

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

**BRIEF AMICUS CURIAE OF UNITED STATES
SENATOR THEODORE F. STEVENS, UNITED STATES
SENATOR LISA MURKOWSKI, AND UNITED STATES
REPRESENTATIVE DON YOUNG
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST¹

Amici curiae Senator Theodore F. Stevens is the State of Alaska's senior member of the United States Senate and a member of the Bar of this Court; Senator Lisa Murkowski is the State of Alaska's junior member of the United States Senate and the only member of Congress born in the State of Alaska; and Representative Don Young is the State of Alaska's lone member of the United States House of Representatives and the only licensed mariner in Congress. The EXXON VALDEZ oil spill of 1989 directly impacted thousands of Alaskans as it disrupted the State's fisheries and other natural resource industries. Over 20,500 of the claimants in this case are residents of the State of Alaska.

Having entered the United States Senate in 1968, Senator Stevens was involved with the Clean Water Act from its earliest stages of development. He co-sponsored the Magnuson-Stevens Fishery Conservation and Management Act of 1976, the primary law governing marine fisheries management in United States federal waters, and sponsored the 1996 and 2006 amendments to that Act. Senator Murkowski, as someone who was born and raised in Alaskan coastal fishing communities, and as a member of the Senate Energy and Natural

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than the *amici* made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Resources Committee, has a unique interest in helping to ensure that the adverse impacts of the EXXON VALDEZ oil spill are adequately and rightly redressed. Representative Young has served as a member of the Merchant Marine Fisheries Committee; Chairman of the House Transportation and Infrastructure Committee, with jurisdiction over the Clean Water Act; and is the current Ranking Member and former Chairman of the House Natural Resources Committee, with jurisdiction over domestic and international fishery issues.

Each member of Alaska's Congressional delegation has been a champion of commercial and subsistence fishermen, as well as the coastal communities in Alaska that depend on marine resources for their survival. Petitioners' reading of the law would jeopardize the interests of Alaskans and would run contrary to the collective efforts of Congress in protecting our Nation's navigable waters, holding violators accountable for their actions, and providing redress to those harmed. For these reasons, *amici curiae* urge the Court to affirm the judgment of the court of appeals.

SUMMARY OF THE ARGUMENT

The Clean Water Act (CWA) does not preclude the federal maritime common law remedy of punitive damages. In order to preempt long-established common law principles, a statute must provide clear intent to do so and speak directly to the question that the common law addresses. Moreover, when enacting legislation, Congress is presumed to be

aware of and supplementing—not supplanting—existing damages frameworks.

Punitive damages have been available under maritime law since the earliest years of admiralty litigation. Neither the CWA itself, nor its legislative history, indicates that Congress intended to revoke Respondents’ access to punitive damages. In fact, the CWA states that vessel owners and operators retain all obligations, under any provision of law, to persons suffering damages from oil spills or removals. The Senate and House Public Works Committee Reports reaffirm the notion that the CWA was intended to build upon, and not undermine, the preexisting foundation of common law remedies.

This case, involving a single, reckless oil spill from a vessel in transit, is distinguishable from cases where the Court has found that the CWA’s comprehensive enforcement mechanism for permitted discharges from point sources preempts common law claims that would interfere with the federal effluent standards. Here, Respondents do not seek to modify federal standards, and likewise the CWA does not affect Respondents’ right to punitive damages.

ARGUMENT

I. The Clean Water Act Does Not Displace Federal Maritime Common Law Remedies.

A. Neither the Clean Water Act, Nor Its Legislative History, Indicates Congressional Intent to Abrogate Punitive Damages.

Congress began the pursuit of environmental protection of our Nation's waterways with the passage of the Federal Water Pollution Control Act (FWPCA) in 1948. 62 Stat. 1155. Despite later efforts to amend the FWPCA to strengthen its protections and enforcement measures, the legislation proved inadequate in this regard as evidenced by the Cuyahoga River fire of 1969. In response, early in the 92nd Congress, the Senate and House Public Works Committees conducted a number of hearings to address the nation's continuing water quality problems. These efforts culminated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 817, as amended 33 U. S. C. §§1251 *et seq.*, commonly known as the Clean Water Act (CWA). The CWA was heralded as the nation's first comprehensive water pollution legislation, building upon existing law designed to reduce pollution before it began, while "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The CWA was one of the linchpins of the "Environmental Decade," along with the creation of the Environmental Protection Agency and the Clean Air Act amendments. Susan J. Buck,

UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 26-27 (3d ed. 2006). The general theme of this era's environmental statutes rarely allowed industry a means of escape from any form of liability.

Despite the importance of reforming our Nation's federal water pollution laws, passage of the CWA was by no means ensured. Destined to be vetoed by President Nixon, an environmental statute as far reaching as the CWA required a supermajority in Congress. This was a task of enormous significance, especially for Alaskans. Within its rivers, lakes, streams, wetlands, and coastal waters, the State of Alaska possesses a greater overall amount of water than any other state in the Union. The CWA had the potential to impact Alaska and Alaska's people more than any other state and its citizens. Consequently, members of Alaska's Congressional Delegation worked closely with their colleagues throughout the legislative process.

The notion that the CWA altered or replaced common law concepts regarding punitive damages, as alleged by Petitioners in this case, is not supported by the record. The statute itself, as well as the committee reports, evidence this. The simple truth is there is no record of debate on the CWA indicating the intent to cancel the rights of injured parties to seek punitive damages.

Unlike the original 1948 legislation that provided no federally required goals, objectives, limits, or even guidelines, the CWA as we know it

today has the stated goal of maintaining and restoring our Nation's waters, and aspires to achieve fishable and swimmable status through discharge regulation and assurance of available federal cleanup funds. 33 U.S.C. §§ 1251 *et seq.* Since 1972, section 1321 of the CWA has operated as the chief mechanism for establishing liability for oil spill damages. *See* 33 U.S.C. § 1321. While this section carries with it certain maritime law implications, at no point does Congress indicate any preemption of maritime or common law remedies, including punitive damages, for oil spills.

Legislation that implicates the common law or general maritime law should be read with a presumption that nothing therein should alter long-established and familiar principles, except when a contrary statutory intent is evident. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). For a statute to abrogate a common-law principle, the statute must “speak directly” to the question that the common law addresses. *U.S. v. Tex.*, 507 U.S. 529, 534 (1993) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *Milwaukee v. Ill.*, 451 U.S. 304, 315 (1981)). Particularly in the area of redress, Congress is presumed to be aware of and not overriding existing rights to damages relative to the legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

To avoid the appearance of conflicting liability regimes, Congress specified in the CWA that vessel owners and operators would retain all obligations, under any provision of law, to persons suffering

damages from oil spills or removals. 33 U.S.C. § 1321(o)(1). Referring specifically to this provision, the Senate Public Works Committee noted that the modifications to existing law merely “*add liability* for the clean-up of any hazardous material discharged.” S. REP. NO. 92-414, at 65 (1971) (emphasis added). The added cleanup liability established a contingency fund, the existence of which expressly does not affect a discharger’s liability for all resultant damages. H.R. REP. NO. 95-139, at 26 (1977).

Likewise, the CWA’s citizen suit provisions plainly read that the statute does not restrict any common law rights or any other relief. 33 U.S.C. § 1365(e). The Senate Committee Report expressly reinforced this principle:

It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. REP. NO. 92-414, at 81 (1971).

The plain reading of the CWA is consistent with the legislative history. Furthermore, at no point in the statute, or in the supporting documents or testimony, are punitive damages so much as given

mention, much less eliminated as a remedy. Congress should not be assumed to have displaced punitive damages in favor of any CWA provisions. Congress preserved common law damages, concurrent with and foundational to the additional statutory protections.

B. The Clean Water Act Does Not Bifurcate Remedies for Oil Spills.

Congress undertook the framing of the CWA's oil spill provisions with the understanding that courts would apply the new statute in concert with existing maritime and common law remedies. "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles" *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).

Admiralty courts may, in some circumstances, adopt and enforce rights based on common law and state statutes, and courts characteristically do so in a supplementary nature to extend liability where maritime law is inadequate.² There is well-documented controversy over exactly when punitive damages are available in claims implicating several areas of maritime, statutory, and common law. *See*

² For an extended historical discussion of the relationship between maritime and common law, see generally Theodore F. Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950).

McMonagle v. Northeast Women's Center, Inc., 493 U.S. 901, 902 (1989) (White, J., dissenting). In spite of that controversy, punitive damages have been recognized as generally available since the beginning of American admiralty litigation for reckless or wanton conduct. *See Amiable Nancy*, 16 U.S. 546, 558 (1818) (indicating the general availability of punitive damages in maritime law for cases of “gross and w[a]nton outrage”). Subsequently, courts have seen fit to award punitive damages in maritime property damage cases both under general federal common law and maritime law, indisputably recognizing the availability of such awards in appropriate circumstances. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Com. 73, 160 (1997).

The Court has now specified—and limited—areas where federal pollution legislation preempts certain torts. In *Middlesex County*, a private nuisance action for the intentional, repeated discharge of pollutants (mainly sewage from stationary sources subject to permitting requirements), was preempted by the FWPCA. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (citing 33 U.S.C. §§ 1251 *et seq.*) In that case, however, the Act's elaborate enforcement mechanism directly addressed the underlying problematic activities. *Id.* at 13-14. Essentially dealing with scheduled effluent discharge, *Middlesex County* amounted to a nuisance suit where the Court determined congressional indicia within FWPCA to be adequate in providing remedies for such nuisance. *Id.* at 15.

Here, Respondents' punitive damages suit is distinguishable due to its contrasting attributes of a reckless, single incident discharge of oil from a vessel in transit, for which there are no "effluent standards" or permits under the CWA. Furthermore, it would be a gross understatement to term the EXXON VALDEZ spill a mere nuisance. As evidenced by the record, Exxon's action in placing a known, relapsed alcoholic at the helm of a supertanker carrying fifty-three million gallons of crude oil constitutes the willful and wanton misconduct recognized by this Court in *Amiable Nancy*, 16 U.S. 546, and its progeny as permitting the award of punitive damages.

Even under a nuisance claim reading, the Court has more recently held that the CWA does not preempt state common law nuisance claims, with the rare exception of those suits that could require standards of effluent control that are incompatible with the federal standards. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-97 (1987). In *International Paper*, property owners sued a paper mill operator under Vermont state law for creating the sustained nuisance of pollutants discharged into Lake Champlain, for remedies including \$100 million in punitive damages. *Id.* at 484. The Court declined to bifurcate CWA relief and separate state punitive damages from state compensatory damages, finding "no suggestion of such a distinction in either the Act or the legislative history". *Id.* at 499 n.19. The Court held that unless Congress meant to "split" a particular remedy for preemption purposes, the full availability of any cause of action under state

law is assumed. 479 U.S. at 499 n.19 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)). This Court in *International Paper* agreed with Congress that the full scope of tort remedies, including punitive damages, are preserved where, as in this case, the common law action is not in conflict with the statutory regime. *Id.*

In the present case, Respondents did not pursue Exxon for a violation of the CWA. Rather, they brought this tort action against Exxon for its demonstrably reckless and wanton conduct in spilling over eleven million gallons of crude oil into Alaska's pristine waters and directly impacting the lives and livelihoods of Alaskans. The CWA's standards have no effect on the Respondents' right to recovery. Here, the CWA expressly allows for full and concurrent recovery of punitive damages.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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