No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING CO., *et al.*,
Petitioners,
v.

GRANT BAKER, *et al.*
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: September 20, 2007

QUESTIONS PRESENTED

1. May punitive damages be imposed under maritime law against a shipowner (as the Ninth Circuit held, contrary to decisions of the First, Fifth, Sixth, and Seventh Circuits) for the conduct of a ship's master at sea, absent a finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner?

2. When Congress has specified the criminal and civil penalties for maritime conduct in a controlling statute, here the Clean Water Act, but has not provided for punitive damages, may judge-made federal maritime law (as the Ninth Circuit held, contrary to decisions of the First, Second, Fifth, and Sixth Circuits) expand the penalties Congress provided by adding a punitive damages remedy?

3. Is this $2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal appeals courts in our history, within the limits allowed by (1) federal maritime law or (2) it maritime law could permit such an award, constitutional due process?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, tort reform activities constitute a substantial portion of WLF's work. WLF is concerned that economic development and consumer welfare not be impeded by improper and excessive punitive damages awards. WLF has regularly appeared before this and other federal courts in cases raising punitive damages issues. *See, e.g., Philip Morris USA v. Williams,* 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *BMW of North America v. Gore*, 517 U.S. 559 (1996). WLF also filed a brief in this case in 1997 when it was before the U.S. Court of Appeals for the Ninth Circuit.

WLF fully supports Petitioners' efforts to obtain review of the three Questions Presented in their petition. WLF is submitting this brief because of its particular interest in persuading the federal courts to establish clearer limits, based on federal common law, on the size of punitive damages awards. The Ninth Circuit essentially held that no such limits exist. WLF urges the Court to grant review in order to consider whether that holding is consistent with the Court's

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

traditional view of remedial issues arising under federal causes of action.

Counsel for Petitioners has filed a blanket consent to all *amicus curiae* briefs. WLF has lodged with the clerk a letter of consent from counsel for Respondents.

STATEMENT OF THE CASE

The EXXON VALDEZ ran aground in Prince William Sound, Alaska in 1989, spilling several hundred thousand barrels of oil into the Sound. Petitioners (collectively, "Exxon") subsequently spent $2.1 billion in cleaning up the spill and paid private claims totaling $300 million. The proceedings commenced against Exxon by state and federal governments were settled in 1991, with Exxon agreeing to pay environmental and natural resources damages of $900 million. Exxon also paid criminal and restitution fines in the amount of $125 million. The total liabilities incurred by Exxon as a result of the oil spill exceeded $3.4 billion. Notwithstanding the liabilities that Exxon had already incurred, an Alaskan jury awarded an additional punishment of $5 billion as punitive damages. The U.S. Court of Appeals for the Ninth Circuit upheld a punitive damages award of $2.5 billion, several orders of magnitude larger than the next highest punitive damages award ever upheld by a federal appellate court. The petition requests that the Court review whether under the circumstances of this case federal law permits a punitive damages award of that magnitude, or any punitive damages award at all.

The immediate cause of the grounding of the EXXON VALDEZ is not in dispute. As the ship was leaving Valdez harbor, Joseph Hazelwood (the ship's captain) explained to Gregory Cousins (the officer on watch) a maneuver that would be required to avoid ice detected in the ship's path. In

violation of Exxon's written policy regarding operation of Exxon vessels, Hazelwood then left the ship's bridge and went to his cabin, leaving Cousins and a helmsman alone on the bridge. Cousins failed to steer the ship away from a reef (the final step necessary to complete the maneuver Hazelwood had explained to him), and the ship ran aground. Hazelwood had a history of alcoholism (a history of which Exxon was aware), and there was evidence at trial that he was drinking heavily on the night of the grounding.

In an action filed in federal district court in Alaska, the plaintiffs (a certified class consisting of all persons who possessed or asserted a punitive damages claim arising from the spill) sought punitive damages under federal maritime law against Hazelwood and Exxon. The case was tried in 1994 along with compensatory damages claims filed by commercial fishermen who alleged that their economic losses exceeded the compensation they had received under Exxon's claims program.

In the first phase of the trial, the jury was instructed to determine whether Hazelwood and/or Exxon had acted recklessly (a necessary predicate for a punitive damages award). It was instructed that because Hazelwood was a supervisory employee, his conduct (even though it violated official Exxon policy) was attributable to Exxon, and thus that if it found that Hazelwood acted recklessly, it should also find that Exxon acted recklessly. The jury found that both acted recklessly.[2]

---

[2] The plaintiffs contended – and submitted relevant evidence hotly disputed by Exxon – that Exxon also should be deemed reckless based on actions of Exxon officials other than Hazelwood. For example, the plaintiffs contended that Exxon officials acted recklessly in allowing Hazelwood to continue to captain the EXXON VALDEZ despite their (continued...)

In the second phase of the trial, the jury considered the economic damages claims of commercial fishermen. Rejecting the great majority of those claims, the jury awarded $287 million in compensatory damages; after Exxon was given credit for its prior claims payments, the net award was $19.6 million. In the third phase, the jury considered punitive damages. It awarded $5,000 in punitive damages against Hazelwood and $5 billion in punitive damages against Exxon. The trial court entered judgment on those awards.

On appeal, the Ninth Circuit in November 2001 affirmed in part, vacated in part, and remanded. Pet. App. 57a-117a. The court rejected each of Exxon's challenges to the permissibility of a punitive damages award. *Id.* 68a-79a. In particular, it rejected Exxon's claim that such damages were impermissible because, in light of the $3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* 68a. The court said:

> Exxon's argument has some force as logic and policy. But it has no force, in the absence of precedent, to establish that the law, or the Constitution, bars punitive damages in these circumstances. . . . [W]e reject the argument.

Id.

The appeals court also rejected Exxon's argument that federal maritime law bars punitive damages awards against a shipowner on the basis of the ship master's reckless conduct,

---

[2](...continued)
knowledge of his history of alcoholism. But the jury made no separate finding on that claim; it was instructed to arrive at a finding that Exxon acted recklessly once it determined that Hazelwood acted recklessly.

in the absence of a finding that the owner directed, countenanced, or participated in that conduct. *Id.* 80a-86a. The court said it was bound in that regard by an earlier Ninth Circuit decision in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), which held that punitive damages could be imposed on a maritime company based on the grossly negligent conduct of a dock foreman employed in a managerial capacity and acting within the scope of his employment. *Id.* 84a-85a.[3] The court did not address Exxon's alternative argument that even when punitive damages are permitted under maritime law, it strictly limits the size of such awards.

The court held that the $5 billion punitive damages award was too high to withstand review under the Due Process Clause. *Id.* 90a-104a. The court noted that the district court had upheld the verdict prior to this Court's decision in *BMW* and thus did not have an opportunity to apply that decision's three guideposts for review of punitive damages awards – degree of reprehensibility, disparity between the harm or potential harm suffered by the victim and his punitive damages award, and the difference between the award and the civil/criminal penalties authorized in comparable cases. *Id.* 94-95 (*citing BMW*, 517 U.S. at 574-75). After discussing how those three factors might be applied in this case and suggesting that a more appropriate punitive damages award might well be significantly less than $5 billion, the court vacated the $5 billion award and remanded "so that the district court can set

---

[3] The appeals court conceded that it was impossible to determine from the verdict whether the jury's finding that Exxon acted recklessly was based on anything other than an imputation from Hazelwood's recklessness. *Id.* 88a. Accordingly, the determination that Exxon acted recklessly – and thus can be held liable for punitive damages – depends on whether *Protectus Alpha* is a proper interpretation of federal maritime law.

a lower amount in light of the *BMW* and *Cooper Industry* standards." *Id.* 104a.

The case made two more round-trips to the district court and back to the appeals court, with each decision focusing on due process limitations on the punitive damages award. Finally, in May 2007 a Ninth Circuit panel announced that it was "time to for this protracted litigation to end," and directed the district court to reduce the punitive damages award to $2.5 billion. *Id.* 1a-56a. The appeals court denied Exxon's petition for rehearing *en banc*, with two judges writing dissents from the denial. *Id.* 285a-293a. Judge Kozinski dissented on the ground that the panel decision conflicted with a well-established federal maritime law prohibition against vicarious punitive damages awards against ship owners. *Id.* 287a-292a. Judge Bea agreed with Judge Kozinski that punitive damages were not awardable in this case, and added that the award was excessive under *State Farm* because the ratio between punitive and compensatory damages was too high. *Id.* 292a-293a.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. Even in an era in which punitive damages awards are often "many times the size of such awards in the 18th and 19th centuries,"[4] the $2.5 billion award in this case stands out as particularly worthy of the Court's attention. It is nearly 100 times larger than the largest punitive damages award ever previously affirmed by a federal appeals court. It is imposed in a case lacking any of the usual hallmarks of particularly culpable conduct, *e.g.*, personal injury, intentional misconduct, or efforts to cover up the results of one's wrongdoing. It is imposed in a field of law (maritime law) with a long tradition

[4] *Philip Morris USA v. Williams*, 127 S. Ct. at 1064.

of limiting damage awards in tort suits. Review is warranted to determine whether the decision of an Alaska jury to transfer massive amounts of wealth from Exxon's stockholders to a group of fellow Alaskans and their attorneys is an appropriate means of punishing a shipowner whose captain acted recklessly, and of deterring such conduct in the future.

The petition ably demonstrates that the decision below conflicts with numerous federal appeals court decisions (and decisions of this Court dating back 200 years) regarding the availability of punitive damages under federal maritime law; conflicts with numerous federal appeals court decisions regarding the availability of punitive damages in oil spill cases governed by the Clean Water Act; and upholds a damages award that exceeds limits – imposed both by maritime law and by the Due Process Clause – on the size of such awards.

WLF writes separately to urge the Court to grant review for the additional reason that the lower federal courts are in need of guidance regarding federal common law limitations on the size of punitive damages awards arising under federal law causes of action. When such cases arise, the lower federal courts all too often confine their analysis of limits on the size of punitive damages awards to a due process an analysis. If the size of the award passes muster under the *State Farm/BMW* line of cases, the analysis comes to an end. That is essentially what happened here: the Ninth Circuit spent a decade examining whether the size of the punitive damages award violated the Due Process Clause, but it barely glanced at the substantial statutory and federal common law arguments raised by Exxon.

Yet it stands to reason that the federal common law imposes far more demanding standards on punitive damages awards than does the Due Process Clause. This Court has long recognized that state courts are entitled to a significant degree

of deference regarding how they go about furthering a State's legitimate interests in punishing unlawful conduct and deterring its repetition. For that reason, the *State Farm/BMW* line of cases grants States substantial leeway in determining the proper size of punitive damages awards, and only steps in to impose limits when an award is so large as to amount to arbitrary punishment that serves no legitimate state interest.

The need for deference disappears when (as here) the punitive damages award arises in a case raising federal questions. In such cases, whether punitive damages are an appropriate remedy and, if so, the appropriate size of such awards are issues that must be settled by the federal government alone. When Congress has adopted legislation that addresses those issues, the job of the federal courts is relatively easy; they simply do their best to discern congressional intent. But Congress often fails to address punitive damages issues when creating new causes of action, thereby leaving it to the courts to fill in the blanks through the creation of federal common law.

Rather than fulfilling that role in the appropriate manner – by, for example, turning for guidance to the general common law or discerning rules based on the purposes sought to be served by punitive damages awards – lower federal courts often turn to the *State Farm/BMW* line of cases. But those cases articulate due process rules that are intended to create an absolute minimum level of fairness, not to govern proceedings peculiarly within the province of the federal courts.

Review is warranted to determine whether the Ninth Circuit inappropriately abdicated its role in creating rules governing the appropriate size of punitive damages awards in federal-question cases, by devoting virtually its entire analysis to the due process limits on the size of the punitive damages award. For example, the Ninth Circuit conceded that there was

"some force as logic and policy" behind Exxon's argument that punitive damages were inappropriate because its $3.4 billion in post-spill payments had already "thoroughly punished and deterred any similar conduct in the future." Pet. App. 68a. But it was unwilling to adopt federal common law rules implementing that "logic and policy," because it was unable to locate any case law establishing precedent for doing so. *Id.* Review is warranted to provide guidance to the lower courts regarding the propriety of adopting federal common law rules governing punitive damages awards. In the absence of such guidance, lower courts will continue to focus solely on due process limitations – limitations that often are insufficient by themselves to ensure that punitive damages awards are properly serving society's interests in deterrence and retribution.

I. REVIEW IS WARRANTED TO PROVIDE GUIDANCE REGARDING FEDERAL COMMON LAW LIMITATIONS ON THE SIZE OF PUNITIVE DAMAGES AWARDS ARISING UNDER FEDERAL-LAW CAUSES OF ACTION

In a line of case stretching back 16 years, the Court has recognized that the Fourteenth Amendment's Due Process Clause imposes limitations on the size of punitive damages awards. The Court has recognized that when such awards can fairly be categorized as "grossly excessive" in relation to a State's interests in punishment and deterrence, they "enter the zone of arbitrariness that violates the Due Process Clause." *BMW*, 517 U.S. at 568.

At the same time, however, the Court has been cognizant that States have very legitimate interests in imposing punitive damages for purposes of punishment and deterrence. Accordingly, the Court has repeatedly expressed federalism-based warnings that its due process standards are not intended

to dictate to state courts all facets of their punitive damages jurisprudence but instead impose bare minimum standards designed to prevent only those awards that most clearly constitute nothing more than arbitrary punishment. Thus, in *BMW*, the Court explained, "In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Id.* In *Cooper Industries*, the Court said, "As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 433 (2001). *See also Philip Morris USA*, 127 S. Ct. at 1065 ("States have some flexibility to determine what kinds of procedures" they will adopt to ensure that punitive damages award comport with due process.).

Similarly, those justices who have opposed recognition of substantive due process limits on the size of punitive damages awards have based their opposition in part on a reluctance to invoke the U.S. Constitution to interfere with States' prerogatives to decide how best to punish and deter wrongdoing. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 472 (1993) (Scalia, J., concurring in the judgment) ("State legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime, and have frequently exercised that authority in recent years."); *BMW*, 517 U.S. at 598-99 (Scalia, J., dissenting) ("[T]he Court's activities in this area are an unjustified incursion into the province of State governments. . . . The Constitution provides no warrant for federalizing yet another aspect of our Nation's culture"); *id.* at 607, 613 n.3 (Ginsburg, J., dissenting) ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain. . . . In any 'lawsuit where state law provides the rule of decision, the

propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.'") (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989)).

By way of contrast, in lawsuits where (as here) it is *federal* law that provides the rule of decision, there are no federalism-based reasons for federal courts to restrict themselves to adopting bare-minimum fairness standards, and every reason to adopt rules to ensure that punitive damages awards are serving their proper purposes. This Court has stated repeatedly that punitive damages serve two legitimate purposes only: deterrence and retribution. *State Farm*, 538 U.S. at 419 ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *BMW*, 517 U.S. at 568, 584-85; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

Moreover, the proper level of deterrence and retribution is an issue of law to be determined by Congress and the courts – not simply handed off to the jury with instructions to do its best to come up with a result that it deems just. As the Court explained in *Cooper Industries*, it is wholly appropriate for courts to impose strict limits on the size of permissible punitive damages awards in federal-law cases and to review such awards carefully to ensure that juries adhere to those limits; unlike the measure of actual damages suffered, "'the level of punitive damages is not really a fact tried by the jury.'" *Cooper Industries*, 532 U.S. at 437 (quoting *Gasperini v. Center for*

Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).[5]

A handful of federal statutes provide explicit caps on punitive damages awards. *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (imposing $300,000 monetary cap on punitive damages in cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*). But by and large, when enacting new federal-law causes of action, Congress has left to the courts the job of fleshing out federal common law rules governing the size of punitive damages awards.

Unfortunately, rather than fulfilling that function, many federal appeals courts have simply turned to the due process limitations imposed by the *State Farm/BMW* line of cases as the sole check on excessive punitive damages awards in federal-law causes of action. *See, e.g., Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007) (applying due process limitations, court reduces from $2.2 million to $400,000 punitive damages award under Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*); *Gaffney v. Riverboat Servs. of Indus.*, 451 F.3d 424, 464 (7th Cir. 2006) (rejecting challenge to size of punitive damages award under 46 U.S.C. § 2114, which prohibits discharge of seamen for acting as whistleblowers; only review available besides due process review is abuse-of-discretion review), *cert. denied*, 127 S. Ct. 933 (2007); *Bowles v. Osmose Utils. Servs., Inc.*, 443 F.3d 671 (8th Cir. 2006) (applying due process limitations, court rejects challenge to award of punitive damages under 42 U.S.C. § 1981 for racial harassment of employee); *Evans v. Fogarty*,

---

[5] *Cooper Industries* determined that because a jury's award of punitive damages does not constitute a finding of fact, careful appellate review of a district court decision upholding the award "does not implicate" Seventh Amendment jury-trial rights. *Id.*

___ F.3d ___, 2007 U.S. App. LEXIS 20177 (10th Cir., Aug. 22, 2007) (reinstating jury's $1.35 million punitive damages award under 42 U.S.C. § 1983; declined to consider defendants' challenge to the size of award because defendants had not raised a due process challenge).

That is precisely what the Ninth Circuit did in this case. It simply declined to consider Exxon's argument that federal common law imposed limits on the size of the punitive damages award. Pet. App. 68a.[6] Exxon argued that such damages were impermissible because, in light of the $3.4 billion paid by Exxon in the aftermath of the spill, a punitive damages award would serve neither of the accepted purposes of such awards: deterrence and retribution. *Id.* While acknowledging that "Exxon's argument has some force as logic and policy," it declined to consider the argument in the absence of precedent supporting Exxon's position. *Id.* But cases of this type provide compelling circumstances for adoption of federal common law rules limiting the size of punitive damages awards. If, in fact, Exxon's prior payment of $3.4 billion meant that a punitive damages award would have little or no deterrent or retributive effect, then the appeals court should have applied federal common law to reduce or eliminate the punitive damages award in this case.

In sum, review is warranted to provide guidance to the federal appeals courts regarding federal common law limitations on the size of punitive damages awards in cases raising issues of federal law.

---

[6] That federal common law argument was in addition to Exxon's arguments that both federal maritime law and the Clean Water Act prohibited *any* punitive damages. *See id.* at 80a-86a, 73a-78a.

II. REVIEW IS WARRANTED BECAUSE THE $2.5 BILLION AWARD CANNOT BE JUSTIFIED ON EITHER DETERRENCE OR RETRIBUTION GROUNDS

Review is also warranted because the overwhelming evidence indicates that the huge $2.5 billion punitive damages award cannot be justified on either deterrence or retribution grounds. Because this Court has held repeatedly that deterrence and retribution are the *only* grounds that can justify a punitive damages award, review is warranted to resolve the conflict between those decisions and the Ninth Circuit decision upholding the huge award.

Deterrence. As Justice Breyer has noted, economic theory holds generally that proper deterrence will be achieved if defendants pay the total cost of the harm they cause. *BMW*, 517 U.S. at 592-93 (Breyer, J., concurring). When tort law requires defendants to compensate for such harm, it forces them to "internalize" the harm's cost, thereby providing appropriate incentives for them to invest in precaution (or scale back activities where accidents may occur) up to the point where social welfare is maximized, *i.e.*, where the marginal cost of increased precaution equals the marginal cost of reduced accidents. *See generally*, Landes & Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987). Here, Exxon has already incurred liabilities exceeding $3.4 billion as a result of the oil spill. The Ninth Circuit's failure to give serious consideration to the deterrent impact of these liabilities already incurred by Exxon cannot be squared with this Court's precedents. It defies reason to suggest that accident costs of $3.4 billion would not induce Exxon (or any similarly situated company) to implement corrective measures.

There is only one scenario that economists cite under which compensatory damages might not fully deter

unintentional torts: the so-called "underenforcement" or "undercompensation" rationale. This rationale posits that compensatory damages may deter incompletely where difficulties in detection or shortfalls in enforcement diminish the likelihood that a defendant will incur liability for the full social cost of its conduct. *See* Ellis, *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). However, that scenario has no bearing to the facts of this suit, where there is no fear that the harm and attribution of liability will go undetected. Injury is evident, the defendant is known, and mass lawsuits for all compensatory damages soon follow.

Nonetheless, much judicial treatment of punitive damages, despite reliance on the deterrence objective, remains strikingly "oblivious[] to the basic point that ordinary civil damages – in the course of providing compensation – concurrently function to deter." Schwartz, *Deterrence & Punishment in the Common Law of Punitive Damages*, 56 S. CAL. L. REV., 133, 137 (1982). Review is warranted to provide guidance to lower courts that plaintiffs seeking punitive damages in federal-law causes of action must support their claims with evidence that a punitive damages award – over and above all compensatory awards – is necessary for deterrence purposes. If the tort system is going to hand out multi-billion dollar awards based on the ostensible need for deterrence, federal common law demands no less.

The Ninth Circuit's justified its imposition of $2.5 billion in punitive damages on Exxon's great wealth. But as Justice Breyer has pointed out, the relevance of wealth to deterrence is difficult to understand, given "the distant relation between a defendant's wealth and its responses to economic incentive." *BMW*, 517 U.S. at 591 (Breyer, J., concurring). Emphasis on wealth is particularly misguided in the case of corporations:

> For natural persons the marginal utility of money decrease as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporations[, however,] are abstractions; investors own the net worth of the business. These investors pay any punitive award (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992).

Moreover, excessive punitive damages may actually lead to "overdeterrence," a result that harms not only the defendant but society as well. Punitive damages exceeding the amount needed to fill any deterrence gap promote inefficiency and misallocation of resources. *See BMW*, 517 U.S. at 593 (Breyer, J., concurring) (larger damages can potentially "'over-deter' by leading potential defendants to spend more to prevent the activity that causes harm, say, through employee training, than the cost of the harm itself."). In sum, the overwhelming evidence before the court of appeals was that the $2.5 billion punitive damages award was unnecessary to deter future misconduct.

Retribution. Nor can the punitive damages award be justified as a means of punishing Exxon. As a practical matter, it is doubtful whether retribution could ever be substantially or meaningfully served by the assessment of punitive damages against fictitious entities such as corporations. As the Supreme Court said in *City of Newport v. Fact Concept, Inc.*, a case

forbidding assessment of punitive damages against municipal corporations as a matter of law:

> Under ordinary principles of retribution, it is the [individual] wrongdoer himself who is made to suffer for his unlawful conduct. . . . A municipality, however can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the government entity itself.

453 U.S. 217, 267 (1981) (emphasis in original).

The same, obviously, is true of private corporations, particularly widely held corporations whose shareholders have no meaningful ability to manage their day-to-day affairs. The goal of retribution may be served by punishing individual corporate agents who commit blameworthy acts – as the jury did in this case by assessing punitive damages against Captain Hazelwood – but it is not served by punishing entities incapable of having malice (or any other blameworthy state of mind sufficient for punitive damages) independent of that of their separately punishable agents. As commentators have long noted, "[T]he entire notion of punishment-as-punishment becomes deeply problematic when applied to the corporate form." Schwartz, *supra* at 144.

A number of courts have made this same point, not least the Supreme Court in *City of Newport*:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon shoulders of blameless or unknowing taxpayers. . . . Whatever its weight, the retributive purpose is not significantly advanced, if

> advanced at all, by exposing municipalities to punitive damages.

453 U.S. at 267-68. At the very least, the fact that the award comes entirely at the expense of innocent parties precludes any sanction of the massive magnitude assessed here.

The appropriateness of a $2.5 billion award is particularly problematic when compared to the $125 million paid by Exxon in connection with criminal proceedings. That amount represented the considered judgment of officials of the United States and Alaska governments regarding the appropriate level of "punishment." There can certainly be no more legitimate measure of society's disapprobation than the penalties enforced by society's elected officials.

By contrast, there is no principled reason for allowing punitive damages juries to impose much greater sanctions, at the behest of self-interested tort victims and their lawyers, on the theory that the public interest in retribution demands more than the public's official representatives have found appropriate. Such a procedure confuses retribution – a purely public expression of social disapproval – with private revenge, a consideration that courts have never recognized as a proper purpose of punitive damages.

In sum, neither deterrence nor retribution can justify a punitive damages award anywhere near the $2.5 billion upheld by the Ninth Circuit. Review is warranted to determine whether, even if maritime law does not bar punitive damages altogether, federal common law requires a substantial reduction in the punitive damages award.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: September 20, 2007