No. 07-219

IN THE

Supreme Court of the United States

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

—v.—

GRANT BAKER, *et al.*,
Respondents.

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

BRIEF OF INTERNATIONAL CHAMBER OF SHIPPING, THE BALTIC AND INTERNATIONAL MARITIME COUNCIL, CHAMBER OF SHIPPING OF AMERICA, TEEKAY CORPORATION, THE BAHAMAS SHIPOWNERS ASSOCIATION, AMERICAN INSTITUTE OF MARINE UNDERWRITERS, AND AMERICAN COMMERCIAL LINES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The amici curiae represent the overwhelming majority of the members of the United States and international maritime industry. The maritime industry transports about 97 percent of United States trade by weight excluding trade with Canada or Mexico.[2] That trade is vital to our nation's economic and national security, and uniform and predictable laws are critical to the maritime community.

International Chamber of Shipping

Formed in 1921, the International Chamber of Shipping ("ICS") is the trade association for the international shipping industry. Its membership comprises shipowners' associations and shipping companies from thirty-five countries (including the United States, Canada, and Mexico).[3]

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[1] No counsel for any party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

[2] *See* U.S. Department of Transportation, Bureau of Transportation Statistics, Figure 2: *Modal Shares of U.S. Merchandise Trade Handled by Land, Water, and Air Gateways by Value and Weight: 2003*, http://www.bts.gov/publications/americas_freight_transportation_gateways/.

[3] The membership of ICS also comprises national shipowners' associations from the following countries: Australia, Austria, Belgium, Bulgaria, Canada, Chile, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hong

ICS coordinates its efforts with the European Community Shipowners' Associations ("ECSA"), which represents the European shipping industry. In addition to associations that belong to ICS, ECSA membership includes associations from Estonia, Latvia, Lithuania, Malta, Poland, Portugal, and Slovenia. ICS also coordinates with national shipowners' associations from China, Chinese Taipei, Indonesia, Korea, Malaysia, the Philippines, Thailand, and Vietnam through the Asian Shipowners' Forum, a voluntary organization that is now being formalized.

Shipowner members of ICS represent about 450 million gross tons,[4] which constitute about two thirds of the world merchant fleet. ICS members carry about two thirds of the volume of United States ocean-going trade a year, making approximately fifty thousand United States port calls per year.

The shipowner members of ICS operate ships in all sectors and trades, including containerships (which carry the shipping containers in which the overwhelming majority of U.S. imports and experts, in terms of value, is transported), bulk carriers (which carry raw materials such as

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Kong, Iceland, India, Ireland, Italy, Japan, Kuwait, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Singapore, Spain, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, and the United States of America.

[4] Gross tonnage of a vessel "consists of its total measured cubic contents expressed in units of 100 cubic feet or 2.83 cubic meters." René DeKerchove, *International Maritime Dictionary* 339 (2d ed. 1948).

grain, ore, coal, and other cargo that is not packaged and is shipped in large quantities), oil and chemical tankers (which carry petroleum products and the many different chemicals that are transported worldwide), gas carriers (which carry liquefied gas), general cargo ships (which carry many different kinds of cargo that are not carried in containers, including large pieces of cargo that would not fit inside a container), specialist ships (e.g. automobile carriers and offshore oil rig supply vessels), and passenger ships. ICS members serve over 100 nations—virtually every nation with a seagoing port.

ICS acts as an advocate for the maritime industry on issues of maritime affairs, shipping policy, legal and technical matters, ship construction, operation, safety, and management, to develop the best possible practices in the industry. To accomplish these goals, ICS strives for a uniform regulatory environment that embraces safe shipping operations, protection of the environment, maintenance of open markets, and fair competition, as well as adherence to internationally adopted standards and procedures. ICS supports regulation of shipping at an international level to obtain uniform regulations that will be enforced worldwide.

The Baltic and International Maritime Council

The Baltic and International Maritime Council ("BIMCO"), founded in 1905, is the world's oldest and one of the largest association of shipowners, ship managers, ship brokers, agents, operators,

associations, and other entities connected with the international shipping industry. Almost 1,000 shipowners, 1,400 ship brokers, and other shipping related companies are BIMCO members. Shipowner members represent more than 65% of the world's available cargo carrying-capacity.

BIMCO strives to raise standards of its members through the harmonization of commercial shipping practices. It promotes quality, safety, security, environmental protection, the fair treatment of seafarers, free trade, and open access to markets. To accomplish these goals, when appropriate and circumstances so demand, BIMCO takes a position on important issues facing the shipping industry, including filing briefs amicus curiae with this Court.

BIMCO also is a leader in producing standard contractual documents for the shipping industry.[5] These documents are balanced to be acceptable both to shipowners and to charterers[6] of ships. Use of standard documents reduces the need to negotiate each contract, promotes uniformity, and raises standards. These balanced documents are trusted by all parties in the maritime industry. BIMCO drafted the documents in reliance

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[5] The documents are published and may be found at the BIMCO website, *at* http://www.bimco.org/. The many BIMCO documents can be found by clicking on the "Documentary" menu.

[6] A charterer is a person or entity who, pursuant to an agreement, called a charter party, hires a ship from a shipowner for a period of time, or who reserves all or part of a ship for carriage of goods for a period of time or voyage. *See* Jo Desha Lucas, *Cases and Materials on Admiralty* 587-88 (Foundation Press 1969).

on existing statutes and treaties. This reliance would be impossible if the underlying statutory and treaty provisions could be circumvented by an award of punitive damages.

Chamber of Shipping of America

The Chamber of Shipping of America ("CSA") include 30 U.S.-based companies that own, operate, or charter oceangoing container ships, dry bulk vessels, and tankers engaged in both the domestic and international trades, and companies that maintain a commercial interest in the operation of such oceangoing vessels.

CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives that include marine safety, maritime security, and environmentally protective operating principles. CSA supports a viable United States domestic maritime industry and promotes open international trade in shipping services. CSA also provides strong technical expertise, marine experience, and knowledge in order to be an authoritative and effective forum for U.S. maritime issues.

CSA represents owners, operators, and charterers of both U.S. and foreign flag ocean vessels before U.S. regulatory, legislative, and administrative entities.

Teekay Corporation

Teekay Corporation ("Teekay") operates a fleet of approximately 170 vessels, including time-

chartered and commercially managed vessels, and is an essential marine link in the global energy supply chain. Teekay's vessels connect upstream gas and oil production with downstream refining and distribution.

In 2006, Teekay's tanker fleet transported 236.8 million metric tons of oil and 3.9 million metric tons of liquefied natural gas ("LNG")[7]—representing approximately 10 percent of the world's seaborne oil movements and about 2.4 percent of the world's LNG transport. Last year, the Teekay fleet completed 3307 voyages. In 2006, the United States imported about 12 million metric tons of LNG, about 10.1 million barrels per day of crude oil, and about 3.4 million barrels per day of other petroleum products.

The Bahamas Shipowners Association

The Bahamas Shipowners Association ("BSA") was inaugurated by The Bahamas Minister of Transport in 1997 to promote the interests of Bahamian registered vessels, currently 1,582 ships with a total of approximately 44 million

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[7] Liquefied natural gas is natural gas that is cooled to about minus 161° Celsius and compressed to 25kPa (3.6 psi) to keep the LNG in liquid form. *See* Maritime Administration, *What is LNG?,* http://www.marad.dot.gov/dwp/lng/faqs/index.asp#faq_7. It is transported in specially designed ships. While LNG supplies about 4% of the natural gas consumed in the United States at this time, it is predicted that LNG will supply 20% of natural gas consumed in the United States by 2015. Joe Silha, *Far East LNG demand siphons more supply from U.S.,* Reuters UK, Sept. 17, 2007, http://uk.reuters.com/article/oilRpt/idUKN1723399520070917.

gross tons. U.S.-based shipowners represent more than 10 percent of the Bahamian tonnage.

The BSA fleet comprises a variety of ships, including cruise ships,[8] refrigerated cargo ships, dry bulk carriers, tankers, ferries, and ships involved in short sea shipping (coastal trade for short distances). BSA represents the interests of the owners of Bahamian registered vessels and voices its views on international policy before such organizations as the U.S. Coast Guard, the IMO, and the European Community.

American Commercial Lines Inc.

American Commercial Lines Inc. ("ACL") is one of the largest and most diversified marine transportation and service companies in the United States. ACL and its subsidiaries provide barge transportation and related services under the provisions of the Jones Act (current version at 46 U.S.C. § 55102 *et seq.*, formerly 46 U.S.C. app. § 883) and manufacture barges, towboats, and other vessels, including ocean-going liquid tank barges. ACL is regulated by general maritime rules and regulations, federal, state and local laws. Decisions relating to punitive damages under statutes affecting water trade and commerce, such as the Clean Water Act, ("CWA"),

[8] Cruise ships contributed more than $35 billion to the United States economy in 2006. Sandra Spears, *Hard-hitting cruise sector adds $35bn to US economy,* Lloyd's List, Sept. 3, 2007, at 7.

33 U.S.C. § 1251, *et seq.*,[9] or under the principles of maritime law, have a direct effect on ACL. As a result, ACL is joining this brief to assist the Court in understanding the position of marine operators within the inland United States marine industry.

The inland marine industry operates on approximately 11,000 miles of commercially significant navigable waterways in the United States.[10] More than 4,000 towing vessels push a collection of 27,000 barges on these waterways.[11] These barges annually carry 617 million tons of materials and products that power the American economy, including coal, grain, petroleum products, petrochemicals, fertilizers, sand, gravel, metallurgic products, and much more.[12] The inland marine industry transports approximately 300 billion ton-miles of cargo annually.[13] These

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[9] 62 Stat. 1155, 33 USC § 1251, *et seq.*, as the Clean Water Act read on March 24, 1989, the date EXXON VALDEZ grounded.

[10] U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook '92* 4020 (1992).

[11] *See* American Waterways Operators, *Value to the Nation,* http://www.americanwaterways.com/about_industry/value.pdf.

[12] David V. Grier, *Locks and Dams, Proceedings of the Marine Safety & Security Council, the Coast Guard Journal of Safety at Sea, Summer 2007* 56 (citing *U.S. Army Corps of Engineers, Institute for Water Resources, Inland Navigation, Value to the Nation (2000), unpublished update 2005)).*

[13] *Id.*

ton miles comprise up to 20 percent of all domestic waterborne cargo movements.[14]

Transportation by barge is environmentally advantageous when compared to other modes of transportation, such as truck or rail car. For example, one large inland towing vessel can push 40 barges that have the same cargo capacity as approximately 2,400 trucks that burn one gallon of fuel to transport the equivalent of 70 ton miles as compared to 530 ton miles by barge.[15]

No company dominates or controls the inland river industry. The inland river industry consists of approximately 750 companies. Forty-five percent of the total capacity is spread amongst nine different operators.[16] In recent years, the inland river industry has weathered economic downturns that have hurt the profitability and development of some smaller operators. None could withstand the imposition of punitive damages approaching the scale assessed in this case.

American Institute of Marine Underwriters

The American Institute of Marine Underwriters ("AIMU") is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, promoter, source of information, and center for

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[14] *U.S. Industrial Outlook '92*, *supra* note 10 at 40-20.

[15] Grier, *supra* note 12 at 56.

[16] U.S. Department of Commerce, International Trade Administration, *Transportation Services in U.S. Industrial Outlook 1993*, 40-19 (1993).

education.[17] AIMU represents 49 marine insurance companies in the United States, which underwrite the vast majority of the ocean marine risks insured in the United States.

The risks insured by AIMU's members include physical damage to vessels, liabilities of shipowners including pollution liabilities,[18] and where permitted by public policy[19] and not excluded by policy wording, punitive damages and penalties. In 2006, AIMU's members underwrote marine insurance policies with collective total premiums of approximately $2.5 billion.

AIMU works in conjunction with the United States government and international groups to monitor the allocating of risks that affect the marine insurance industry and the broader marine industry. AIMU is the forum for action on the important and timely issues that affect United States marine insurers, reinsurers, and the maritime community at large.

AIMU members can operate efficiently and provide the maritime industry with vital insurance products only if the rules imposing liability are clear and predictable.

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[17] *See* www.aimu.org.

[18] While AIMU understands that Petitioners' liability for any punitive damages in this case will be uninsured and no AIMU member has a pecuniary interest in the outcome of this litigation, AIMU and its members have a strong interest in the effect this decision will have on future cases.

[19] In most United States jurisdictions, courts have determined that insurance coverage of punitive damages is not contrary to public policy. Lorelie S. Masters, *Punitive Damages: Covered or Not?*, 55 Bus. Law 283, 294 (1999).

INTRODUCTION

Permitting punitive damages in the context of this case would destroy the uniformity and predictability needed by the international and domestic maritime industries. The law cannot be uniform and predictable if the courts impose remedies that Congress did not authorize in the applicable statutes. The courts below undermined uniformity by adding a punitive damage remedy to the remedies specified in the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*[20] Congress carefully drafted the CWA to balance the interests of all affected parties and the courts should respect the Congressional judgment.

SUMMARY OF ARGUMENT

The Founders of our nation realized that the maritime industry must be governed by uniform and predictable laws. For that reason, the Constitution grants federal courts jurisdiction over admiralty and maritime matters. This Court has long held that the courts should not develop new admiralty law in an area in which Congress has legislated. The CWA governed the oil spill in question. That Act provided punishment for the party responsible for spilling oil. Exxon was punished according to the CWA and should not be further punished by punitive damages added to the CWA. The CWA represents a careful balance by Congress of the interests of all parties involved in the transportation in question. That

[20] 62 Stat. 1155, 33 USC § 1251, *et seq.*, as the Clean Water Act read on March 24, 1989, the date EXXON VALDEZ grounded.

balance should not be upset by the addition of non-uniform and unpredictable punitive damages.

ARGUMENT

I. The Law Has Long Recognized the Need for the Maritime Industry To Be Governed by Uniform and Predictable Law.

The need for uniformity and predictability in maritime law has long been recognized. The Constitution expressly extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1.[21] Moreover, this Court's jurisprudence has long reflected the importance of uniform and predictable maritime law. Only two Terms ago, in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 29 (2004), this Court emphasized the

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[21] Alexander Hamilton, writing in *The Federalist*, explained that the vesting of admiralty jurisdiction in the federal courts was intended to promote uniformity. Hamilton stated that maritime causes "so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public phase. . . ." The Federalist No. 80, at 478 (Alexander Hamilton) (G. Wills ed. 1982); *see also* The Federalist Nos. 12, 44, 64. Additional evidence of the Founders' intent for uniformity in maritime law can be seen in the 1789 Judiciary Act, which established the federal court structure. Section 9 of the Act provided that the Federal District Courts of the United States shall have:

> exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. . .; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Act of Sept. 24, 1789, ch. 20 § 9, 1 Stat. 73, codified at 28 U.S.C. § 1331 (1).

importance of "protecting the uniformity of federal maritime law." The *Kirby* Court explained that the grant of admiralty jurisdiction in Article III of the Constitution "must have referred to a system of law coextensive with and operating uniformly in, the whole country." *Kirby*, 543 U.S. at 28 (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna,* 88 U.S. 558, 575 (1874)). The *Kirby* Court particularly wished to avoid "undermin[ing] the uniformity of general maritime law." 543 U.S. at 28; *see also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996) ("In several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision.") (citing *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961)).

The spirit and purpose of the Constitution's Admiralty Clause, U.S. CONST. art. III, § 2, requires that maritime legislation should be coextensive and operate uniformly in the entire United States. *See Panama R. Co. v. Johnson*, 264 U.S. 375, 386-87 (1924). Congress embraced its role in creating uniform maritime legislation when enacting legislation such as the CWA. Congress did not authorize punitive damages in that legislation and such damages should not be permitted to disharmonize its application and undermine uniformity in maritime law.

The proper harmony and uniformity of maritime law is vital because maritime law governs complex commercial transactions among

nations.[22] Domestic uniformity of maritime law is not only a matter of importance for our internal commerce, it is important in our participation in the world community of international maritime commerce. This Court has explained that the framers of the Constitution placed admiralty and maritime cases under national control "because of its intimate relation to navigation and to interstate and foreign commerce." *Panama R. Co.*, 264 U.S. at 386. From the earliest times, this Court has recognized that maritime law has an important international dimension. *See The Lottawanna*, 88 U.S. 558, 572-73 (1874); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 453-54 (1851). More recently, this Court has recognized that "conflicts in the interpretation of [a maritime law convention] not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995). The application of punitive damages in maritime law would upset the uniformity and predictability of maritime law that is of vital importance to maritime commerce not only in this country, but throughout the entire international maritime community.

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[22] A typical shipping transaction involves principal participants from as many as six different countries. *See*, *e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553, 559 (1995).

II. The Unpredictable Nature of Punitive Damages Would Adversely Affect the Maritime Industry and Would Increase the Cost of Trade With the United States.

Uniform and predictable laws assist the safety of ships and ports. They also clarify the allocation of risks, which helps prevent the need for double insurance and allows an efficient insurance system to cover the many risks inherent in ocean shipping.

A. The Effects of Punitive Damages on Safety

The entire maritime industry, in the United States and abroad, should be able to look to one uniform set of safety regulations to govern a ship wherever the ship happens to be. Safety would be threatened if a ship's crew had to change its procedures as the ship moved from place to place, as this Court properly recognized in *United States v. Locke,* 529 U.S. 89 (2000) (rejecting Washington State's attempt to impose its own safe manning requirements when Congress and the international community had already spoken).

Safety regulations are truly uniform only to the extent that they are interpreted in the same manner throughout the world. If one jurisdiction were to consider the violation of a particular regulation sufficient to justify imposing punitive damages, then the imposition of punitive damages would essentially amend the safety regulations to place more emphasis on that particular regulation than on other provisions that might be even more important. If, for instance, a court were to impose punitive damages because a

mariner departed from a rule of the International Regulations for Prevention of Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, adopted by statute at 33 U.S.C. § 1602, *et seq*., ("COLREGS"), future mariners might be unduly reluctant to depart from that particular rule even if departure from it would help to prevent a collision. *See* COLREGS rule 2(b) (authorizing "a departure from these Rules necessary to avoid immediate danger"). The punitive damages would upset the careful balance of COLREGS by over-deterring a particular action.

Many federal statutes and international treaties govern the maritime industry to mandate the safety standards a shipowner must follow.[23] To ensure clarity, predictability, and certainty, they should be interpreted as they are

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[23] *See, e.g.* International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 ("SOLAS") (entered into force May 25, 1980), and its 1978 Protocol, Feb. 17, 1978, 32 U.S.T. 5577, 1226 U.N.T.S. 237 (entered into force May 1, 1981), as amended; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, S. Exec. Doc. No. 96-1 EE, 1361 U.N.T.S. 2 ("STCW") (entered into force Apr. 28, 1984, for the United States Oct. 1, 1991), and its July 7, 1995 amendments; the International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1313 U.N.T.S. 3 ("MARPOL")(entered into force Mar. 30, 1983), and its 1978 Protocol, Feb. 17, 1978, 17 I.L.M. 546, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983); Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1915 (1994 & Supp. IV 1998) ("APPS"). APPS requires compliance with the MARPOL Protocol and applies to all ships of U.S. registry or nationality or operated under U.S. authority, wherever located. APPS also applies to foreign ships when in the navigable waters of the United States.

written and only as they are written.[24] If they are interpreted otherwise, safety will suffer. No jurisdiction should give one safety regulation more importance than another unless the regulations themselves mandate that preference. If different courts were to decide that some regulations should be preferred over others, the relative importance of various regulations would change as a ship moved from one jurisdiction to another.

Punitive damage awards by various courts for acts or omissions that juries consider reckless create, in essence, new regulations, analogous in many ways to the Washington State regulations that were pre-empted in *United States v. Locke,* 529 U.S. 89 (2000). (Indeed, punitive damages are worse, for the governing standards are not set in advance by expert state regulators but after the fact by lay juries.) One of the pre-empted regulations in *Locke* would have harmed uniformity in crew training. A crew trained under one uniform set of standards will be safer

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[24] Justice Story's opinion in *The Amiable Isabella*, 19 U.S. 1, 71, 72 (1821), clearly explained that treaties must be interpreted only by their texts.

> [T]his Court does not possess any treaty-making power. . . .; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law.
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> [T]his Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.

than a crew trained to use varying standards at varying times and at varying places. Thus the *Locke* Court recognized that crew training is a subject on which uniformity is essential. *See id.* at 113; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 169 (1978) (recognizing "the congressional desire of achieving uniform, international standards"). Allowing individual juries to award punitive damages would also "frustrate the congressional desire of achieving uniform, international standards." *Id.*

B. The Effects of Punitive Damages Would Change the Allocation of Risks and Would Thus Increase the Cost of Transportation.

Stability, uniformity, and predictability are needed in the maritime industry to allocate risks in a clear manner. This need concerns not just insurers, but the entire maritime industry. The adverse effect of punitive damages is not limited to oil tankers but extends to all kinds of ships and marine ventures.

If punitive damages are permitted in the context of this case, there is no way to predict when another jury might make a similar award. The increased insurance costs for maritime shipping would increase the cost of trade with the United States. The more clearly risks inherent in the maritime industry are defined and allocated, the more efficiently the insurance system may guard against those risks. Efficient definition and allocation of

risks are found in the many admiralty treaties and in many United States admiralty statutes.[25]

When the law clearly allocates maritime risks to only one party, that party alone will typically obtain insurance and pay the premiums to guard against the risk. When the risk allocation is unclear, all parties to whom the risk might possibly be allocated need to obtain coverage and pay premiums for the risk that might be allocated to them, resulting in double insurance, increased business cost, and hence increased cost of trade with the United States.

Permitting punitive damages in this context would call into question the allocation of risks in maritime statutes and treaties across the board. The Ninth Circuit's rationale could justify a punitive damages award for an act or omission that by statute or treaty should be excused outright or should result in limited liability. Punitive damages could be imposed on a carrier in

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[25] Although the United States has not ratified all of the world's admiralty treaties, even unratified treaties often apply in the United States under our conflict of law rules. *See*, *e.g., Man Ferrostal, Inc. v. M/V Vertigo*, 447 F.Supp.2d 316 (S.D.N.Y. 2006), *reconsideration and certificate of appealability denied,* 2006 U.S. Dist. LEXIS 66621 (S.D.N.Y. Sept 18, 2006) (applying 1910 Collision Convention); *Otal Investments Ltd., M/V Kariba*, 03 Civ. 4304, 03 Civ. 9962, 04 Civ. 1107, 2005 U.S. Dist. LEXIS 13321, 2005 AMC 2454 (S.D.N.Y. July 7, 2005) (applying 1910 Collision Convention), *aff'd in part, rev'd and remanded in part,* 494 F.3d 40 (2d Cir. 2007); *see also Itel Container Corp. v. M/T Titan Scan*, 139 F.3d 1450 (11th Cir. 1998) *cert. denied*, 525 U.S. 962 (1998) (applying the Hague/Visby Rules as incorporated by reference); *see also* Francesca Morris, *The Pennsylvania Rule: No Longer the Rule?*, 32 Tul. Mar. L.J. 131, 131 (2007).

one case and on cargo interests in precisely the same circumstances in another case.

The CWA governed this case. It set forth the duties of all parties involved in the carriage of cargo. The CWA also established penalties for its breach. Those penalties did not include punitive damages and the courts should not amend the CWA by adding punitive damages to it.

An analogous risk allocation system is used for the carriage of goods. The Carriage of Goods by Sea Act (COGSA)[26] determines the risks for which carriers pay for insurance and those for which cargo interests buy insurance. A great body of case law has developed on risk allocation for the carriage of goods by sea during years of experience. These decisions have created well-established authority on which the industry relies. The risk of punitive damages would seriously harm the precedential value of this entire line of authority.

III. Punitive Damages Awards Would Circumvent Further Refinement of Risk Allocation in the Maritime Industry by Liability Limitations.

Limitation of liability performs two valuable functions in the maritime world. It increases a carrier's ability to obtain insurance for risks allocated to it and thus assures that the great majority of losses will be paid to the parties suffering the losses. It also further defines the party to bear the

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[26] Carriage of Goods by Sea Act, Ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701 (formerly codified at 46 U.S.C. §§ 1300, *et seq*.)

risk of loss or damage. Thus it is no surprise that limitation of liability is a long-established, well-entrenched aspect at the core of maritime law. Carriers bear the risk of damage, if they are liable, up to the limitation amount, and claimants bear the risk above the limitation amount.

Limitation also provides an effective method to punish grievous behavior by a carrier. A carrier can lose the right to limit its liability for grievous behavior both by the explicit provisions of many statutes and treaties and under some general maritime law doctrines, such as the "deviation" doctrine.[27] Two general types of limitation provisions are common. "Global limitations" are provided by the United States Limitation of Liability Act of 1851, 46 U.S.C. §§ 30502-30512, the 1976 Limitation Convention,[28] and the 1996 Protocol to the 1976 Limitations Convention.[29] These laws limit all liability of shipowners, not only liability for cargo, subject to certain exceptions. The other type of limitation regime limits the carrier's liability for specific claims. The

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[27] Judge Friendly explained the doctrine of unreasonable deviation in *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

[28] International Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221, 16 I.L.M. 606 ("1976 Limitation Convention").

[29] Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, May 2, 1996, [2004] Austl. T.S. 16, 35 I.L.M. 1433 ("1996 Protocol"). The United States has not ratified or adhered to the 1976 Limitation Convention or its 1996 Protocol. United States courts, nevertheless, will apply these international treaties when appropriate under choice of law principles. *See* note 25, *supra*.

most common of these is the "package limitation" under COGSA § 4(5) for cargo loss or damage.[30] The CWA also contains limitation provisions of this type. *See* CWA § 1321(f)(1) (Pet. App. 299a).

Rather than imposing punitive damages for grievous behavior, treaties, statutes, and general maritime law doctrines generally deprive a carrier guilty of such behavior of the protection of the otherwise applicable limitation provisions. Thus a carrier loses the protection of the Limitation Act if the cause of the damage is within the "fault or privity of the owner." 46 U.S.C. § 30505(b). Comparable international treaties deprive the carrier of the benefit of limited liability if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." 1976 Limitation Convention, art. 4. Under the historic deviation doctrine, a carrier generally loses the benefit of the COGSA package limitation if it unreasonably "deviates" from the course of the voyage. *See*, *e.g.*, *Hostetter v. Park*, 137 U.S. 30 (1890). And under CWA § 1321(f)(1) (Pet. App. 299a), the limitation on compensatory dam-

[30] International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 Stat. 233, 247, 120 L.N.T.S. 155 ("Hague Rules"); Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on Aug. 25, 1924, Feb. 23, 1968, 1412 U.N.T.S. 128 ("Hague-Visby Rules"); A/CN.9/WG.III/WP.81 – Transport Law: draft convention on the carriage of goods [wholly or partly] [by sea], dated February 13, 2007. The present draft of the proposed convention may be found at the UNCITRAL website: www.uncitral.org. by clicking on Working Group III.

ages does not apply when a discharge was "the result of willful negligence or willful misconduct within the privity and knowledge of the owner."

In sum, these admiralty statutes, treaties, and doctrines rely on the loss of limitation rights rather than punitive damages to deter egregious behavior. Courts should not now permit jury punitive damage awards to disturb that well-established system. It would be a radical change in maritime law to allow a single jury to nullify the careful balance that has been struck to allocate risks among different segments of the industry.

IV. Separation of Powers Principles Prevent the Courts From Creating General Maritime Law Doctrines When Congress has Addressed the Same Issue in a Statute.

Maritime courts routinely decline to create new general maritime law doctrines in an area of maritime law in which Congress has enacted legislation. Thus in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 287 (1952), this Court refused to extend maritime law by approving a rule of contribution between joint tortfeasors in a maritime personal injury case. The *Halcyon Lines* Court reasoned that since Congress had specifically enacted legislation in the field of maritime personal injury torts, it would be inappropriate for the Court to do so. *Id.* at 285. The Court stated, "[w]e have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." *Id.* at 280. This Court went on to explain that Congress is best able to gather information,

balance the interests at stake, and determine the most appropriate solution:

> The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made.

Id. at 286.

In *Mobil Oil v. Higginbotham*, 436 U.S. 618 (1978), this Court again emphasized the distinct and separate roles of Congress and the judiciary. In a lawsuit under the Death on the High Seas Act ("DOHSA"), the *Higginbotham* Court held that loss-of-society damages were not available, because the DOHSA preempted other maritime law. 436 U.S. at 624-25. In holding that the DOHSA governed the measure of damages, this Court stated "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* at 625. The Court went on to explain that,

> [i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

Id.

In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), this Court furthered the separation of powers jurisprudence of *Higginbotham*. The *Miles* Court held that the judiciary should not be

permitted to disturb congressional policy judgments by expanding remedies in maritime law. 498 U.S. at 27. The Court stated, "Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits" *Id.* at 24.

Here, the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, before it was amended in 1990, governed Exxon's[31] liability and specified the punishment to be imposed on Exxon for the EXXON VALDEZ spill. Most significantly, the CWA does not provide for the award of punitive damages against Exxon, the owner of the EXXON VALDEZ and the statutorily-mandated responsible party. Instead, the CWA, on the one hand, limits the liability of the party responsible for the oil spill, but, on the other hand, denies limitation of that liability if the "discharge was the result of wilful negligence or wilful misconduct within the privity and knowledge of the owner." 33 U.S.C. § 1321(f); *cf. supra* at 16. Neither the limitation nor the loss of limitation is relevant here, however, because Exxon accepted responsibility for the spill, voluntarily paid for virtually all the damage caused, and did not attempt to limit its liability.

The courts below imposed punitive damages, despite the CWA, because a jury, acting under faulty instructions, determined that Exxon was reckless.[32] But because punitive damages have

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[31] Petitioners are referred to as "Exxon."

[32] *See* Jury Instructions on Vicarious Liability for Punitive Damages, Jury Instruction No. 33 (reproduced as Appendix K to Exxon's Petition for Certiorari at 301a).

no basis whatsoever in the statutory scheme of sanctions Congress crafted in the CWA, this Court should not overstep the well-established boundaries of the separation of powers in admiralty law. In enacting legislation, such as the CWA, to address oil spills, Congress gathered relevant information on the most effective way to prevent oil spills and deter irresponsible behavior. It also appropriately balanced the interests at stake. The enacted legislation achieves uniformity and is preemptive in the field. The Court should not go beyond the limits set by Congress by creating new remedies in a field preempted by Congress. To do so would conflict with congressional lawmaking powers, and would upset the uniformity, predictability, and effectiveness of congressional legislation not only as it affects the carriage of oil, but as it affects the entire maritime industry and the law in general.

V. Prescriptive Legislative and Administrative Measures Are More Effective In Preventing Damage Than the Threat of Punitive Damages

Punitive damages merely act as an instrument of punishment to scourge the offending party after an accident has already happened. They offer no guidance to the carrier in advance that would enable the carrier to prevent the accident. This Court has long recognized that the purpose of punitive damages is two-fold: punishing unlawful conduct *and* deterring its repetition. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568 (1996) (citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Newport v. Fact Concerns, Inc.,* 453 U.S. 247 (1981); *Pacific Mutual*

Life Insurance Co. v. Haslip, 499 U.S. 1 (1991)). Requiring carriers to take specified actions to prevent the unwanted event is far more successful and makes far more sense than imposing punitive damages if the unwanted event were to occur. Finely tuned and carefully targeted legislative and administrative prevention programs are far superior to after-the-fact punitive damages imposed by a jury lacking any expertise in the field.

A. Unlike Punitive Damages, Prevention Programs Require Shipowners to Take Specific Steps to Prevent Oil Spills, Provide Detailed Guidance as to Those Steps, and Guarantee Full Compensation for Victims of Oil Spills

The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-61 ("OPA 90") was enacted largely in reaction to the EXXON VALDEZ oil spill. The purpose of the statute was to establish a structured process that would reduce the risk of future oil spills from ships and fully to compensate persons damaged by any future oil spills. The legislation has succeeded in both aspects.

OPA 90 tasked the U.S. Coast Guard with a major rulemaking effort to draft specific precautions shipowners must take to prevent oil spills. For instance, OPA 90 requires that all new tank vessels must have double hulls.[33] Older tank vessels must be inspected according to strict standards to assure that they are structurally

[33] OPA 90, Section 4115, codified at 46 U.S.C. § 3703a.

sound.[34] Ships must be fitted with overfill prevention devices to reduce the risk of spills during loading.[35] The use of automatic steering systems and unmanned engine rooms are strictly regulated.[36] Tankers must be escorted by tugboats in certain waters.[37] The tugboats could help prevent a grounding or collision in the event a tank vessel's steering or engine failed. OPA 90 includes many other precautions that shipowners must take.

The specific precautions required by OPA 90 and the Coast Guard's regulations provide concrete guidance that informs carriers in precise detail exactly what they are expected to do. They are thus far more likely to prevent future damage than a vague threat of punitive damages, which simply warns a carrier not to do anything that a jury might subsequently find unacceptable. It therefore makes no sense for this Court to attempt to regulate carrier conduct ineffectively by authorizing lay juries to impose punitive damages while Congress and the administrative agencies are taking advantage of the expertise available to them to craft balanced

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[34] OPA 90, Section 4109, found as a Note following 46 U.S.C. § 3703.

[35] OPA 90, Section 4110, found as a Note following 46 U.S.C. § 3703. This section also allowed for tank level or pressure monitoring devices, but they were determined to be impracticable.

[36] OPA 90, Section 4114 found as a Note following 46 U.S.C. § 3703.

[37] OPA 90, Section 4116(c), found as a Note following 46 U.S.C. § 3703.

and specific programs that are more likely to solve the problem.

B. History Shows That Voluntary Compliance Programs and Incentives Are Often More Effective Than Punitive Measures

The advantage of carefully targeted legislative and administrative measures instead of punitive measures is not limited to the oil spill context. Another good example of this proposition may be found in the Anti-Drug Abuse Act of 1986.[38] That act imposed extremely large fines on shipowners, if drugs were smuggled into the United States on one of their ships. The large fines did not prevent drug smuggling because the carriers simply did not know how to prevent the problem. But smuggling decreased after the federal government assisted carriers by entering "Carrier Initiative Agreements," which required carriers to take specific agreed actions designed to prevent smuggling.

In 1984 the Carrier Initiative Program was started generally in response to the increased smuggling of drugs into South Florida, and specifically in response to the customs seizure of an American flag air carrier. Nathan J. Bayer & Ellen Y. McClain, *The Anti-Drug Abuse Act of 1986: The Ocean Carrier's Dilemma*, 20 J. Mar. L. & Com. 299, 322 (1989). The carrier's aircraft had repeatedly violated Custom's drug laws. *Id.* As a condition of release of the aircraft, the carrier agreed to a multi-point agreement implementing stringent security measures. *Id.*

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[38] Pub. L. No. 99-570, 102, 100 Stat. 3207, 3207 (1986).

Punitive measures, even substantial penalties and vessel seizure, were obviously not a sufficient deterrent for a carrier that did not know what steps to take. The focus of the program eventually changed from responding to individual seizures for drug violations to a "preventative awareness initiative, addressing security problems and concerns of the members of the transportation industry as a whole *before* they were confronted with the assessment of a manifesting penalty and seizure of their conveyances by the Customs Service." *Id.* (emphasis added).

The resulting Sea Carrier Initiative Agreement—now known as the Carrier Initiative Program ("CIP")—is an overarching scheme under which carriers calling at U.S. ports agree to abide by various security measures to prevent drug smuggling. Under the auspices of the CIP, U.S. Customs and Border Protection ("Customs") provides anti-drug smuggling training to air, sea, and land commercial transport companies.[39] According to Customs,

> [t]he overall goals of these programs and their training component are to encourage commercial carriers to share with CBP the burden of stopping the flow of illicit drugs; to deter smugglers from using commercial carriers to smuggle drugs; and to provide carriers with the incentive to improve their security and their drug smuggling awareness.[40]

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[39] U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/border_security/international_activities/partnerships/cip.xml.

[40] *Id.*

In exchange for signing the agreements, Customs provides training to carriers' employees and management. In the event that illegal drugs are found on board, the degree of compliance with the security measures is considered as a mitigating factor in any seizure or penalty decision.

Successful implementation of the CIP and its ancestry shows that harsh punitive measures simply do not work as well as legislative and administrative measures. The balance of parties' interests and specific requirements are much better able to achieve a desired purpose than is a vague threat of punitive damages. This Court should leave the solution of such problems to Congress, the Coast Guard, and the international maritime safety community—the actors with the expertise to solve them. Empowering a jury to award punitive damages is much less likely to achieve any positive results.

CONCLUSION

The judgment should be reversed.

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December 24, 2007

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WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,210 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 24, 2007.

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