First Circuit noted, consistent with the court of appeals' decision here, that "the general admiralty and maritime law that existed prior to the enactment of [OPA] . . . permitted the award of punitive damages for reckless behavior" that caused oil spills. *Id.* at 65. It then held that OPA's new remedies replace private parties' previous ability to recover such damages. *Id.* at 64-66. Regardless of whether this interpretation of OPA is correct, it makes clear that any inquiry into statutory

remedies in any future tort action such as this would focus on OPA's new statutory framework, not the CWA's.

III. The Size of the Punitive Award Does Not Warrant Further Review.

Exxon challenged the size of the punitive award in the courts below primarily on due process grounds. Indeed, after eleven pages of briefing presenting exclusively constitutional arguments, Exxon told the Ninth Circuit that "*if the Court does not wish to reach the issue of constitutional excessiveness*, it should exercise its power as a common law maritime court to reduce the award to no more than the amount, if any, that is necessary to the objective of punishment and deterrence in a maritime context." Exxon 1997 C.A. Br. 81 (emphasis added). Following Exxon's suggested hierarchy, the Ninth Circuit reviewed the Phase III verdict only under the Due Process Clause. Accordingly, we shall address the Due Process Clause before responding to Exxon's attempt to change the playing field.

1. This case does not raise any due process issue meriting this Court's review. Space limitations prevent recounting the district court's extensive findings of historical fact, which are entitled to deference, *Cooper*, 532 U.S. at 440 n.14, and which the court of appeals accepted, concerning Exxon's reprehensible conduct and the harm it inflicted. Nor is there room here to detail all of Exxon's distortions of, and omissions from, the record in its attempt to recast the case. Respondents thus refer this Court to the findings of both courts below and the accompanying legal analyses. *See* Pet. App. 22a-42a, 60a-67a, 88a-90a, 120a-124a, 142a-180a. Given those opinions, a brief response to Exxon's arguments suffices.

a. *Reprehensibility*. Exxon contests the court of appeals' conclusion that Exxon's conduct was "in the higher realm of reprehensibility" and was reduced only to "a mid range" by its legally-compelled post-spill mitigation. Pet. App. 31a.

This conclusion, and Exxon's quibbles with it, Pet. 29-30, are entirely fact-bound and do not warrant further review.

Exxon suggests that it should have gotten *more* credit for its post-spill claims program than the Ninth Circuit gave because, in Exxon's words, it paid claimants (1) "voluntarily," (2) "quickly," and (3) "fairly." But this ignores that (1) Alaska law rendered Exxon strictly liable for economic harm, Pet. App. 124a & n.17, so Exxon had a legal obligation to pay claims; (2) Exxon did not pay all, or even most, claimants "quickly"; many were paid only during trial or by different entities, such as the Trans-Alaska Pipeline Liability Fund, sometimes over Exxon's objection; and (3) Exxon refused to pay anything for various types of fishing losses for which the jury awarded $168.5 million, refused to pay entire categories of claimants, and never paid anything for harm beyond the purely economic. *See* Pltfs. 2004 C.A. Br. 35-37, 47-50 (detailing payment history). Exxon's additional claim that respondents did not suffer any "non-economic" injuries also ignores the findings that this disaster, which crippled the regional economy (and for Native Alaskans, their way of life), inevitably had profound non-economic effects. *See* Pet. App. 25a-26a, 123a-124a, 150a-152a, 166a-167a. Finally, Exxon's suggestion that the Ninth Circuit improperly considered potential harm to the ship's crew ignores this Court's recent holding that courts may consider the effects of a defendant's conduct on nonparties "to determine reprehensibility." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007). That is all the Ninth Circuit did. Pet. App. 27a.

b. *Ratio.* Exxon claims that the 5 to 1 ratio of punitive damages to economic harm contravenes this Court's statement in *State Farm* that "[w]hen 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. In addition to ignoring the words "perhaps" and "can" in this quotation, Exxon ignores three important matters specific to this case.

First, the average amount of economic harm per class member was not "substantial"; it totaled less than $15,500 per person. Pet. App. 38a, 168a-69a. Because class certification cannot "abridge, enlarge or modify any substantive right" of class members, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the fact that Exxon sought and obtained certification of a mandatory class cannot reduce plaintiffs' punitive recoveries by aggregating their modest individual economic harms into a large collective injury. *See Lambert v. Fulton County*, 253 F.3d 588, 598 (11th Cir. 2001) (calculating ratios separately for each plaintiff). Indeed, even if there were a colorable argument to the contrary, Exxon would be estopped from making it. When respondents questioned Exxon's certification motion, Exxon emphasized to the district court that "certification of a mandatory punitive damages class would not in any way . . . prejudice any of the parties" or "alter the substantive rights of any parties." Exxon Reply in Support of Motion to Certify Mandatory Punitive Damages Class, Dkt. 4539, at 5. At the very least, the unique mandatory class framework of this trial distinguishes it from all of the cases Exxon discusses and makes it a poor vehicle for resolving any supposed confusion over *State Farm*'s ratio discussion.[14]

Second, *State Farm*'s one-to-one suggestion (as well as its "single-digit" guidance) assumes a situation in which the monetary value of a plaintiff's noneconomic harm has been quantified, and the plaintiff "has been made whole for his injuries by compensatory damages." 538 U.S. at 419, 425. In *State Farm*, each plaintiff recovered $500,000 "for a year

[14] Exxon suggests (Pet. 28 n.9) that the 5 to 1 ratio conflicts with the 2 to 1 and 1.4 to 1 ratios, respectively, in *Estate of Moreland v. Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005), and *Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004). But in those cases, the courts *upheld* punitive damage awards, while noting that they fell comfortably within the single-digit range. *Stamathis* also emphasized that a court calculating a ratio must account not only for economic damages but also for the value of "insult, pain, and mental suffering." 389 F.3d at 443.

and a half of emotional distress" over whether an insurance claim would be covered. *Id.* at 426. Here, by contrast, respondents' noneconomic harm was never quantified, and maritime law's conception of compensatory damages prevented respondents from being made whole for that harm. *See supra* at 6-7; Pet. App. 24a-26a, 53a (Browning, J., dissenting), 166a-168a; *cf. Cooper*, 532 U.S. at 437 n.11.

Third, this Court has made clear that the ratio analysis must consider not just the actual harm the tort inflicted but also the potential harm it threatened. *State Farm*, 538 U.S. at 424-25; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). Here, the 42 million gallons of crude that the EXXON VALDEZ fortuitously did not discharge threatened "immense" additional harm. Pet. App. 167a.

c. *Penalties.* The court of appeals analyzed penalties in both of its opinions. Pet. App. 40a-41a, 101a-104a. Exxon attempts to argue the details of that analysis yet again, asserting that "[c]ombined federal and state civil penalties for this oil spill could not have exceeded about $80 million." Pet. 30. But this tells only part of the story. In fact, "Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties . . . in excess of $255 million." Pet. App. 176a-177a. Further, federal criminal penalties for the three crimes to which Exxon pleaded guilty could have exceeded $3 billion. Pet. App. 173a-175a. And federal and state legislation passed in response to this disaster – reflecting "legislative judgments concerning appropriate sanctions for the conduct at issue" *BMW*, 517 U.S. at 583 (quotation omitted) – would have subjected Exxon to $1.3 billion in civil penalties.

2. Nor should this Court entertain Exxon's request to create a new maritime law excessiveness doctrine tailored to its repeatedly rejected version of the facts of this case.

a. Exxon waived its maritime law argument. Because it told the Ninth Circuit that it need not address maritime law if it considered the due process challenge, Exxon cannot now

claim (Pet. 21-23) that the absence of a freestanding common law analysis is erroneous or creates some kind of conflict. Appellate courts cannot be sandbagged in this manner.

b. Prudential considerations also make this an improper vehicle for devising a brand new legal doctrine. This Court will not consider issues neither pressed nor passed on below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Exxon did not press a maritime excessiveness claim below; after failing to seriously urge any such claim in the district court,[15] it told the Ninth Circuit there was no need to reach the issue. And neither the district court nor the Ninth Circuit passed on the issue. *See* Pet. App. 90a-104a, 224a-228a. Worse yet, no other court has ever considered any maritime excessiveness argument resembling Exxon's here. Under such circumstances, this Court should not break new ground.

c. In any event, Exxon's substantive argument is both meritless and fact-bound. Exxon does not explain exactly what rule of law it urges, but to the extent Exxon suggests this Court should create a new excessiveness doctrine on the theory that maritime law "is concerned with . . . limitation of liability," Pet. 23 (quotation omitted), Congress already has addressed that concern in the Limitation Act. That Act protects shipowners from any tort liability beyond their interest in vessels as long as they lack privity or knowledge with respect to the tort. *See* 46 U.S.C. § 183; *supra* at 16-17.

Nothing justifies eliminating the line that Congress drew so as to bestow similar protection upon those shipowners, such as Exxon, that *do* act recklessly with privity or knowledge. The common law always has permitted imposing punitive damages with single-digit ratios, *State Farm*, 538 U.S. at 425, and this Court may not "limit the right of the injured party to a recovery" allowed by common law beyond

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[15] Apart from a heading and three scattered sentences asserting that both constitutional "and maritime law" limit the size of punitive awards, Exxon's 73-page Rule 50(b) excessiveness brief in the district court contained less than one and one-half pages discussing maritime law.

what is "necessary to effectuate" the purpose of the Limitation Act. *The Main v. Williams*, 152 U.S. 122, 132-33 (1894). Indeed, in the only case recently to consider the size of a punitive award in a maritime case for conduct at all similar to Exxon's, the court approved a 7.5-to-1 ratio, reasoning that "the imposition of punitive damages . . . encourages shipowners to hire qualified and responsible captains and to exercise supervisory power over them. In addition, it fairly punishes [the owner] for his failure to provide any supervision over his captains." *CEH*, 70 F.3d at 705 (quotation omitted). Such awards "protect[] maritime commerce," *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (quotation omitted), not only by encouraging safety and accountability, but also by safeguarding the interests of other mariners – such as the commercial fishermen here.

Exxon's plea for this Court to craft a brand new four-pronged exception to this legal landscape tailored to the supposed facts of this case amounts to nothing more than an unfounded request for error correction. Exxon's claim that its cleanup costs and governmental payments for environmental harm provided sufficient "punishment or deterrence" (Pet. 24-25) ignores the non-environmental nature of respondents' injuries, Pet. App. 79a, as well as the fact that the criminal payment "d[id] not reflect the true extent of the harm" later revealed at this trial. Pet. App. 240a, 174a n.111. Exxon's arguments about the "substantiality" of the damages and about comparable penalties fail for the same reasons as do its identical due process arguments. And Exxon's final point (Pet. 26) ignores the fact that this Court has never cast doubt, in the context of due process or common law, upon the "well-settled" and "typical" practice of informing juries of a defendant's financial condition. *TXO*, 509 U.S. at 462 n.28; *see also State Farm*, 538 U.S. at 427-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 2007

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