

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   EXXON SHIPPING COMPANY,                                 :

4   ET AL.,   :

5                                 Petitioners                         :

6                         v.   :   No. 07-219

7   GRANT BAKER, ET AL.   :

8   - - - - - x

9   Washington, D.C.

10   Wednesday, February 27, 2008

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12                                 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:08 a.m.

15 APPEARANCES:

16 WALTER DELLINGER, ESQ., Washington, D.C.; on behalf  
17 of the Petitioners.

18 JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of  
19 the Respondents.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 this morning in Case 07-219, Exxon Shipping Company  
5 versus Baker, et al.

6 Mr. Dellinger.

7 ORAL ARGUMENT OF WALTER DELLINGER

8 ON BEHALF OF THE PETITIONERS

9 MR. DELLINGER: Good morning, Mr. Chief  
10 Justice, and may it please the Court:

11 When the Exxon Valdez ran aground in Prince  
12 William Sound on March 24, 1989, the resulting spill of  
13 11 million gallons of oil was one of the worst  
14 environmental tragedies in U.S. maritime history.

15 The only remaining aspect -- the only aspect  
16 of the litigation over the Valdez disaster that is  
17 before the Court today concerns almost entirely lost  
18 revenues by the commercial fishing industry. Exxon long  
19 ago paid \$400 million in compensation for that lost  
20 revenue. At issue here is whether an additional warrant  
21 to the commercial fishing class of \$2.5 billion dollars  
22 in punitive damages is permissible under Federal  
23 Maritime Law.

24 The first of the three reasons that the  
25 decision below should be reversed is that the Ninth

1 Circuit erred in overturning a maritime law rule that  
2 has been settled for 200 years. Although a shipowner  
3 is, of course, liable to fully compensate for all of the  
4 damages caused by the wrongful acts of a captain in  
5 compensation, it is liable for punitive damages under  
6 the long-settled rule only if the shipowner directed,  
7 ratified, or participated in the --

8 JUSTICE GINSBURG: Mr. Dellinger, how was  
9 that rule settled? You go in that story and The Amiable  
10 Nancy, but no one even raised the question of punitive  
11 or exemplary damages in those cases. So what is the  
12 long-settled line of decisions of this Court in maritime  
13 law that you are relying on?

14 MR. DELLINGER: Justice Ginsburg, The  
15 Amiable Nancy is the only maritime case, but this Court  
16 in Lake Shore in 1893 --

17 JUSTICE GINSBURG: That was on land on the  
18 railroad.

19 MR. DELLINGER: Yes, but this Court's  
20 unanimous opinion by Justice Gray in Lake Shore cites  
21 with approval The Amiable Nancy decision and the  
22 maritime context. Three times this Court has considered  
23 the question of whether there should be respondeat  
24 superior liability in punitive damages for the wrongful  
25 action.

1 JUSTICE GINSBURG: You are talking about  
2 maritime law, and relying on *The Amiable Nancy*. And my  
3 only point is that was not raised, argued, or decided.  
4 So it's rather, I think, an exaggeration to call it a  
5 long line of settled decisions in maritime law.

6 MR. DELLINGER: Justice Ginsburg, the issue  
7 has been so well settled, and Courts of Appeals have so  
8 long recognized, that punitive damages are not available  
9 in vicarious liability in maritime cases that the issue,  
10 understandably, doesn't -- doesn't come up. It's --

11 JUSTICE SCALIA: And we thought so in  
12 *Prentice*.

13 MR. DELLINGER: Yes. In *Lake Shore* versus  
14 *Prentice*, this Court did in 1818 and 1893 and 1999  
15 address this question, once in the maritime context,  
16 once in the context of Federal common law, and once in  
17 the particular statutory context of --

18 JUSTICE GINSBURG: Well, the *Lake Shore*  
19 case, if I remember right, did not involve a managerial  
20 employee. It involved a conductor on a train.

21 MR. DELLINGER: That's -- that's correct.  
22 But it -- but the rule is clear from *Lake Shore* versus  
23 *Prentice* that it is the same rule as *The Amiable Nancy*  
24 rule. There is not respondeat superior liability in the  
25 absence of some action on the part of the shipowner.

1 Now, the reason --

2 CHIEF JUSTICE ROBERTS: So the shipowner is,  
3 I suppose, the owner of Exxon or the hundreds of  
4 thousands of shareholders, right? So you have to have a  
5 shareholder driving the boat before you can assess  
6 liability?

7 MR. DELLINGER: No. The company acts  
8 through its policymaking officers or through its  
9 policies; so that if a reckless judgment is made by  
10 someone who had authority to set policy for the company,  
11 either the president of Exxon Shipping -- I mean if the  
12 Plaintiffs were correct that the jury actually,  
13 necessarily --

14 CHIEF JUSTICE ROBERTS: So it's not quite  
15 correct to say only the owner. In other words, it is a  
16 certain level of employee, because corporations only act  
17 through individuals. It is a certain level of employee  
18 in the company.

19 Now, where do you draw the line between the  
20 CEO and the cabin boy? How do you do that? And I would  
21 suspect, just instinctively, that somebody driving one  
22 of these huge tankers is a lot closer to the CEO than  
23 the cabin boy.

24 MR. DELLINGER: The one thing that,  
25 traditionally, if you look at all the Courts of Appeals

1 cases and all of the tradition and maritime law, is that  
2 the captain or the pilot, anyone on board the ship, does  
3 not implicate in punitive damages the company, or the  
4 shipowner.

5 JUSTICE KENNEDY: You mean the captain --

6 MR. DELLINGER: -- or the ship owner.

7 JUSTICE KENNEDY: -- is not a managerial  
8 officer for any purpose? Suppose he decides that he's  
9 going to leave despite an adverse weather report? Is he  
10 not a managerial agent at least for that?

11 MR. DELLINGER: I think the tradition is  
12 clear, Justice Kennedy, that if it's a -- that the  
13 maritime tradition is that, while you are liable for all  
14 of the harms caused by that, the decisions made on the  
15 ship do not implicate in punitive damages.

16 JUSTICE KENNEDY: Well, I'm -- I'm asking  
17 about the concept of the managerial officer in general.  
18 And I think that we can explore in this argument,  
19 whether or not The Amiable Nancy held very squarely  
20 about punitive damages, whether we ought to do so in the  
21 first instance.

22 MR. DELLINGER: That is correct.

23 JUSTICE KENNEDY: And it seems to me a large  
24 part of that inquiry turns on what a managerial officer  
25 is and what -- was Hazelwood not a managerial officer

1 for any purpose at all?

2 MR. DELLINGER: You know, I can't rule out  
3 the possibility that someone in that position might be,  
4 but he did not set company policy.

5 JUSTICE GINSBURG: But I thought that you're  
6 talking about a different level. I think we ought to be  
7 clear on this. I thought it was conceded that Hazelwood  
8 was, indeed, a "managerial agent" as that term is used  
9 in the Restatement of Torts, right?

10 So you are talking about it's not good  
11 enough that you are managerial agent; you have to be in  
12 a higher echelon in the company. That's your position?

13 MR. DELLINGER: That is correct. There has  
14 -- one has to be someone with authority to set relevant  
15 policy who has some responsibility over that area of the  
16 company's operations that would not --

17 JUSTICE SOUTER: Why should that be? I  
18 mean, why should there be a different rule? Let's  
19 assume -- I mean I'll assume for the sake of argument  
20 that The Amiable Nancy does not settle the issue  
21 absolutely.

22 Why, then, should the -- and it doesn't, it  
23 seems to me, settle this distinction at all. So why  
24 should there be a distinction between corporations  
25 generally and maritime corporations?



1 MR. DELLINGER: Well, there are two  
2 responses to that question.

3 The first is that there is -- this has  
4 worked in the context of maritime law for 200 years, and  
5 -- and because of the -- there has been a long tradition  
6 of needing to foster and promote maritime commerce, and  
7 the fact that it's thought to be particularly risky and  
8 dangerous to conduct maritime commerce. But --

9 JUSTICE SOUTER: Well, isn't -- isn't part  
10 of the reason, at least for the assumption that there's  
11 a distinction, something that I think was mentioned in  
12 The Amiable Nancy? And that is in those days, when a  
13 ship put to sea, the ship was sort of a floating world  
14 by itself. And the -- the contact with the shipowner  
15 was simply gone until the thing came back into port  
16 again.

17 That is certainly not the case today, and we  
18 know it's not the case in the circumstances here.

19 So if the -- if the relationship to the  
20 corporation, to the CEO, if you will, and the captain of  
21 a vessel is not in any way different from the  
22 relationship of the CEO and, say, a division chief of a  
23 corporation, I don't see why that distinction should  
24 hold today.

25 MR. DELLINGER: There is no question,

1 Justice Souter, but that communications have -- have  
2 improved. There is a -- there is much of the tradition  
3 of maritime law that still obtains. Maritime commerce,  
4 because it takes place on the high seas, is an  
5 inherently and continuously more risky endeavor than  
6 most other occupations, but --

7 JUSTICE SOUTER: That may be an argument for  
8 no punitive damages, but I don't see why it's an  
9 argument for distinguishing between maritime  
10 corporations and others. I mean, other -- other kinds  
11 of enterprises have a lot of risk in them, too. And I'm  
12 missing the distinction there.

13 MR. DELLINGER: Well, to the extent that one  
14 doesn't see that the tradition of -- of what's worked in  
15 maritime law in its own system of law for 200 years  
16 should be different, it is not at all clear why the  
17 maritime law rule ought not be the rule on land. There  
18 are eight States --

19 JUSTICE SCALIA: Well, I had not understood  
20 you to concede that -- that the land rule was different  
21 from the maritime rule. I gather that in many States  
22 it's the same as what you assert the maritime rule to  
23 be.

24 MR. DELLINGER: That is correct. And it is  
25 the rule that this Court adopted in Lake Shore versus

1     Prentice, and it is -- it is --

2                   JUSTICE SCALIA:   Which was a land case.

3                   MR. DELLINGER:   And the policy behind it --

4                   JUSTICE SOUTER:   But you are right, and I  
5     want to make -- let me just make clear one other point.  
6     You are drawing a distinction, as I understood you to  
7     say to Justice Ginsburg, between the Restatement  
8     position and your position.

9                   MR. DELLINGER:   That is correct --

10                  JUSTICE SOUTER:   Okay.

11                  MR. DELLINGER:   -- although there are some  
12     States that have the Restatement position that may read  
13     "managerial employee" in the way that maritime law does,  
14     and that is a person who is in a position to set  
15     relevant policy for the company and not just the branch  
16     manager at a -- at a Wal-Mart.

17                  JUSTICE GINSBURG:   But there aren't many  
18     States that follow the Restatement position.

19                  MR. DELLINGER:   That is correct.   And -- but  
20     my point is not that -- my point is simply that there  
21     are good reasons for the maritime law rule, and they  
22     have been accepted in other cases.

23                  When Justice Gray embraced that rule in the  
24     Lake Shore case, he did so because he thought it  
25     inappropriate to impose punitive elements on someone who

1 was not actually the wrongdoer. And when Justice  
2 O'Connor wrote in Kolstad, she spoke of the important  
3 principle underlying common law limitations on vicarious  
4 liability for punitive damages.

5 JUSTICE GINSBURG: Am I right, Mr.  
6 Dellinger, that in the railroad case the court was  
7 dealing with the concept of respondeat superior? It  
8 didn't make any distinction between regular employees  
9 and managerial employees, and, indeed, it was not  
10 dealing with a managerial employee.

11 MR. DELLINGER: It was dealing with someone  
12 who was at the level of a conductor, I think, exactly on  
13 par with the captain.

14 JUSTICE GINSBURG: But I don't recall that  
15 they made anything about managerial. They were just  
16 talking about respondeat superior at large, I thought.

17 MR. DELLINGER: Yes. Now, I think --

18 JUSTICE KENNEDY: But I don't think the  
19 conductor is on a par with a captain. The captain has  
20 this huge vessel. He can decide when it leaves. He  
21 decides the course. And I think that "managerial  
22 officer" might be a divisible concept.

23 Obviously, he doesn't bind Exxon for filing  
24 its tax returns or to decide whether there's a  
25 deduction. But you are saying he binds Exxon for no

1 purpose at all, ever.

2 MR. DELLINGER: For punitive damages. Of  
3 course, they are bound to pay for all of the harm  
4 caused. But that --

5 JUSTICE KENNEDY: Of course, we are talking  
6 about punitive damages but at the concept of a  
7 "managerial officer." And I haven't heard why he isn't  
8 a managerial officer at least as to some things.

9 MR. DELLINGER: Well, for two reasons:

10 One, he was unable to set policy for any of  
11 these issues. And think of the larger context. The  
12 reason we want to hold someone, an entity or a person,  
13 liable in punitive damages is because they make a  
14 decision that is malicious or profit-seeking, or  
15 whatever.

16 When you are advancing the policies of the  
17 company and are empowered to advance those policies, and  
18 you do so in a way that is either malicious or driven by  
19 profit motives or hope to conceal it, when all of those  
20 things happen, it is appropriate to visit upon those  
21 persons the extra punishment of punitive damages.

22 And that's why it's not the importance of  
23 the job. It's the fact that when someone acts contrary  
24 to the interest -- contrary to the interest of a company  
25 and its shareholders, why in that instance should

1 someone who is not advancing the company's interests,  
2 not authorized to make policy, do so?

3 So if the --

4 JUSTICE GINSBURG: Are you --

5 JUSTICE STEVENS: May I ask this question,  
6 Mr. Dellinger?

7 MR. DELLINGER: Yes.

8 JUSTICE STEVENS: In some punitive-damages  
9 cases, the liability attaches because the person has  
10 hired someone who is obviously incompetent.

11 Supposing that the -- a crew member was --  
12 an obviously incompetent crew member was hired by the  
13 captain of the ship. Would that be sufficient to  
14 justify punitive damages?

15 MR. DELLINGER: Not against the company that  
16 owned the ship. Only if someone --

17 JUSTICE STEVENS: And if he was hired by a  
18 shore-based personnel, then, would that be the  
19 difference for you?

20 MR. DELLINGER: The -- only if the company  
21 at a policymaking level is implicated would the company  
22 --

23 JUSTICE STEVENS: The one -- the company  
24 says the captain hires the crew members who could cause  
25 all sorts of damage. And another company says somebody

1 on shore can do it. You have a different rule between  
2 those two?

3 MR. DELLINGER: Oh, well, I think if the  
4 case arises in a maritime context, there would not be --  
5 there would not be a different rule, whether a decision  
6 was made on shore or not. If you are talking about a  
7 maritime law case --

8 JUSTICE STEVENS: Would there be vicarious  
9 liability or not in the case: Negligence in hiring an  
10 incompetent crew member?

11 MR. DELLINGER: Not unless the decision was  
12 made by someone at a policymaking level.

13 JUSTICE STEVENS: Well, he has the authority  
14 to decide who to hire. Is that policymaking?

15 MR. DELLINGER: No. That's the  
16 implementation of -- that's the implementation of a  
17 policy. So I think what -- if you keep in mind the  
18 purposes of punitive damages, as to whether conduct  
19 should be deterred and whether it should be punished,  
20 and when you are talking about going against the  
21 shareholders of the company, not -- of course, they have  
22 to pay for all the compensatory harms. We don't doubt  
23 that.

24 But for punishment the notion is that it is  
25 the -- that-- that at least eight States have and it is

1 in the maritime law rule that you need to show that  
2 there is -- that there is --

3 JUSTICE STEVENS: Recklessness in hiring the  
4 employee who caused the damage can be a --

5 MR. DELLINGER: Yes, absolutely. We have  
6 not disputed the fact that if the jury actually did have  
7 to conclude that Exxon was reckless in the supervision  
8 or the hiring or the placement of Hazelwood, that that  
9 would be a grounds for imputing punitive-damages  
10 liability.

11 JUSTICE STEVENS: In hiring the third mate  
12 here, if he was negligently hired by somebody on shore,  
13 there would be liability? But if he was negligently  
14 hired by the captain, there would be no liability?

15 MR. DELLINGER: No. I think it has to do  
16 with the level at which the -- at which the hiring  
17 decision was made. It has to be a decision -- and I  
18 think the way the case was tried it makes sense that if  
19 senior officials for Exxon were informed and if the jury  
20 decided on the basis that at a high level at Exxon  
21 Shipping that they knew that this person was -- should  
22 not be put in command of a ship, and, nonetheless, it  
23 did so, that would implicate them. If I could --

24 JUSTICE GINSBURG: There was -- there was  
25 sufficient evidence of that. I mean --



1 MR. DELLINGER: Yes.

2 JUSTICE GINSBURG: The jury could have found  
3 that Exxon knew that this captain had a severe alcohol  
4 problem; and, yet, they let him stay on voyage after  
5 voyage and did nothing about it.

6 So the jury could have found: Never mind  
7 the captain. Exxon, itself, is a grave wrongdoer  
8 because it allowed the tanker to be operated by a  
9 captain who was certainly not fit.

10 MR. DELLINGER: Yes, and I want to be clear  
11 about that. The answer to that question is: Yes, the  
12 jury could have found that Exxon was reckless in  
13 allowing Hazelwood to command the ship and that that  
14 recklessness would implicate the company for punitive  
15 damages.

16 But they need not have done so. They need  
17 not even have reached the issue, and the court of  
18 appeals said -- it is at page 88 and 89. The Ninth  
19 Circuit said that the jury could also, in the  
20 alternative, have found that Exxon followed a reasonable  
21 policy of fostering reporting and treatment by alcohol  
22 abusers, knew that Hazelwood had obtained treatment, and  
23 did not know that he was taking command of the  
24 ship drunk.

25 JUSTICE GINSBURG: It was a jury question.

1     There was evidence both ways.   So, on this issue, am I  
2     right in thinking that if you succeed, all you can get  
3     is a new trial?

4                   MR. DELLINGER:   That is correct.

5                   JUSTICE GINSBURG:   And, I take it, next time  
6     around the jury would get a special verdict and be  
7     asked:   Was Exxon, itself, reckless in allowing this  
8     captain to stay on the ship?

9                   MR. DELLINGER:   That is correct.   That is  
10    correct.

11                  CHIEF JUSTICE ROBERTS:   That is only true if  
12    you lose on your second and third questions as well,  
13    right?

14                  MR. DELLINGER:   Yes.

15                  CHIEF JUSTICE ROBERTS:   The answers to your  
16    second and third questions preclude a new trial?

17                  MR. DELLINGER:   That is correct.   And that's  
18    actually a recent --

19                  JUSTICE BREYER:   Do you want to get --  
20    looking at this case of Lake Shore, as I read -- as I  
21    read that case, I'm thinking that they looked back to  
22    the admiralty case, but they're saying this isn't an  
23    admiralty rule.   It's a Federal rule.   And the Federal  
24    rule is that to make the corporation liable for  
25    punitives in the absence of bad conduct by anyone in the

1 corporation but for the lower executive, you can't do  
2 it.

3 But if it were a higher executive, the  
4 president and general manager or, in his absence, the  
5 vice president in his place, then you could.

6 So they are distinguishing among levels of  
7 corporate officials. Now that seems to be the Federal  
8 rule, right?

9 MR. DELLINGER: Yes.

10 JUSTICE BREYER: All right. Now, what  
11 happens to that Federal rule? One thing we know  
12 happened to it is that time passed; Erie v. Thompkins  
13 came along; and most of the relevant cases left the  
14 Federal courts or Federal law and were decided under  
15 State law.

16 Was there anything left in the Federal  
17 system besides admiralty where this Federal rule might  
18 apply; and, if so, what happened to it?

19 MR. DELLINGER: The only place it would  
20 remain is in statutory settings where the court has to  
21 supply the answer to a question of whether punitive  
22 damages are an available remedy in a Title VII case.  
23 And that's -- that's the only --

24 JUSTICE BREYER: Well, what happened? And  
25 the reason I think I'd like to know is because it seems

1 to me it makes a difference from the point of view of  
2 stare decisis whether the Federal rule, as Federal rule,  
3 has always stayed the same or the Federal rule has  
4 eroded so that in place X and Y it disappears, remaining  
5 only in admiralty, in which case you have a genuine  
6 outlier.

7 And I don't know what the history is.

8 MR. DELLINGER: Well, the -- of course, with  
9 the -- with the replacement of the Arrowsmith versus  
10 Tyson by Erie against Thompkins, it was no longer a  
11 broad area.

12 JUSTICE BREYER: I know. That's beside the  
13 point to my question.

14 MR. DELLINGER: In the lower courts the rule  
15 has continued as a maritime rule law. It has worked  
16 within the context of a maritime law rule. Maritime is  
17 its own system of law. The fact that West Virginia --  
18 West Virginia has a different law than this Court's  
19 maritime law --

20 JUSTICE STEVENS: Let me just interrupt. To  
21 what extent is present maritime law informed by State  
22 common law throughout the country?

23 MR. DELLINGER: It is in the absence of a --  
24 in the absence of a Federal rule, but here the -- there  
25 are -- there's not uniformity among the States.

1           To turn to the second question of whether --  
2   which would actually preclude the need even to resolve  
3   The Amiable Nancy issue as to whether there should be as  
4   a matter of judge-made maritime law a punitive-damages  
5   remedy for unintentional oil spills. Now, the starting  
6   point to think about that, I believe, is this Court's  
7   decision in Milwaukee versus Illinois in 1981.

8           This is the standard the Court set: Federal  
9   courts create common law only as a necessary expedient  
10  when problems requiring Federal answers are not  
11  addressed by Federal statutory law. That precisely  
12  describes this case.

13           The Court looking out --

14           CHIEF JUSTICE ROBERTS: Well, the City of  
15  Milwaukee involved the displacement by Federal statutory  
16  law of Federal common law. Your case involves the  
17  displacement of Federal maritime law by Federal  
18  statutory law.

19           Federal maritime law is routine. Federal  
20  courts do that all the time. Federal common law is  
21  unusual, and in the City of Milwaukee was resorted to  
22  simply by necessity.

23           Doesn't that suggest that whatever the  
24  Federal maritime rule on punitive damages is, it's a  
25  harder showing on your part to conclude that it's

1     displaced by the statutory process?

2                   MR. DELLINGER:   Well, the reason I think  
3     that's not -- not the case is twofold.

4                   First of all, the era in which this Court  
5     created lots of admiralty law has receded itself because  
6     Congress has become active, and then there's no longer  
7     a -- as necessary, a role for this Court.

8                   Justice O'Connor, for example, said that in  
9     -- that we sail -- the courts sail -- now sail in  
10    occupied waters in making maritime law because of the  
11    amount of Federal statutory law.

12                   And, secondly, the assumption that there was  
13    a well developed punitive damages remedy in maritime  
14    law, and that we have a harder road to show that the  
15    existence of a series of Federal statutes eliminates the  
16    need for that, is just not established.

17                   This Court itself has never affirmed an  
18    award of punitive damages under maritime law.  It has  
19    never held that punitive damages are available for  
20    unintentional conduct in maritime law.  It has never  
21    held that they were available for oil spills.

22                   There were only four cases of Federal  
23    maritime punitive damage awards in the history of the  
24    country before the Clean Water Act was passed.  
25    Professor Robinson finds eight more cases that don't use

1 the term "punitive damages" or "exemplary," or anything  
2 else; but, at most, that would be 12. We think the  
3 answer is four.

4 So that -- and, in fact, the largest award  
5 ever -- ever made was for \$500,000. So there was no --  
6 and that was after the Clean Water Act. So there's no  
7 established tradition of -- of punitive damages.

8 This Court would be making a major step to  
9 affirm an award, to play a role, in an unintentional  
10 case of punitive damages in maritime law for oil spills.  
11 Because what Congress has done here is to obviate the  
12 need for a remedy by passing a comprehensive and  
13 carefully calibrated statute.

14 But the hallmark of the Clean Water Act is  
15 the obvious effort to balance --

16 JUSTICE GINSBURG: Mr. -- Mr. Dellinger,  
17 before we get into the merits of that issue, the Clean  
18 Water Act did not enter this case until 13 months after  
19 the jury verdict. And the trial court, who had very  
20 carefully managed this case -- and it was a humongous  
21 case -- would never list it as an issue in the case.  
22 And so he said: I won't hear it 13 months after the  
23 verdict.

24 Why shouldn't we instruct the court of  
25 appeals that when a district judge does a diligent job

1    like that one did to try to get at all the issues --  
2    says you're too late; you can't come in 13 months after  
3    the verdict and argue a point of law that would have  
4    overtaken the verdict, because essentially you're asking  
5    for judgment as a matter of law on this issue.

6                   MR. DELLINGER:  Justice Ginsburg, that sort  
7    of concern has much more force if you are talking about  
8    issues that go to the substantiality of the evidence.  
9    But here the court of appeals --

10                   JUSTICE GINSBURG:  No.  Well, what did you  
11   make -- you made a motion to bring up the Clean Water  
12   Act as dispositive on punitive damages, and you made  
13   that motion 13 months after the jury verdict.

14                   MR. DELLINGER:  Right.

15                   JUSTICE GINSBURG:  And what is the basis in  
16   the Federal rules for that motion?

17                   MR. DELLINGER:  The motion was made before  
18   the entry of judgment.

19                   JUSTICE GINSBURG:  13 months after the  
20   verdict.

21                   MR. DELLINGER:  That -- the motion was  
22   not on -- on -- the court of appeals held -- not only  
23   did the court of appeals press -- not only was the issue  
24   pressed and passed upon by the court of appeals, the  
25   court of appeals held that the district court was wrong



1 in assuming that it was waived. The district court was  
2 told by the plaintiffs that this was the same motion --

3 JUSTICE GINSBURG: But I -- that's not my  
4 question. My question is: Under what Federal rules did  
5 you move to bring up this issue 13 months after the  
6 verdict?

7 MR. DELLINGER: It was under rule 59, under  
8 rule 49.

9 JUSTICE GINSBURG: 49 is on special  
10 verdicts. What did this have to do with special  
11 verdicts?

12 MR. DELLINGER: I'm sorry. It was a rule 50  
13 -- it was a rule 50 motion. It was not untimely, and  
14 the court of appeals --

15 JUSTICE GINSBURG: Rule 50 is pretty strict,  
16 isn't it? I mean, rule 50 -- if you want to use rule  
17 50, you have to first move before the case goes to the  
18 jury. And if the judge says no, I'll reserve it. Then  
19 you move again after the jury. And if you don't, it's  
20 got very tight timelines.

21 And you are arguing to a court that has held  
22 that these limitations in the Federal rules must be  
23 strictly observed. And I don't know of any time limit  
24 in the Federal rules that's stricter than the rules that  
25 involve 50(b).

1                   MR. DELLINGER: Justice Ginsburg, there are  
2 several answers to the waiver question. First of all,  
3 this Court has the authority to based upon it because  
4 the court appeal based upon it. Secondly, the court of  
5 appeals correctly said that as the -- the plaintiffs had  
6 told the judge, that motion, he need not rule on because  
7 it is the same motion that the -- that had been made  
8 earlier. Now the earlier motion was based upon the  
9 TAPAA Act, as -- that it features it as a reason why the  
10 court need not create or recognize a punitive damages  
11 remedy. The second motion --

12                   JUSTICE GINSBURG: And you didn't appeal on  
13 that. You raised it properly, you lost on it, and you  
14 didn't appeal on TAPAA.

15                   MR. DELLINGER: That would be the case if we  
16 hadn't raised it all. We raised it both times, the  
17 court said it was the same motion. Here's what the  
18 court of appeals said. The court of appeals said that  
19 Exxon clearly and consistently argued statutory  
20 preemption as one of the theories --

21                   JUSTICE GINSBURG: Statutory. But the  
22 statute was TAPAA, and it was not the Clean Water Act.

23                   MR. DELLINGER: That is correct. But the  
24 essential argument, the court of appeals is the same,  
25 and if the issue were not raised -- even if the issue

1 had not been raised at all in the trial court, even if  
2 the had not been put before the district court, the  
3 court of appeals still could have agreed to hear the  
4 question of whether a punitive damages remedy is  
5 obviated by the panoply of Federal statutes that are out  
6 there. That -- that there is -- there was an exercise  
7 of the court of appeals. The decision is now the law in  
8 the Ninth Circuit and this Court has full authority to  
9 review it, because as the --

10 JUSTICE GINSBURG: As you know, there were  
11 or at least some strong amici briefs in this case that  
12 have asked this Court, tell the court of appeals that's  
13 no way to operate vis-a-vis district courts.

14 MR. DELLINGER: Well, the -- even Professor  
15 Miller recognizes that this is not jurisdictional and  
16 that the court has the power to do it, the power to hear  
17 this case. And it is before it. And -- and even if the  
18 matter had not been raised in the district court, the  
19 court of appeals had authority to consider it. And  
20 there's --

21 CHIEF JUSTICE ROBERTS: Mr. Dellinger, did  
22 you say you had a second and a third point?

23 MR. DELLINGER: Yes.

24 CHIEF JUSTICE ROBERTS: You going to get to  
25 them?

1 MR. DELLINGER: Oh, uh -- yes, indeed.

2 CHIEF JUSTICE ROBERTS: All right.

3 MR. DELLINGER: The -- the Clean Water Act,  
4 the reason it's an important issue, is that the one  
5 thing that Congress has not done, whether it's in TAPAA,  
6 in the Clean Water Act or the Oil Pollution Act, is they  
7 have not provided for punitive damages but moreover,  
8 they have never had any remedy that is uncalibrated,  
9 that is limitless, that is not carefully measured so  
10 that it respects the need to protect the interests to be  
11 protective by those laws, by the interest in clean  
12 water, with a decision not to overdeter.

13 The problem with having a punitive damages  
14 remedy in an area where punitive damages has played no  
15 significant role, that is judge-made, is that it simply  
16 obliterates the balance that Congress has struck. If  
17 you look at the --

18 JUSTICE KENNEDY: You're talking about  
19 tradition. It has never been the tradition for criminal  
20 statutes to have open-ended penalties. So that -- that  
21 explains why the CWA has specific limits.

22 MR. DELLINGER: Even on civil fines, even on  
23 other aspects of it, there is -- there is a careful  
24 calibration. And once Congress has decided that the  
25 limits of liability are twice the measurable pecuniary

1 loss, to add to that careful set of remedies that  
2 Congress has adopted another remedy that is however many  
3 billions of dollars the jury might choose totally  
4 unsettled the scheme when Congress has addressed the  
5 very issue. When you ask the question: Are punitive  
6 damages available for oil spills, and you look at the  
7 Clean Water Act, which covers so much of the territory  
8 of this act, it is hard to make out the case that --  
9 that there's a need for a judicially created remedy,  
10 particularly when the judicially created remedy, unlike  
11 something that was done by Congress comes without caps,  
12 without structure, without guidance.

13 If Congress were to decide that a  
14 punitive-damages remedy, it's likely that they would  
15 place some kind of structural limits or caps on it and  
16 not have this limitless, free-floating --

17 JUSTICE KENNEDY: Well, perhaps that's a  
18 segue to point No. 3. I don't wish to --

19 MR. DELLINGER: No. That's a -- I think  
20 that --

21 JUSTICE KENNEDY: -- to cut you off. On  
22 point --

23 MR. DELLINGER: Even if the --

24 JUSTICE KENNEDY: On point No. 3 --

25 MR. DELLINGER: I'm sorry. You have a

1 question?

2 JUSTICE KENNEDY: My only question is this:

3 Assume that there will be punitive damages applicable to  
4 Exxon under maritime law in in case. We have read in  
5 the briefs about the limits that should be imposed on  
6 these punitive damages. And those are from our  
7 due-process cases.

8 If we are deciding this case as a matter of  
9 our authority to determine Federal maritime law, are  
10 there factors that we should include in a  
11 punitive-damages framework that do not -- that do not  
12 appear in our due-process cases? And, if so, what are  
13 those factors?

14 MR. DELLINGER: Well, I think surely that's  
15 right. And the -- your question recognizes, as have  
16 individual Justices, that -- that here you are like a  
17 State court in the sense that, as Justice Scalia said,  
18 State courts have ample authority to eliminate  
19 unfairness and to set their own rules in this area, as  
20 you do here.

21 Now, the first --

22 JUSTICE SCALIA: You would say one of those  
23 factors is the Clean Water Act, wouldn't you?

24 MR. DELLINGER: Yes.

25 JUSTICE SCALIA: Even if it is not

1 pre-emptive as a matter of law, it's one of the factors  
2 that you can bring to the Court's attention, I suppose.

3 MR. DELLINGER: That is correct.

4 JUSTICE KENNEDY: And I take it, under that,  
5 you would point to the double -- the provision for a  
6 fine double the amount of the damages? That would be a  
7 factor?

8 MR. DELLINGER: The --

9 JUSTICE KENNEDY: I mean, if we're looking  
10 for guidelines --

11 MR. DELLINGER: Yes. A double --

12 JUSTICE KENNEDY: -- double general damages  
13 is a factor that we could -- that we could follow in the  
14 maritime framework?

15 MR. DELLINGER: Yes, but you would look to  
16 what the criminal penalty is that's actually imposed.  
17 The Court has said civil fines are a better guide. And  
18 the civil fine, the maximum civil fine here for both the  
19 State of Alaska and the United States, would be \$80  
20 million.

21 If you look to what the responsible law  
22 enforcement authorities and public officials of both the  
23 United States and Alaska thought was the proper amount,  
24 they imposed a criminal fine of \$150 million, which was  
25 reduced to \$25 million because of the cleanup efforts

1 and the fact that Exxon prepaid \$300 million of the  
2 losses in advance.

3 JUSTICE GINSBURG: What about looking at  
4 what this Court said in TXO was proper in a  
5 punitive-damages case? That is, this spill was  
6 horrendous, but it could have been far worse.

7 And so, under TXO, you look at what was the  
8 -- could be the maximum damage that could have been  
9 caused by this occurrence, and that could be many  
10 times --

11 MR. DELLINGER: Well, there was -- first of  
12 all, it would be different to look at potential harm if  
13 the potential harm were attempted by the defendant, and  
14 the defendant had been unable to carry out the --

15 JUSTICE GINSBURG: But it wasn't --

16 MR. DELLINGER: -- the planned harm.

17 JUSTICE GINSBURG: -- a factor here. I  
18 mean, wasn't the example that the captain was trying to  
19 maneuver the ship after the disaster in such a way that  
20 would have made it much worse?

21 MR. DELLINGER: That was not even the basis  
22 of liability that was put before the jury. And if you  
23 -- and -- nor was it shown that that -- that that would  
24 have caused harm.

25 What -- what you really have here is you --



1 the first thing you would start with, Justice Kennedy,  
2 is to ask whether it is necessary for punishment and  
3 deterrence.

4 And when you start with payments that have  
5 reached \$3.4 billion in terms of compensation, fines,  
6 remediation, restitution, that clearly obviates the need  
7 for deterrence.

8 And if you look to -- if you look to  
9 punishment -- if you look to punishment, here the one  
10 thing that is clear is that this was not an intentional  
11 act. It was not malicious. The company did not stand  
12 to make one dollar of profit. There was no effort to  
13 enhance the profits of the company, nor was there any  
14 possibility of concealment.

15 And what the -- what the Plaintiffs put  
16 before this Court, the Respondents in this case, are a  
17 number of issues that were never put before the jury,  
18 not part of the case, by people who were not even  
19 plaintiffs; matters that were outside of the record and  
20 contrary to the instructions. So that the jury was told  
21 compensation --

22 JUSTICE KENNEDY: What would be the  
23 formulation of the rule if the Court thinks that any  
24 added amount would not deter, and how do we know that?  
25 How do you formulate this rule?

1                   MR. DELLINGER: Well, it is absolutely  
2   essential to formulate some kind of rule. The best  
3   guide is to look, I think, at civil penalties, which  
4   gets to -- to \$80 million, but to look to what the Court  
5   said in your opinion in State Farm, where -- where  
6   compensatories are so substantial it may eliminate any  
7   need for additional punitive-damages remedy. There's --

8                   JUSTICE SOUTER: May I go back to your  
9   civil-penalty point?

10                  MR. DELLINGER: Yes.

11                  JUSTICE SOUTER: Isn't the problem with the  
12   civil-penalty argument is -- that the civil penalties  
13   were calibrated for environmental damage, and what we  
14   are dealing with here is individual economic damage? So  
15   we've got an apples and oranges comparison, haven't we?

16                  MR. DELLINGER: Well, two responses:

17                  First of all, the \$150 million penalty did  
18   -- the purpose of the Clean Water Act also includes  
19   protection of property. So it's not just for the  
20   environment. And, indeed, part of the reason for  
21   cutting the \$150 million award was the compensation that  
22   had been paid.

23                  But, secondly, if you --

24                  JUSTICE SOUTER: To the -- for lost trade or  
25   something?

1                   MR. DELLINGER: Right. It -- even if you  
2 took that as calibrated to the environmental damage, the  
3 environmental damage was twice what the compensation --  
4 the total compensation paid was \$500 million. The  
5 company paid nearly a billion dollars for natural  
6 resources harm.

7                   If \$150 million was the right amount for the  
8 environmental damage, then the right amount for the half  
9 of that that constitutes the lost wages would be \$75  
10 million, which is itself close to the \$80 million.

11                  But here I think that it is incumbent upon  
12 the Plaintiffs to show why you need deterrence when  
13 there was no profit motive, and you've had to pay \$3.4  
14 million dollars. And when if you look to punishment,  
15 that can't be a black hole into which all the limits on  
16 punitive damages disappear.

17                  It's whether that -- if this Court can't set  
18 standards that would limit an award of this kind, that  
19 is a reason for believing that this ought to be done by  
20 Congress if there are going to be punitive damages.

21                  I'd like to reserve --

22                  JUSTICE BREYER: But the -- I mean, the  
23 obvious kind of thing would to be say that the standard  
24 would depend upon the reprehensibility of the conduct of  
25 the officer of the corporation, including the captain,

1 if you lost on that.

2 And where we said roughly before zero to 10  
3 -- and you are quite right that this is a huge amount of  
4 money -- you'd say zero to five, up to five times. I  
5 mean that would be rough and ready. But the idea would  
6 be to impose enormous deterrence upon large firms  
7 involved in your industry that you are representing not  
8 to make certain the officers on the ship behave in a  
9 reprehensible way.

10 It's crude, but I mean that's the kind of  
11 thing that we said in the due-process cases.

12 MR. DELLINGER: Well --

13 JUSTICE BREYER: Then why wouldn't you --

14 MR. DELLINGER: Keep in --

15 JUSTICE BREYER: Why wouldn't you --

16 MR. DELLINGER: Keep in mind that the  
17 largest award in the history of punitive damages was an  
18 award for 500,000. That was 1/14 --

19 JUSTICE BREYER: You're going to say --  
20 you're going to hear in two seconds -- they're going to  
21 say this is the company that makes the most amazing  
22 profit, et cetera. And so you're trying to deter them.  
23 So we know what, you know -- so, what do you say to  
24 that?

25 MR. DELLINGER: I -- I say that this -- that

1 the amount is enough to deter anybody for anything when  
2 it is \$3.4 billion. And it's hard to know how you could  
3 have a punitive rationale for something which was  
4 unintentional, not designed to make a profit, and could  
5 not have been concealed.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Fisher.

9 ORAL ARGUMENT OF JEFFREY L. FISHER

10 ON BEHALF OF THE RESPONDENTS

11 MR. FISHER: Mr. Chief Justice, and may it  
12 please the Court:

13 Each of the three rulings at issue here  
14 rests firmly in the mainstream of American tort law.  
15 And there is no reason in maritime jurisprudence to  
16 depart from those rules.

17 I want to start with the first question  
18 presented, what Exxon calls the vicarious liability  
19 issue. And I think it's important to frame the  
20 discussion by starting with the actual jury instruction  
21 that's at issue in this case. It's at Pet. App. 301a.

22 It says that a managerial agent is someone  
23 who supervises other employees and has responsibility  
24 for, and authority over, particular aspects of a  
25 corporation's business.

1                   And, as Justice Ginsburg noted, Exxon has  
2   never disputed that Captain Hazelwood satisfied this  
3   definition. As its own internal documents explain,  
4   Captain Hazelwood was in charge of what they called a  
5   business unit of Exxon Shipping. He was in charge of  
6   hundreds of millions of dollars of equipment, of  
7   product; he was in charge of budgeting and personnel  
8   with respect to the vessel; he was also in charge of  
9   safety. He was the person who decided on behalf of  
10   Exxon that it was safe to leave port the night of March  
11   23, 1989.

12                   Now, it is our submission that it is  
13   perfectly appropriate to expose the corporation to  
14   punitive damages based on the reckless acts of such an  
15   individual.

16                   In doing so, it does not, as Exxon would  
17   contend, impose vicarious liability. Rather, what it  
18   does is it exposes a corporation to liability based on  
19   its own culpability.

20                   The very point of the restatement test, as  
21   opposed to the vicarious liability rule that is followed  
22   by the majority of the States, is that it requires some  
23   complicity on the part of the corporation.

24                   CHIEF JUSTICE ROBERTS: What if it's the  
25   lookout posted -- I don't know if they have one -- but

1 the lookout posted in the front of the ship, and he is  
2 drunk, and doesn't see the reef or something? Is the  
3 corporation liable in that case?

4 MR. FISHER: Not for punitive damages,  
5 Mr. Chief Justice. And the reason why is because the  
6 lookout does not run a business unit of Exxon Shipping.

7 What is happening here -- and I want to  
8 focus on this for a moment because Mr. Dellinger --

9 CHIEF JUSTICE ROBERTS: So you regard the  
10 ship as a business unit?

11 MR. FISHER: That's what Exxon regarded the  
12 ship as, and so that's what the record says. And the  
13 idea is that you had --

14 CHIEF JUSTICE ROBERTS: That's different if  
15 they say that it's -- depending on how they categorize  
16 the different units tells whether they are liable or  
17 not?

18 MR. FISHER: Well, I don't want to rest  
19 primarily on labels. The idea is function. And I  
20 think, going back to the instruction, what the  
21 instruction is asking the jury to determine is: Is this  
22 a person who has authority over an aspect of a  
23 corporation's business? I think a shorthand for that is  
24 in Exxon's own documents that it is --

25 JUSTICE SCALIA: In respect, I mean, the

1     janitor has authority over an aspect of the corporation.  
2     I mean, surely, that can't be the test.

3                 MR. FISHER: Well, I think the authority --

4                 JUSTICE SCALIA: I assume the test is the  
5     person has to be high enough that it justifies holding  
6     the entire corporation. And I doubt whether a captain  
7     is -- is high enough. How many of these units does  
8     Exxon have?

9                 MR. FISHER: There are about 20 vessels like  
10    the Valdez.

11                JUSTICE SCALIA: Twenty vessels.

12                MR. FISHER: Now, I think Mr. Chief Justice  
13    had it right when he said it's no answer to say it can't  
14    be the master; it has to be the corporation. The  
15    corporation can only act through people. So there has  
16    to be a line drawing that takes place.

17                Now, this notion of the idea that the master  
18    isn't good enough because he had to be a policymaker is  
19    new to us.

20                CHIEF JUSTICE ROBERTS: That was a question  
21    that I asked, not a statement.

22                Well, how do you draw the line? I mean, is  
23    the second in command on the boat a man responsible for  
24    policy?

25                MR. FISHER: He may not be. I don't think



1 the question is whether he's responsible for policy.

2 Again, it's whether he's the person in charge.

3 What Exxon during instruction to the  
4 district court asked the jury to be required to find is  
5 that there was a shore-based supervisory official of the  
6 Exxon defendants who made the decision. So Exxon itself  
7 recognized that you have to draw the line somewhere.

8 We think the best place to draw the line,  
9 and the conservative place to law, the line is the  
10 managerial-agent rule that's in the Restatement.

11 Now, Mr. Dellinger says there are eight  
12 States that follow a different rule. And it's important  
13 to understand that that's not the case. Even among the  
14 States that follow the Lake Shore formulation in  
15 general, you still have to have a way to implement it.  
16 It's not -- the idea is if the corporation has to be  
17 complicit, you still have to tell the jury which human  
18 beings they can look to for that complicity.

19 So at page 33 of our red brief --

20 JUSTICE SCALIA: I thought the Lake Shore --  
21 well, I thought the Lake Shore and Amiable whatever it  
22 is principle was that a captain ain't one of those. The  
23 captain doesn't -- doesn't do the job.

24 MR. FISHER: There was no captain at issue  
25 in Amiable Nancy. And, Of course, there wasn't a

1 captain at issue in Lake Shore, because it was a  
2 land-based case.

3 But on page 33 of our red brief we've given  
4 you seven -- several States that say we follow the  
5 complicity test, and here's how you do it. You require  
6 the jury to find that the person is at least a  
7 managerial agent.

8 Exxon itself in its reply brief on page --  
9 page 11, footnote 5, cites several States. And I gather  
10 these are the States to which Mr. Dellinger is referring  
11 when he says there are eight States that follow our  
12 rule.

13 Well, we did some research after getting the  
14 reply brief, and I want to give you a few cites, because  
15 it illustrates the principle yet again. Several of  
16 those States say we follow the Lake Shore complicity  
17 idea. And, therefore, the way we do it is we require a  
18 jury to find at least a managerial agent. So Kansas is  
19 a State that Exxon cites.

20 In the Flint Hills case at 941 P.2d 374,  
21 Kansas says the way in modern times you implement Lake  
22 Shore is you require a managerial agent. In  
23 Connecticut, the Stoltz case 867 A.2d 860, and in the  
24 D.C. Circuit, Justice Scalia, they quote one of your  
25 opinions. If you look at D.C. law, the D.C. Court of

1 Appeals itself and a D.C. circuit in another case have  
2 said -- and this is the Arthur Young case, 631 A.2d 354,  
3 and the GMAC case at 273 F.2d 92 --

4 JUSTICE KENNEDY: Do any of those cases say  
5 the managerial agent is liable if he violated express  
6 instructions from an employer?

7 MR. FISHER: No State tort case that we're  
8 aware of, Justice Kennedy, adopts -- I think what you're  
9 referring to is the Kolstad policy exception.

10 JUSTICE KENNEDY: Because that's what the  
11 last part of your instruction 33 says. And it does seem  
12 to me that this captain may be managerial for some  
13 purposes and not others. I think that's the way it's  
14 going to have to come out. Maybe not. But certainly he  
15 was not entitled to set aside the policy of Exxon that  
16 you cannot navigate a vessel while intoxicated.

17 MR. FISHER: Well, I think I want to say two  
18 things. The first is that, as I understand it, Exxon  
19 has conceded across the board that Captain Hazelwood is  
20 a managerial agent. And in this case -- in this Court's  
21 own Kolstad case, if you look at it again, it says  
22 Amiable Nancy, Lake Shore and the way you implement  
23 that --

24 JUSTICE KENNEDY: But they have not conceded  
25 the accuracy or correctness of instruction 33. And

1     that's because he was not entitled to set aside the  
2     policy on intoxication.

3                 MR. FISHER: Well, if you were to adopt a  
4     rule that no other State has adopted, which is to say  
5     there was a policy defense in ordinary tort cases, which  
6     unlike Kolstad do not rest on the subjective knowledge  
7     of the actor, even then, we submit, we tried that issue  
8     in this case, Justice Kennedy; and there was -- Exxon  
9     had every opportunity to argue policy. In its closing  
10    argument to the jury, the only policy it mentioned was  
11    the policy of two officers on the bridge while  
12    transporting --

13                JUSTICE KENNEDY: No. Your instruction says  
14    if he was a managerial agent, his acts are attributable  
15    to the corporation. That's it.

16                MR. FISHER: That's right, Justice Kennedy.  
17    We think that's the proper rule of law.

18                JUSTICE KENNEDY: So the corporation's  
19    responsibility or complicity or culpability is simply  
20    not relevant under your theory of the case, even though  
21    that's what you talk about in your brief.

22                MR. FISHER: Well, I don't want to act like  
23    a dog chasing his tail here, Justice Kennedy, but the  
24    idea is to ask whether the corporation is culpable, you  
25    have to ask which people. And what happened in this

1 Court's own decision in Kolstad said in implementing  
2 Lake Shore that you look to the managerial agents. And  
3 that's what --

4 JUSTICE BREYER: That's -- that's why I'm  
5 interested in the same question I asked on the other  
6 side. As I read Lake Shore, it seemed to me my first  
7 reading of it that it picked up this distinction that  
8 Justice Story made, and it said quite right, you could  
9 impute punitives or exemplary damages to a corporation  
10 where its managerial official is the one who causes --  
11 who behaves recklessly. But wait, we don't mean quite  
12 that. We mean some managerial officials.

13 And they seem to refer in the admiralty  
14 case, I'll tell you one who he isn't, namely, the ship's  
15 captain. He's not in that category. And then in this  
16 other case, they say -- they talk about a superintending  
17 agent authorized to imply, employ, and discharge the  
18 conductor.

19 And they give that as an example of a  
20 managerial official where there would not be exemplary  
21 damages assessed against the corporation in light of his  
22 conduct.

23 So when I read that, I thought that this  
24 Lake Shore case is just picking up the earlier case; and  
25 that's the Federal law. And you've given the examples

1 where the State law has changed; and I have no doubt you  
2 are right. You read the cases very well.

3 But is there an example where I could say  
4 that the Federal law has changed, too? And you started  
5 down that track, but the reason this is of probably more  
6 than inordinate concern to me is that I wrote the case  
7 in Sand, I wrote a dissent in Legion, I looked into  
8 stare decisis law and made fairly clear views of what it  
9 is.

10 So what would you say to someone who has  
11 accepted certain legal principles that we have had in  
12 prior cases? And you want to say nonetheless you win.  
13 Okay. Why?

14 MR. FISHER: Three reasons, Justice Breyer.  
15 The first is with all due respect, Amiable Nancy did not  
16 involve the wrongdoing of the captain. It involved the  
17 wrongdoing of a lower officer on the ship; and so  
18 it's -- there's nothing in the Amiable Nancy that deals  
19 with captains, so you don't have a stare decisis effect  
20 that comes from Amiable Nancy with respect to captains.

21 The second thing is there are some more  
22 recent Federal cases that discuss the Lake Shore  
23 managerial agent idea. We've cited them in our -- in  
24 our red brief along through -- I'm flipping now -- but  
25 there are RICO cases; there are other cases, and

1 Mr. Dellinger said, where statutory case -- statutory  
2 regimes need to be implemented. And we have cited  
3 several lower court decisions that look to the  
4 managerial agent rule to do that, none of this Court.

5 The third thing is to understand, as you  
6 talked about in Lake Shore, you are having to pick  
7 somebody, and the general idea is higher up is okay, and  
8 way down low is not okay. Fletcher in his Cyclopedia on  
9 corporations says that if the Lake Shore idea is to make  
10 sense today, you have to understand that when you're  
11 dealing with humongous corporations, you have to look  
12 not just to the president or vice president -- and this  
13 is what the D.C. Circuit said in the GMAC case as well  
14 -- is that when you deal with multinational corporations  
15 with tens of thousands of employees and divisions, you  
16 look to -- you look a little bit lower down than those  
17 top job titles to managers.

18 And so again this is what Professor  
19 Schoenbaum says in his amicus brief to this Court  
20 dealing with that from a maritime perspective.

21 CHIEF JUSTICE ROBERTS: Mr. Fisher, you --  
22 your friend says in his reply brief that you cannot cite  
23 one U.S. maritime case that has allowed vicarious  
24 liability for punitive damages. Is this the first one?

25 MR. FISHER: No, it would not be, Mr. Chief

1 Justice. What we did --

2 CHIEF JUSTICE ROBERTS: What's your best  
3 case?

4 MR. FISHER: What we did our reply brief --  
5 I'm sorry, what we did in our red brief is cite to  
6 Professor Robertson's article in saying that he  
7 collected the cases, and which he did; and so our best  
8 cases are the City of Carlisle case, the Ludlow and  
9 Ralston against States Rights is very close. There's a  
10 distinction in Ralston versus exemplary --

11 CHIEF JUSTICE ROBERTS: Well, let's take --  
12 take the Ludlow. Mr. Dellinger says that's a case where  
13 the court found that the owner is not vicariously  
14 liable.

15 MR. FISHER: We don't think that's the right  
16 reading of the case. We submit -- we have a footnote in  
17 our own brief that says that there are only two cases  
18 that they cite in which a captain's conduct is not  
19 imputed to the ship's owner. They are both more than  
20 100 years old, and neither of them deal with  
21 corporations.

22 So I think it is entirely fair to say that  
23 you have more or less an open issue before you today.  
24 What I think I want to be sure the Court understands,  
25 though, is that there is not a stare decisis problem



1     that this Court has to confront with respect to the  
2     first question.  You have a spattering of a few old  
3     cases that lean in different directions.

4                 JUSTICE BREYER:  And so it differs from  
5     Sand, for example, where they are like two cases?

6                 MR. FISHER:  Pardon me?

7                 JUSTICE BREYER:  It differs from Sand?  You  
8     say it is not -- I'm interested in your last remark.  In  
9     the Sand ways I found -- you know we went through it,  
10    public policy was on the other side.  But -- but we had  
11    several cases, it wasn't a thousand; it was more like  
12    two; and the Supreme Court had said in two cases, one  
13    very clearly, you know -- you see the point there.

14                MR. FISHER:  Yes.

15                JUSTICE BREYER:  Why do you say there is no  
16    stare decisis problem?

17                MR. FISHER:  Well, because neither Amiable  
18    Nancy nor the Lake Shore case, which are the only two  
19    cases from this Court, dealt with a managerial agent.  
20    The more recent cases from this Court, Hydrolevel and  
21    Kolstad -- Hydrolevel says any agent for treble damages  
22    for antitrust, and Kolstad follows the managerial agent  
23    principle, following in the natural evolution of Amiable  
24    Nancy and Lake Shore.

25                So I don't think this Court has ever

1 considered it to be any stare decisis problem, even if  
2 all of the lower courts were lined up against it, which  
3 is far from the -- far from the case here. What you  
4 have is a just few lower courts in either correction. I  
5 gather that's one of the reasons why this Court decided  
6 to grant certiorari in this case, because there's some  
7 dispute among the lower courts as to exactly how this  
8 principle works in maritime law.

9 But again, we don't think there's any  
10 problem with this Court --

11 JUSTICE SCALIA: That, and \$3.5 billion.

12 (Laughter.)

13 MR. FISHER: I said one of the reasons,  
14 Justice Scalia.

15 JUSTICE GINSBURG: There's some confusion,  
16 Mr. Fisher, about this Kolstad. I take your -- it has  
17 entered this case at two levels. One is this business  
18 about the company policy; but as far as Exxon having a  
19 policy, you don't mix alcohol with employment on a  
20 tanker; but Kolstad said it has to be a consistently  
21 enforced policy. So you don't have any problem with  
22 Kolstad on that issue, if you're using it here for a  
23 managerial --

24 MR. FISHER: Kolstad starts from the  
25 proposition of managerial agent is the proper way to

1 implement a complicity rule.

2           There's a second part of Kolstad that says  
3 we have to change what we think is the ordinary common  
4 law rule, the proper Federal common law rule. We have  
5 to change it in the context of Title VII because of the  
6 unusual situation in which employers can be held liable  
7 based on the subjective knowledge of the wrongdoer; and  
8 tort law is exactly the opposite. It is an objective  
9 test. And so there's no worry in imposing punitive  
10 damages here, that you're going to -- that you're going  
11 to dissuade an employer from training its employees.

12           Now, on the facts, even if you were to agree  
13 with me on that legal argument, you're exactly right on  
14 the facts, Justice Ginsburg. Exxon had a paper alcohol  
15 policy that prohibited drinking aboard ship, just like  
16 the Coast Guard has a policy to that effect. But the  
17 evidence in this case was that Exxon didn't enforce it.

18           JUSTICE KENNEDY: So in your theory of the  
19 case, instruction 33, if the superior had told Hazelwood  
20 don't pilot the ship today, Exxon would still be liable?  
21 That's your theory of the case under instruction 33?

22           MR. FISHER: On the --

23           JUSTICE KENNEDY: Or the last part of the  
24 instruction 36, I think.

25           MR. FISHER: On the first part of the case

1 in phase one that was our -- that was the legal theory,  
2 Justice -- you're right, Justice Kennedy. But in phase  
3 three of the trial when a jury decided whether to award  
4 punitive damages, the instructions told it, among other  
5 things -- this is instruction 30 in phase three -- it  
6 told among other things to consider whether or not the  
7 wrongdoers were violating company policy.

8 JUSTICE KENNEDY: Well, but that -- that  
9 goes to measures, not to liability.

10 MR. FISHER: Absolutely.

11 JUSTICE KENNEDY: That was the first phase.  
12 And that's the instruction, it seems to me, that you  
13 have to explain.

14 MR. FISHER: Well, I -- I accept that, and I  
15 think I've explained that by distinguishing an ordinary  
16 tort case from the situation in Title VII. I think it's  
17 instructive for this Court, and we agree with Exxon that  
18 when this Court sits as a maritime court, it looks for  
19 guidance to what other State courts have done. And we  
20 think it's instructive that not one single State court,  
21 either before or after Kolstad, has adopted a policy  
22 defense for defendants. There's simply no such decision  
23 on the books outside of discrimination cases.

24 We think --

25 CHIEF JUSTICE ROBERTS: What is your

1 position of how to look at the case if you have a  
2 managerial employee who acts contrary to corporate  
3 policy? Is the corporation still exposed to punitive  
4 damages?

5 MR. FISHER: In a tort case, Your Honor?

6 CHIEF JUSTICE ROBERTS: In a case like this.

7 MR. FISHER: Yes. We think -- and that's --  
8 and that's what instruction Justice Kennedy --

9 CHIEF JUSTICE ROBERTS: So what can a  
10 corporation do to protect itself against punitive  
11 damages awards such as this?

12 MR. FISHER: Well, it can hire fit and  
13 competent people who it decides --

14 CHIEF JUSTICE ROBERTS: Well, and assume it  
15 has a policy that we will hire fit and competent people?

16 MR. FISHER: Well --

17 CHIEF JUSTICE ROBERTS: And you're saying --  
18 that's the question I'm asking. What if there is a  
19 breach of the corporate policy? I don't see what more a  
20 corporation can do. I mean, your --- other than --  
21 other than what? I mean it has to say that the policy  
22 is this, and if somebody breaks the policy, they're  
23 liable for compensatory damages, which can as this case  
24 shows be in the billions of dollars, and of course the  
25 individual is liable for punitive and other awards.

1                   But what more can the corporation do other  
2   than say here is our policies? And try to implement  
3   them.

4                   MR. FISHER: Apart from adopting a policy,  
5   they need to implement it soundly. And the argument  
6   you're making, if I understand it correctly, would  
7   obtain just as easily if the vice president of Exxon  
8   Corporation or the president of Exxon Shipping, whom  
9   Mr. Dellinger says would put Exxon on the hook, had made  
10  the decision to put Joe Hazelwood in command of this  
11  ship. And so you always have the problem --

12                  CHIEF JUSTICE ROBERTS: At that level -- at  
13  that level, the president, I think you would have an  
14  argument that the policy was being changed. It's not  
15  clear that that argument works when you're dealing with  
16  someone at Mr. Hazelwood's level.

17                  MR. FISHER: Well, in some -- I think in  
18  some respects we're back to the argument of where you  
19  draw the line. But let's look at the conduct in this  
20  case. Who made the decision that it was safe to depart  
21  port that night on behalf of Exxon Corporation? Captain  
22  Hazelwood. The record unequivocally says that Captain  
23  Hazelwood is the one who made that policy decision.

24                  JUSTICE STEVENS: Let me throw this thought  
25  on the table. If the policy is made by the board of

1 directors, can the president unilaterally change the  
2 policy? The Chief seems to be suggesting he could?

3 MR. FISHER: I don't think so.

4 JUSTICE STEVENS: It seems to me we have  
5 this problem, the president of the company is the same  
6 as the vice president.

7 MR. FISHER: I think that's the point that I  
8 was trying to make.

9 CHIEF JUSTICE ROBERTS: I suppose that would  
10 go to how consistently and how effectively the policy is  
11 enforced. If the president of the company isn't  
12 following the policy it's not going to be taken very  
13 seriously. That's different than saying you have a  
14 situation where on an episodic and sporadic basis a firm  
15 company policy is breached, the individual is breaching  
16 the policy.

17 MR. FISHER: Well, if we're to the point  
18 where the question is whether or not the policy was  
19 enforced, we'll very happily rest on the record in this  
20 case, because that was what we tried to the jury: That  
21 there was no serious alcohol policy that was enforced.

22 We showed 33 instances in the record of  
23 Exxon employees drinking with Hazelwood or learning that  
24 he drank. Up and down the corporation, as the district  
25 judge explained, for three years, upper management was

1 receiving reports that this man was drinking aboard the  
2 vessel.

3 Now, its policy, Mr. Chief Justice, was that  
4 that was not allowed. But over a three-year span, as  
5 the district judge found again and again and again, they  
6 were told there was a problem.

7 JUSTICE BREYER: That wouldn't -- you might  
8 win on that one. I mean if you show that. They have --  
9 we have to assume that that isn't so, don't we --

10 MR. FISHER: I think you assume --

11 JUSTICE BREYER: -- for purposes of this  
12 argument?

13 MR. FISHER: Well, two -- two points,  
14 Justice Breyer:

15 On answering the first question presented --

16 JUSTICE BREYER: Yes. Okay, that's all.

17 MR. FISHER: -- you assume --

18 JUSTICE BREYER: That's fine.

19 MR. FISHER: -- unless we can show -- unless  
20 we can make an overwhelming harmless errors --

21 JUSTICE BREYER: On the second and third,  
22 this is what --

23 MR. FISHER: The second and third, I think  
24 you assume the facts --

25 JUSTICE BREYER: -- some time available. I



1 would like you to address at some point at your  
2 convenience what should the standards be if, in fact,  
3 the captain of a ship, or responsible for conditions,  
4 for example, negligence or recklessness is now going to  
5 be not only imputed to the corporation but subject for  
6 punitives.

7 Now, what I'm interested in, in the back of  
8 my mind is: This is a very dramatic accident. It  
9 involves oil spills, and they cause a enormous amount of  
10 trouble. But there are accidents every day, and ships  
11 are filled with accidents like automobiles in other  
12 places. And there are all kinds of things that go  
13 wrong.

14 And if, in fact, it has not been normal in  
15 admiralty until now to assess punitives against the  
16 corporation on the basis of the activity of, say, the  
17 ship's master, failures of responsibility, then it will  
18 be a new world for the shipping industry and for those  
19 who work on the ships.

20 What happens when a sailor slips and is  
21 hurt, and it's very serious to that sailor, et cetera?  
22 What principles do you have to suggest, if any, for  
23 creating a fair system that isn't just arbitrary?

24 MR. FISHER: Well, I think this is the  
25 perfect segue from the first and third questions. As I

1 transfer there, I want to point out that I think the  
2 only reason that we heard in the first -- the first  
3 portion of the argument for absolving Exxon of  
4 responsibility in the situation is because of the  
5 dangerousness of captaining vessels like this.

6           This Court has already addressed that  
7 concern in its collision doctrine, and tort law  
8 generally addresses the problem of dangerous activities  
9 and split-second decisions. And the answer to that is  
10 they are simply not reckless when somebody makes a  
11 good-faith decision in a crisis in the midst of  
12 dangerous activity. So we don't think there's any  
13 special rule that is necessary with respect to the first  
14 question presented.

15           Now, you asked me how do deal with it in  
16 terms of the size of the award. We think -- first of  
17 all, I think that if I can beg to differ slightly with  
18 the way you framed it, as Professor Robertson explained,  
19 punitive damages are -- have always been firmly  
20 established in maritime law.

21           And then just because there haven't been  
22 that many cases doesn't tell you that they've been  
23 frowned upon. It just means that we haven't had that  
24 many cases that have resulted in reported decisions.

25           Now, in looking to guidance, this Court

1 isn't sitting as a maritime court. So it -- it's sitting  
2 as a common-law-type court. We think the best place to  
3 start is with the common-law tradition, which is that  
4 cases are tried to juries; juries make the first  
5 decision; and then the trial court reviews for passion  
6 and prejudice and for substantial evidence, as our trial  
7 court did here. And then the court of appeals reviews  
8 that for abuse of discretion.

9           If there's anything more that's necessary in  
10 maritime law, we submit Congress has already stepped  
11 into the breach with the Limitation of Liability Act.

12           JUSTICE KENNEDY: Correct me if I'm wrong.  
13 You've read the case -- our case in Cooper, which says  
14 that the appellate court has to examine de novo to  
15 determine the adequacy or the excessiveness of the award  
16 to deter.

17           MR. FISHER: I think that's a constitutional  
18 holding. What this Court said in Cooper was if --

19           JUSTICE KENNEDY: Well, then, a fortiori, it  
20 gives us the right and the duty to do so as -- sitting  
21 as a common-law-type court.

22           MR. FISHER: Yes. I'm not going to fight  
23 you on that, Justice Kennedy. There was an earlier  
24 sentence in Cooper that says if no constitutional issue  
25 is raised, the only thing an appellate court should do

1 is review for abuse of discretion. But I think that  
2 ultimately you end up in the same place, which is that  
3 there's a de novo review of the excessive -- of whether  
4 the award is excessive based on the facts that have been  
5 -- that have been tried.

6 And if this Court is going to adopt a set of  
7 guideposts for maritime law, we think the proper place  
8 to look is the due- process cases this Court has already  
9 decided.

10 This Court has already -- in its due-process  
11 cases, the Court looked to the common law. That's  
12 where, I gather, the guideposts this Court adopted came  
13 from: Reprehensibility, in particular, which this Court  
14 said was the most important indicia, as well as a  
15 reasonable relationship, what's commonly referred to as  
16 the "ratio test."

17 JUSTICE SCALIA: What about -- what about  
18 looking to the Clean Water Act? And I wanted to ask you  
19 this question about the Act. Assuming we agree with you  
20 that -- that it was too late to raise the Clean Water  
21 Act as a separate pre-emptive factor in the case, why  
22 was it too late in the appellate court to raise the  
23 Clean Water Act as an additional reason why maritime law  
24 should not be interpreted to allow punitive damages and,  
25 in part 3 of the case, as a factor, why punitive damages

1 of the amount at issue here should not be allowed?

2 It seems to me there it's not a new  
3 argument. It's just an additional factor for arguments  
4 that have already been made.

5 MR. FISHER: I think I accept what you said,  
6 Justice Scalia. The third -- with respect to the size  
7 of the award, we never contested Exxon's ability to  
8 argue that the Clean Water Act is one place you can  
9 look.

10 So, if you were to look to the Clean Water  
11 Act, you initially have the problem that Justice Souter  
12 mentioned. You have the apples and oranges problem.  
13 The Clean Water Act sets a fine cording to the  
14 environmental harm. Now, the State of Alaska had that  
15 estimated in its -- and this is in its brief -- and that  
16 came out to be -- I believe the number is about  
17 \$2.6 billion.

18 So, if you were to look -- if you were to  
19 put aside the apples and oranges problem and look to the  
20 Clean Water Act, then you get almost the number that  
21 we're standing here with today.

22 If you look at the harm a different way, you  
23 still get an extremely large number. You get \$500  
24 million of compensation to the Plaintiffs. And then on  
25 top of that, we think in light of the way this Court has

1 addressed ratio analysis in its other cases, you need to  
2 take account of the fact that there are vast injuries  
3 that have not resulted in any compensation.

4 So to do any kind of --

5 JUSTICE SCALIA: Yes. That's part 3. What  
6 about part 2? Why -- why can't the Petitioner raise the  
7 argument or why could not the Petitioner raise it in the  
8 court of appeals? Okay, we agree that the Clean Water  
9 Act does not pre-empt the granting of punitive damages  
10 here, but one of the factors that we ought to take into  
11 account in deciding whether modern admiralty law in this  
12 situation permits punitive damages is the existence of  
13 the Clean Water Act. That's not a pre-emption thing.  
14 Is that also waived, do you think?

15 MR. FISHER: Well, I think it would be  
16 because that's -- they never made that argument in the  
17 district court, and they didn't make that argument to  
18 the --

19 JUSTICE SCALIA: They don't have to make  
20 every tiny little argument. I mean, you can think of  
21 additional points on appeal so long as it's under the  
22 same major heading. And the major heading here is not  
23 the Clean Water Act pre-empts punitive damages; the  
24 major heading is, rather, modern admiralty law does not  
25 permit. And, you know, they had made other arguments

1 about prior cases; they had talked about State law; and  
2 this is just another argument: By the way, here's  
3 another one. There's the Clean Water Act.

4 MR. FISHER: Well, they didn't make that  
5 argument, but if they had, I don't think it ends up  
6 being any different than their pre-emption argument  
7 because -- remember their pre-emption argument isn't a  
8 pure pre-emption argument. They're not here today  
9 saying the Plaintiffs can't recover compensatory  
10 damages, as was the case in the Milwaukee and Illinois  
11 case, for example. What they're saying is that the  
12 Clean Water Act displaces our ability to recover  
13 punitive damages.

14 And there, by making the argument that I  
15 gather you've sketched out, it looks very much like the  
16 same argument that they didn't properly make.

17 JUSTICE SCALIA: It's close.

18 MR. FISHER: But it doesn't --

19 JUSTICE SCALIA: But it doesn't really say  
20 pre-emption, and so it's -- it's just another factor to  
21 consider when you decide what the evolving law of  
22 admiralty requires.

23 JUSTICE GINSBURG: There was a statute that  
24 was raised in the district court. And the district  
25 court raised this TAPA Act, and they thought that that

1 was the statutory guide, and that was the reason why  
2 there should not be punitive damages, but -- so that was  
3 one of the things the court of appeals said under the  
4 head of waiver. They're substituting one federal  
5 statute for another.

6 MR. FISHER: That's right, Justice Ginsburg.  
7 And at page 103 of the joint appendix, the district  
8 court ruled on that motion and held that TAPAA was the  
9 statute that was controlling with respect to spills of  
10 trans-Alaska oil and that the savings clause of TAPAA  
11 expressly preserved our ability to seek punitive  
12 damages.

13 That's a ruling that, as you noted, Exxon  
14 never appealed, and so it is the law of the case.

15 CHIEF JUSTICE ROBERTS: A while ago you were  
16 about to make a point on the Limitation of Liability  
17 Act.

18 MR. FISHER: Yes.

19 CHIEF JUSTICE ROBERTS: A little while ago,  
20 you were about to make a point on the Limitation of  
21 Liability Act.

22 MR. FISHER: Yes.

23 CHIEF JUSTICE ROBERTS: But I was -- I would  
24 have thought that cuts heavily against you on the third  
25 point. In other words, if we're looking to guidance,



1    you look to Federal law.  And whether it's directly  
2    applicable or not, the Limitation of Liability Act  
3    reflects a very strong Federal policy about restricting  
4    liability on shipowners, adopted at a time when it was  
5    intended to encourage maritime -- the maritime economy.  
6    And why isn't that something we should look to, at least  
7    under question three?

8                   MR. FISHER:  Well, as I said, I agree you  
9    should look to it, but you should do it in a way this  
10   Court's Miles decision instructs.  It says that Congress  
11   doesn't just enact general policies.  By enacting a  
12   statute that gives some protection, Congress indicates  
13   not just a general policy, but more importantly, the  
14   sphere into which that policy is to be given effect.

15                   And so the notion that Congress did step in  
16   and give shipowners some protection but left out  
17   shipowners like Exxon that behave in the manner at issue  
18   in this case, we think is a strong --

19                   CHIEF JUSTICE ROBERTS:  Well, that means  
20   they don't get the really quite extraordinary protection  
21   that the limitation of liability gives.  It doesn't mean  
22   that we should ignore the reflection of that policy  
23   outside the confines of the Limitation of Liability Act.

24                   MR. FISHER:  Well, I think -- I think you  
25   should look to it and understand that Congress has

1 declined to give the protection. In OPA 90, which was  
2 passed right after the spill in direct response to the  
3 spill, Congress made explicit that the Limitation Act  
4 should never apply to spills of Trans-Alaska oil. And  
5 the TAPAA did the same thing in the --

6 CHIEF JUSTICE ROBERTS: The argument is not  
7 that the Limitation of Liability Act should apply. It's  
8 that it would be very strange to say, where Congress has  
9 radically reduced the exposure of shipowners in one  
10 area, that we as a matter of development of Federal  
11 common law, Federal maritime law should allow  
12 dramatically expanded punitive liability in another area  
13 of shipowning liability.

14 MR. FISHER: Well, we don't think we're  
15 asking for any kind of expansion of liability. All  
16 we're asking is for the traditional admiralty rule which  
17 has been recognized by Justice Story early on and all  
18 through the cases that in cases of reckless indifference  
19 a shipowner can be held liable for punitive damages.  
20 The only thing --

21 JUSTICE SOUTER: Mr. Fisher, the problem I  
22 have -- maybe it isn't a problem I have, but a question  
23 that that argument raises is this:

24 We know something now that Justice Story did  
25 not know, and that is we've had an awful lot more

1 experience with punitive damages practice. And we've  
2 spent the last decade or so of this Court dealing with  
3 the problem of how to set constitutional limits for  
4 awards which sort of by most people's standards verged  
5 on the excessive.

6 The problem that we've had -- we've had two  
7 problems in coming up with those constitutional  
8 standards:

9 One is we can't simply substitute ourselves  
10 as lawmakers for the State. We're talking about  
11 constitutional limits, not optimum standards.

12 And number two, given those limits on us, we  
13 have not been able to come up with anything that could  
14 be called determinant standards. We've never, for  
15 example, found a sufficient reason constitutionally to  
16 put an absolute ratio kind of limit on it.

17 But here, as you were pointing out earlier,  
18 we're sitting as a kind of common-law court. We are in  
19 the position of the States here.

20 Why shouldn't we recognize the difficulty of  
21 trying to deal with indeterminate limits which we've  
22 proven in the constitutional context and say, therefore,  
23 we've simply got to come up with a number, because no  
24 other way is going to give us any kind of an  
25 administrable standard; and our number -- and I'm not

1 saying this should be it -- but our number is going to  
2 be double the compensatory damages? That's the limit.

3 Would that be an illegitimate thing for us  
4 to do or an unwise thing for us to do?

5 MR. FISHER: Well, I think it would -- I'll  
6 stick with unwise, Justice Souter.

7 (Laughter.)

8 MR. FISHER: And I think the reason why is  
9 because we agree with that. You should -- you should  
10 look to the experience of the States. Not one single  
11 State, as a matter of common law authority, has set a  
12 bright-line ratio. The only place --

13 JUSTICE KENNEDY: But the -- the United  
14 States Code, the general criminal code, 18 U.S.C. 3571,  
15 has exactly that number. It's -- for -- it's double the  
16 pecuniary loss for a criminal act.

17 And it seems to me, if when we're looking  
18 for guidance, as Justice Souter quite properly indicated  
19 we must, and Justice Scalia has indicated with reference  
20 to the Water Act, that this is -- gives us a very  
21 valuable instruction.

22 MR. FISHER: We think that's one place this  
23 Court can look. But again, a common-law court, we  
24 believe, sets standards, not a bright-line rule. If you  
25 were to adopt some sort of bright-line statute, you'd

1 have to deal with any number of legislative problems  
2 that the several States have dealt with and Congress,  
3 when it has passed these kinds of limits.

4 First, you have to decide the ratio number.  
5 You have to pull something out there. Then you have to  
6 decide is it on a per capita basis in terms of -- what  
7 several States have done is they've set a limit, that a  
8 ratio only kicks in at a certain dollar amount. In this  
9 case, it's worth remembering that the plaintiffs are  
10 only standing to recover \$75,000 a piece in punitive  
11 damages.

12 Now, most States that even have caps, or  
13 several of the States at least, say they don't apply if  
14 the awards are under a \$100,000 per capita.

15 JUSTICE BREYER: Why? What's even the  
16 theory of that? Because the theory of punitives is that  
17 the individual who's receiving the money wasn't hurt one  
18 penny's worth?

19 MR. FISHER: But the theory --

20 JUSTICE BREYER: And that really the money  
21 ought to go to the people generally in the State or it  
22 ought to go to other people, rather than those people  
23 who have already been compensated. That's the theory of  
24 it.

25 MR. FISHER: I think that's --

1 JUSTICE BREYER: That exhibits the  
2 difficulty for me of trying to figure out how to do it.

3 MR. FISHER: I think the theory of the  
4 States, Justice Breyer, is that if you hurt lots and  
5 lots of people, it's a worse act than if you only hurt  
6 one or two. And so if you have, as in this case,  
7 destroyed an entire regional economy, that it would be  
8 inappropriate to give some sort of credit for that by a  
9 lower ratio just because you've harmed more people.

10 Now, there's also --

11 JUSTICE KENNEDY: But isn't the measure what  
12 is necessary to deter? Isn't that what we've asked  
13 first and foremost, not exclusively perhaps?

14 MR. FISHER: Well, I think you've looked at  
15 punishment and deterrence, Justice Kennedy.

16 And if I could finish the last thing I want  
17 to say about looking at a ratio, several States that  
18 even have ratios carve out drunk driving cases and cases  
19 involving intoxication from any other otherwise  
20 applicable limits. And that's -- I think one reason  
21 why, Justice Kennedy, is deterrence. And so, I think  
22 let's start with deterrence, but I want to frame that  
23 discussion by recognizing that in Cooper this Court said  
24 that deterrence is not the only goal; you also look to  
25 punishment.

1           Now, I think Exxon's primary argument on  
2     deterrence grounds is that we've paid \$3.4 billion out  
3     of our pocket already as a result of this spill, and  
4     that's a lot of money. The reality is, once they get  
5     their tax credit and insurance benefits for that money,  
6     the number is really under 2 billion. But it's still a  
7     lot of money.

8           And so I think it's important to look at the  
9     district court proceedings involving the Clean Water  
10    Act, involving the criminal prosecution here, and ask  
11    whether it makes sense to have Exxon pay additional  
12    money in punitive damages. We think it is.

13           The first thing to understand is that the  
14    same district judge that saw the criminal proceedings in  
15    this case sat over our trial. He understood what the  
16    criminal case was about, and what it was about was the  
17    environment. That was only thing on the table in the  
18    criminal case. And so, when we tried to argue --

19           CHIEF JUSTICE ROBERTS: It was a different  
20    jury. And the jury is the one that set the amount of  
21    punitive damages.

22           MR. FISHER: There was no jury, of course,  
23    in the criminal case.

24           CHIEF JUSTICE ROBERTS: Right.

25           MR. FISHER: But there was a jury in our

1 case. The district judge reviewed that and said, after  
2 being instructed in instruction number 36 in our case --  
3 and this is something that we tried -- the chairman of  
4 Exxon took the stand in trial and gave the jury a chart  
5 of all the money that Exxon had paid out of its pocket  
6 and told the jury: We've been deterred enough, so you  
7 shouldn't award any punitive damages. And the jury, of  
8 course, rejected that argument that Exxon made.

9 And the district judge reviewing that  
10 decision -- and this is around page 240 to 245 of the  
11 petition appendix -- the district judge said: I think  
12 the jury had ample reason to do so. And remember to the  
13 tune of \$5 billion. And so why did the district judge  
14 think that? Well --

15 CHIEF JUSTICE ROBERTS: This is the same  
16 judge who approved the instruction that said Hazelwood's  
17 negligence and recklessness is automatically imputed to  
18 Exxon, right?

19 MR. FISHER: Yes.

20 CHIEF JUSTICE ROBERTS: So he was operating  
21 that under understanding of the law.

22 MR. FISHER: Well, not when he was reviewing  
23 the size of the award, Mr. Chief Justice.

24 In the criminal case, the statement of facts  
25 supporting the guilty plea in the criminal case -- and



1 remember, we're only talking about environment in the  
2 criminal case -- and in terms of punishment, the only  
3 money for punishment in the criminal case is \$25  
4 million. All the rest of the money is, as the district  
5 court said, to clean up Exxon's mess or to put money  
6 into the environment.

7               Now, for \$25 million fine that Exxon paid in  
8 the criminal case, the district judge explained -- or  
9 I'm sorry, the district judge approved the statement  
10 that the U.S. attorney submitted, which said the basis  
11 for this is that the captain and the third mate were  
12 negligent. That was the only thing even there.

13              It wasn't until our trial and our discovery  
14 that it was brought out that the complicity of the  
15 organization ran far deeper. And so at our -- phase  
16 three of our trial, which was entirely about Exxon's  
17 conduct, not any more at all about Captain Hazelwood's  
18 conduct -- in phase three of our trial we started out  
19 the closing argument by saying here's the relevant  
20 evidence for the jury.

21              And we played something for the jury called  
22 Trial Compilation 9. Now, that appears at appears at  
23 page 1295 of the joint appendix, and we actually  
24 submitted a videotape that we have submitted to the  
25 Clerk's office, and it is sitting in the Clerk's office.

1           There are 50 segments in Trial Compilation  
2   9, and all 50 deal with Exxon's upper management  
3   receiving reports of Hazelwood's conduct and deeming it  
4   a gross error to put him in command and so forth, all  
5   there.

6           So it wasn't until the trial in our case  
7   that it came out how deep the complicity ran in the  
8   organization and how reprehensible the conduct was.

9           And in reviewing the award the district  
10   judge said: Now, with that level of complicity and  
11   reprehensibility, I think the jury could have decided  
12   that Exxon should be punished for this --

13           JUSTICE BREYER: What is the relevance?

14           MR. FISHER: -- occurrence.

15           JUSTICE BREYER: What's the relevance of the  
16   leg that we're assuming Exxon, other than the captain,  
17   did bad things?

18           MR. FISHER: We submit that --

19           JUSTICE BREYER: You seem to be now talking  
20   about the evidence that they did bad things. But that's  
21   the leg that they did --

22           MR. FISHER: The district judge said that  
23   this is what he deemed a critical factor supporting the  
24   punitive award.

25           JUSTICE BREYER: Well, doesn't that show,

1 then, that there had to be a finding that they did the  
2 bad thing?

3 MR. FISHER: No. If you accept our argument  
4 in the first that to get in the door, all we had to show  
5 was that a managerial agent was reckless and that  
6 Captain Hazelwood, as Exxon conceded, Was a managerial  
7 agent. When you are reviewing the size of the award --  
8 and I think we're talking about the third question  
9 presented, the size of the award -- all the -- all the  
10 evidentiary questions are resolved in favor of us, and  
11 certainly they are resolved in a way that conducting de  
12 novo reviews, a lower court understood and told this  
13 Court what the record was. And it is all about the  
14 three years that they knew Captain Hazelwood was  
15 drinking.

16 But I don't want to leave Justice Kennedy's  
17 question about deterrence, because even if this Court  
18 looks at the payments Exxon has made from a perspective  
19 of deterrence, there are two legs in which Exxon has  
20 clearly not been deterred. The first is that Exxon's  
21 own executives testified to Congress shortly after the  
22 spill that the results of the spill were, quote, "pretty  
23 much as we envisioned."

24 Now, it was also common knowledge in the  
25 organization, and this came out at trial, that the idea

1 of putting a drunken master in charge of a supertanker  
2 was a potential for disaster and incalculably raised the  
3 chances of a disaster and a catastrophic spill  
4 occurring. Knowing all this; knowing what could happen;  
5 knowing that the industry did not have sufficient  
6 cleanup equipment to contain a big spill; knowing that  
7 tens of thousands of Alaskans that depended on Exxon  
8 taking proactive action, the kind of action that  
9 Congress had demanded in passing the TAPAA; Exxon  
10 nonetheless left Captain Hazelwood in command over a  
11 three-year span. So it wasn't deterred by knowing what  
12 would happen if the tanker ran aground.

13 Even if you look at it from the perspective  
14 of having paid the money out of its pocket, what did it  
15 do? It still hadn't been deterred. In the wake of the  
16 spill, and this is part of Trial Compilation 9, and this  
17 was part of the argument to the jury, Exxon fired one  
18 person -- Captain Hazelwood. They reassigned the third  
19 mate. Everybody else up -- further up the chain of  
20 command who allowed this to happen received bonuses and  
21 raises. They have taken no action inside the company to  
22 express in any meaningful way that they've been deterred  
23 by what happened in this incident --

24 JUSTICE GINSBURG: Mr. Fisher --

25 MR. FISHER: -- and the amount of money that

1 they've had to pay.

2 JUSTICE GINSBURG: -- your time is running  
3 out. And this there's one question I'd like you to  
4 address, and that is are there other cases against Exxon  
5 seeking compensation and punitive damages based on this  
6 oil spill that are still awaiting trial or decision? Or  
7 is this it?

8 MR. FISHER: By definition,  
9 Justice Ginsburg, this is a mandatory punitive class, so  
10 this is the one and only time Exxon will face the  
11 respect of punitive damages.

12 JUSTICE GINSBURG: So you don't have the  
13 problem of litigant A getting these punitive damages and  
14 than B, C and D all wanting to --

15 MR. FISHER: Right. One of the many ways in  
16 which this case is the mirror image of the due process  
17 cases that Justice Souter was referring to that caused  
18 this Court to have such great concern about the uptick  
19 in punitive damages, here you have a single case. You  
20 have a single digit ratio which is proportionate to the  
21 harm that was shown in this case.

22 You have -- in contrast to State Farm, in  
23 the most recent -- second most recent case this case  
24 had -- in State Farm you had two plaintiffs who stood  
25 before this Court having received \$500,000 each in

1 compensatory damages for the emotional distress of 18  
2 months of not knowing whether an insurance claim was  
3 going to be paid. What you have today are 32,000  
4 plaintiffs standing before this Court, each of whom have  
5 received only \$15,000 for having their lives and  
6 livelihood destroyed and haven't received a dime of  
7 emotional distress damages.

8 If there are no further questions, I'll  
9 submit.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Fisher.

12 Mr. Dellinger, you have four and a half  
13 minutes.

14 REBUTTAL ARGUMENT OF WALTER DELLINGER  
15 ON BEHALF OF PETITIONERS

16 MR. DELLINGER: Let me begin by noting that  
17 it's -- I do not think the Court will find in the record  
18 that Exxon said this was expected and approved the --  
19 you can look at that excerpt on the DVD and see for  
20 yourself what was -- what was meant by that.

21 With respect, it is difficult to decide what  
22 level of employee should implicate a company; but it is  
23 divisible I think, as Justice Kennedy suggested. It is  
24 based on whether that employee has authority over the  
25 policy, and even a ship captain may have authority over

1   some policies; he did not here.  At the end of the day  
2   what the Ninth Circuit held was that Exxon was liable --  
3   could be liable for 2.5 billion, simply because against  
4   its policies, Hazelwood left the deck.  That's all that  
5   we need to be found.

6                   Now with respect to the -- with respect to  
7   the amount of punitive damages here, where you are --  
8   punitive damages cases generally look to for the need to  
9   deter the activity where someone acts out of malice and  
10  hostility, intending to harm, which is not true here; or  
11  when a corporation acts out of a profit motive and hopes  
12  perhaps it will be concealed or that it will make enough  
13  money off of it.  That is not true here.  Exxon gains  
14  nothing by what went wrong in this case, and paid dearly  
15  for it.

16                   In the criminal case, the U.S. and Alaska  
17  agreed that the amount of the penalty was quote,  
18  "sufficient to provide punishment and deterrence for the  
19  conduct in question."

20                   Now if you talk about the -- the amount  
21  where you have that kind of deterrent, for an  
22  unintentional act that -- of the amount that's already  
23  paid, I heard no response to what one would say to  
24  Justice Kennedy's opinion in State Farm as an outer,  
25  outer limit.  In State Farm the Court said where

1 compensatory damages are substantial, then perhaps --  
2 this is the constitutional context -- perhaps an amount  
3 equal to compensatories would be the most.

4 What was substantial there was 1 million  
5 dollars. The compensatories here were 400 or 500 times  
6 the -- what the Ninth Circuit found -- 504 million  
7 dollars. Yes?

8 JUSTICE GINSBURG: Just as a class, if you  
9 take them individually, each individual, did Mr. Fisher  
10 say 15,000 something?

11 MR. DELLINGER: Well, from the stand --  
12 first of all, from the stand point of a company it  
13 doesn't matter whether you pay one person 500 million  
14 dollars or a lot of people 500 million dollars, in terms  
15 of punishment and deterrence.

16 But also it is the case that -- that with  
17 regard to the first plaintiff who had been fully  
18 compensated, the argument would have been that in light  
19 of all that happened, there is no need for punishment  
20 and deterrence even in the first case, and certainly  
21 cumulatively, when the amount ad reached, say the amount  
22 of the civil fines of 80 million, one would have said no  
23 more punitives, because the purpose of punitive damages  
24 is a public purpose. It is not to compensate the  
25 individual.



1                   Here we're at 500 times what was considered  
2   substantial in State Farm. I don't see -- and what is  
3   that -- that part of State Farm is to be considered a  
4   dead letter, how one could not see that this is the  
5   case. But that -- that amount of compensatories is an  
6   outer limit, because if you look to what the civil  
7   penalties would be that responsible officials have  
8   obtained, it is 80.2 million dollars; and when you look  
9   to the fact that this is a case where, as Justice Breyer  
10   notes, with the First Circuit opinion, outside the  
11   fishing context there would have been no compensatories  
12   paid at all, or owing, because it's consequential  
13   damages and in most States, the great majority of the  
14   States, that is not even a compensable -- a compensable  
15   injury. But it is a special rule for -- for fishing.

16                  So these are awards -- that would not have  
17   been done in any case. This was a tragic and terrible  
18   event, and one for which the company has paid dearly,  
19   and the -- at the end of the day, the question will be  
20   whether this Court without any guidance should assume  
21   that there should a punitive damages remedy in areas  
22   where Congress has already acted, and whether, if so,  
23   the plaintiffs have made out any case of an additional  
24   need for punishment and deterrence beyond what public  
25   authorities have agreed to.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
2 The case is submitted.

3 (Whereupon, at 11:38 a.m., the case in the  
4 above-entitled matter was submitted.)  
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