No. 07-219

In The
Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

[redacted] INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS AND INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS [redacted] AS *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September 20, 2007

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

International Association of Independent Tanker Owners ("INTERTANKO") and International Association of Dry Cargo Shipowners ("INTERCARGO") respectfully request that the Court grant leave to file the attached *amicus* brief in support of petitioners' request that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

The issue arises in the context of a $2.5 billion punitive damage award against the owners of the tank vessel *Exxon Valdez*. The Ninth Circuit's decision for which issuance of a writ is sought creates conflict among the circuits with regard to shipowner liability for punitive damages. Petitioners have sought issuance of a writ to the Ninth Circuit to reconcile divergent dispositions between the circuits and to address the legitimacy of massive punitive damage awards against vessel owners under the Constitution and general maritime law. The divergence between the circuits creates uncertainty as to the liability exposure of vessel owners having minimal contacts with the Ninth Circuit, home to some of the busiest ports in the United States. Resolution of this conflict will provide INTERTANKO and INTERCARGO members, as well as much of the worldwide shipping industry with clarity as to the magnitude of risk they confront when engaging in maritime commerce.

Pursuant to Rule 37.2 of the Rules of this Court, INTERTANKO and INTERCARGO have sought and received written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. On September 12, 2007, counsel for the Petitioner consented in writing to the filing of this brief. On September 13, 2007, INTERTANKO and INTERCARGO received written consent from counsel for respondents.[1] Accordingly, counsel for INTERTANKO and INTERCARGO move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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[1] Letters from Petitioners and Respondents indicating consent to file are being filed with the clerk of the Court.

QUESTIONS PRESENTED

In the view of *amici curiae*, INTERTANKO and INTERCARGO, the questions presented for review are as follows:

1. Whether the Ninth Circuit erred in departing from the traditional maritime rule governing vicarious liability maintained in the First, Fifth, Sixth and Seventh Circuits.

2. Whether the remedies and penalties set forth in the Clean Water Act are the exclusive remedies available for marine pollution claims.

3. Whether a $2.5 billion punitive damage award is permissible under maritime law or constitutional due process.

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BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) AND THE INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS (INTERCARGO)

INTEREST OF *AMICI CURIAE*[1]

INTERTANKO is an unincorporated, not-for-profit association of independent tanker owners and operators. As used in this context, "independent" reflects INTERTANKO membership criteria that member companies be tanker owners neither owned nor controlled by cargo owners (*e.g.*, oil companies) whose cargo is carried aboard INTERTANKO vessels. INTERTANKO, however, works closely with all sectors of the international marine tanker market, and oil company-owned tanker companies participate in INTERTANKO activities as associate members. INTERTANKO's approximately 250 independent members and 300 associate members own, operate and manage more than 3,000 tankers in all major maritime trades of the world, including all major liquid bulk ports in the United States. The independent owner members of INTERTANKO operate somewhat more than 2,500 vessels totaling approximately 210 million tons (deadweight), or 70 percent of the world's independent tanker fleet.

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amici curiae*.

INTERCARGO is an unincorporated, not-for-profit association of owners, operators, and managers of bulk dry cargo vessels. These vessels carry bulk (non-containerized) commodities such as ores and other minerals, grains, steel, coal and timber throughout the world, including to and from ports in the United States.

Both INTERTANKO and INTERCARGO provide for policy discussion and exchange of information on developments that affect the highly regulated and complex business of carrying oil, chemicals and dry bulk cargoes by ship between ports throughout the world. The organizations advance their members' interests before local, state, regional and national legislatures, courts, administrative agencies and United Nations bodies with authority over international maritime activities. Both organizations are uniquely situated to apprise the Court of the impacts of liability regimes governing marine oil spills. Because both INTERTANKO and INTERCARGO vessels trade to United States ports on all three (Atlantic, Gulf and Pacific) ocean coasts of the United States and in the Great Lakes, both organizations are concerned that liability regimes governing casualties relating to the release of oil into the marine environment be rational, harmonious and uniform, not only within the United States, but, to the maximum achievable extent, throughout the world.

While there is wide variation in the size of the fleets and the financial profiles of companies who are members of INTERTANKO and INTERCARGO,

many of the companies are relatively small, privately held enterprises. The average fleet size for INTERTANKO and INTERCARGO members is less than ten vessels and the assets of these companies are generally not sufficient to sustain large awards of punitive damages. While owners, operators and managers of marine transport providers rely heavily on global insurance markets to provide coverage for awards of compensatory damages, punitive damage assessments in jurisdictions that recognize such awards are generally uninsurable.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Petition.

SUMMARY OF ARGUMENT

For nearly 190 years, federal courts sitting in admiralty have faithfully applied this Court's unanimous decision in *The Amiable Nancy* which limited the vicarious liability of shipowners to compensatory damages, allowing vicarious punitive damages only in instances where shipowners were complicit in the misconduct of their agents. 16 U.S. 546, 559 (1818). The Ninth Circuit adopted this rule in 1905 and adhered to it for eighty years before it elected to apply a new rule from the Restatement (second) of Torts § 909 (1969). *Protectus Alpha Navigation v.*

N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985). In the decision below, faced with two incompatible panel decisions, a split panel of the Ninth Circuit opted to supplant the traditional maritime rule, bringing that court into direct conflict with every other circuit that has addressed this issue – the First, Fifth, Sixth and Seventh Circuits. *In re the Exxon Valdez*, 270 F.3d 1215, 1236 (9th Cir. 2001).

The conflict created by the Ninth Circuit's recent decision undermines both the uniformity and substance of settled maritime law. Shipowners now confront two very different liability regimes in the United States, the world's largest maritime trading destination. Under the traditional maritime rule found in most circuits, shipowners can manage their risk by planning for familiar contingencies and preparing to bear actual remedial costs when accidents occur. Under the Ninth Circuit's rule, however, actual remedial costs are only a point of departure, with incalculable and potentially ruinous punitive damages stretching beyond the horizon. The persistence of such inconsistent liability laws would be a burden in many industries, but given the inter-jurisdictional movements of ocean-going vessels, the costs of legal discord are particularly disruptive to interstate and international commerce. Indeed, it was the essential need for uniform maritime laws that caused the Framers to make this Court the final arbiter of maritime law. U.S. CONST. art. III, § 2, cl.1. Because this Court alone has the power to restore uniformity and clarity to a crucial question of maritime law,

amici respectfully request issuance of a writ of certiorari to the court of appeals below.

ARGUMENT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT, WHICH HAS ABANDONED THE TRADITIONAL MARITIME RULE LIMITING VICARIOUS LIABILITY FOR PUNITIVE DAMAGES, AND THE FIRST, FIFTH, SIXTH AND SEVENTH CIRCUITS, WHICH ADHERE TO THE TRADITIONAL RULE.

Five U.S. Circuit Courts of Appeals have addressed the important issue of whether punitive damages can be imposed on shipowners for the acts of shipmasters. The First, Fifth, Sixth and Seventh Circuits apply the traditional maritime rule articulated by this Court in *The Amiable Nancy*, 16 U.S. 546 (1818) – that punitive damages *can* be imposed on shipowners for the acts of shipmasters, but only when owners have directed, countenanced, or participated in the conduct of their agent.[2] *See CEH Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995); *In re P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143

[2] Even in the absence of such culpability, shipowners are subject to vicarious liability for compensatory damages.

(6th Cir. 1969); *The State of Missouri*, 76 F. 376 (7th Cir. 1896). After eighty years of adhering to this rule, the Ninth Circuit has deviated from it and has adopted a rule that is irreconcilable with the binding precedents of this Court and the general maritime law adhered to in every other circuit.

A. Since This Court's Decision in *The Amiable Nancy*, Courts Outside the Ninth Circuit Have Consistently Applied the Traditional Rule Limiting Shipowner Vicarious Liability.

When American privateersmen sailing on the brig *Scourge* boarded and plundered a neutral Haitian vessel, the schooner *Amiable Nancy*, the owner of the schooner, Monsieur Mirault, libeled the *Scourge* in the Southern District of New York, thereby seeking relief from her American owners. After finding the owners of the *Scourge* liable for the tortious acts of their privateersmen, the court ordered its clerk to estimate damages with the aid of "two respectable merchants." *The Amiable Nancy*, 1 Fed. Cas. 765, 766 (C.C.D.N.Y. 1817) (relaying the unpublished decision of the district court). The resulting award was approximately seventeen times the value of the looted property, and on appeal, Justice Henry Livingston, riding circuit, found it "impossible not to be struck with the very large amount which [had] been assessed for damages, when compared with the actual injury sustained." 1 Fed. Cas. at 768. As Livingston observed, the district court had "taken for granted

that vindictive damages are to be recovered, and that in such cases a court will not be very particular as to the limits within which it will circumscribe a defendant's liability."[3] The Circuit Court, therefore, made it clear that there are limits on vicarious liability by rejecting the "rule of vindictive damages which [had been] pressed upon the court" and holding that "the measure of [a shipowner's] responsibility is simply "the full value of the property injured or destroyed." 1 Fed. Cas. at 769 (quoting *Del Col v. Arnold*, 3 U.S. 333 (1796)).[4]

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[3] Punitive damages at this time were often awarded through the undeclared inflation of compensatory damages. This practice originated in early English common law as a way for jurors to express their sympathy for plaintiffs and their scorn for defendants since damages for emotional harms were not recognized at common law. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 83-84. This practice, seen in *The Amiable Nancy*, is also manifest in several other maritime cases from the era. *See, e.g., Chamberlain v. Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823) (awarding what amounted to punitive damages for "precisely the same purposes as those in the leading English decisions . . . " Robertson, *supra* n. 4, at 88-89).

[4] Justice Livingston also made several compelling policy arguments against vicarious punitive damages in this context. For example, he observes that the promise of high punitive damages from shipowners will create a disincentive to settle disputes ("Such heavy assessments . . . scarcely reducible to any rule, will also prevent compromises between the parties. No offer of compensation . . . however fair, and although fully commensurate with the loss that has been sustained, will satisfy the extravagant pretensions of the injured party . . ." 1 Fed. Cas. at 770).

The following year, this Court voted unanimously to uphold the Circuit Court's limitation on vicarious liability. Justice Joseph Story, the "father of American admiralty law,"[5] wrote that the owners of the *Scourge* clearly had "a responsibility for the conduct of the officers and crew employed by them," and thus, were "bound to repair all the real injuries and personal wrongs sustained . . . " (*i.e.* compensatory damages). 16 U.S. at 558-59. However, even though the "lawless conduct" of the privateersmen warranted the imposition of "exemplary damages," this was a suit against the owners, and the Court held the owners were "not bound to the extent of vindictive damages" (*i.e.* punitive damages) because they were "innocent of the demerit" complained of, "having neither directed it, nor countenanced it, nor participated in it in the slightest degree . . . " 16 U.S. at 559.

The Amiable Nancy is not a quaint relic of the Marshall Court. It is a binding precedent of maritime law that has been expressly affirmed by this Court, *Lake Shore & Michigan S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893), and followed by federal courts sitting in admiralty for almost 190 years.

To counsel's knowledge, the first case to apply *The Amiable Nancy* was *Ralston v. The State Rights*,

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[5] *See* SCHWARTZ, A HISTORY OF THE SUPREME COURT 60 (1993) ("Early American commercial and admiralty law were largely the creation of Story's decision."); Story was the editor of the influential TREATISE ON THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN (1810).

20 F. Cas. 201 (E.D. Pa. 1836), in which the captain of the steamship *State Rights* deliberately and repeatedly rammed its competitor, the steamship *Linnaeus*, with its ice-breaker bow. The court acknowledged its authority to award "exemplary damages" as a general matter, but, applying *The Amiable Nancy*, it limited liability to compensatory damages. 20 F. Cas. at 201. Despite the fact that the owners were found to have been "too inattentive to the manner in which [their captain] was using the authority they had committed to him," the court refused to award punitive damages because the owners were not "particularly informed" of the captain's actions or "the vindictive motives he avowed for his misconduct." 20 F. Cas. at 201.

Twenty years later, the Ninth Circuit's predecessor, the California Circuit, held in *McGuire v. The Golden Gate*, 16 F. Cas. 141 (C.C.N.D. Cal. 1856), that "damages may be inflamed to teach offenders their duty; but not when the proceedings are against the owners. . . . Such should not be made liable beyond the amount of actual damages, uninfluenced by any considerations of punishing the act of the perpetrator . . . " 16 F. Cas. at 143. Citing *The Amiable Nancy*, the court held "in actions against innocent owners, while the policy of the law holds them liable for actual damages as proved, these cannot be enhanced to admonish the guilty." 16 F. Cas. at 144.

Toward the end of the nineteenth century, this Court unequivocally affirmed *The Amiable Nancy* in *Lake Shore & Michigan S. Ry. Co.*, 147 U.S. 101, 107-08 (1893). In this case, a train conductor had abused

and caused the wrongful arrest of a passenger who sought punitive damages against the railroad. Extending *The Amiable Nancy* beyond the maritime context, the Court held that "[a] principal" is "of course liable to make compensation for injuries done by his agent within the scope of his employment," but "cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*." 147 U.S. at 107-08.

By 1896, *The Amiable Nancy* rule was so well established that, when the Seventh Circuit found a steamship owner liable for the act of the steamer's master in *The State of Missouri*, 76 F. 376 (7th Cir. 1896), the court simply said "[u]ndoubtedly the damages to be awarded must be compensatory, and not exemplary, where recovery is sought against the master for the unauthorized tort of the servant." 76 F. at 380.

The Ninth Circuit confronted this issue for the first time nine years later in *Pac. Packing & Navigation Co. v. Fielding*, 136 F. 577 (9th Cir. 1905). After being falsely imprisoned aboard a steamship by her captain, the plaintiff sought punitive damages from the shipowner. The plaintiff urged the court to treat shipmasters as corporate executives under the theory that the intent of those who wield "the whole executive power" can be imputed to the corporation itself. 136 F. at 580. The Ninth Circuit rejected this theory. Although the court recognized that "the master

of a ship at sea . . . is for the time being in the sole and absolute command of the ship and of everybody in it," the court refused to equate shipmasters with corporate executives "especially in view of the decision of the Supreme Court in the case of the *Amiable Nancy* . . . the doctrine of which case was expressly approved in *Lake Shore, etc., Railway Company v. Prentice*." 136 F. at 580.

Over the next ninety years, district courts sitting in admiralty in the First, Fifth and Eleventh Circuits consistently applied what had clearly emerged as the traditional maritime rule limiting shipowner vicarious liability for punitive damages. *See The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909) (declaring that "punitive damages cannot be awarded" against the owner of a vessel "who is not proved to have had any share in or knowledge of the malicious act."); *The Ludlow*, 280 F. 162, 163 (N.D. Fla. 1922) ("There is a clear distinction in the admiralty law between the liability of the owner or principal as a consequence of the tort of the agent. . . . The owner or employer is exempt from punitive damages, unless it may be shown that the owner acquiesced in or ratified the wrong, or that the deed was perpetrated in the line of the agent's authority. Otherwise, he is liable only for actual damages suffered."); *McGuffie v. Transworld Drilling Co.*, 625 F. Supp. 369, 373 (D. La. 1985) (rejecting the Ninth Circuit's deviation from the traditional rule: "except for a single Ninth Circuit case [*Protectus Alpha Navigation v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985)], all the

cases we discovered, which were decided under the general maritime law, are in accord. They hold that the principal or master cannot be cast for punitive damages for the willful or reckless act of the agent or employee unless the act was committed with the approval or knowledge of the principal."); *Jones v. Compagnie Generale Maritime*, 882 F. Supp. 1079, 1086 (S.D. Ga. 1995) ("This principle is well considered, especially in the maritime context . . . The retribution and deterrence objectives of punitive awards are not achieved 'when courts drop the punitive damage hammer on the principal for the wrongful acts of [an employee].' The employee alone committed the wrongful acts, while the principal may not condone or encourage any behavior of the kind." 882 F. Supp. at 1086 (citations omitted)).

The Sixth Circuit adopted the traditional maritime rule limiting vicarious liability for punitive damages in 1969 with *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). The Fifth Circuit followed suit with *In re P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989). The *P & E Boat Rentals* court cited *Fuhrman* favorably, noting that the Sixth Circuit was "more faithful to the teaching of the Supreme Court in *The Amiable Nancy* and *Lake Shore* . . . " than the Ninth Circuit which had recently adopted a new rule based on the Restatement (second) of Torts § 909 (1969). 872 F.2d at 652. The court also made clear that "to define the scope of the punitive damage relief that should be accorded under the general maritime law," it is the general maritime law

– not the Restatement – that provides the appropriate authority. 872 F.2d at 651-52.

Finally, in 1995, the First Circuit adopted the traditional maritime rule in *CEH Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995). Unwilling to make a "wholesale adoption of the Restatement" as the Ninth Circuit had, the First Circuit maintained that shipowners cannot be vicariously liable for punitive damages unless they exhibit "some level of culpability for the misconduct." 70 F.3d at 705. ("section 909(c) [of the Restatement], read literally, could impose liability in circumstances that do not demonstrate any fault on the part of the principal.").

Notwithstanding minor variations in emphasis and verbalization, the above survey demonstrates that federal courts have generally held fast to the principles announced by this Court in *The Amiable Nancy* with great consistency. It is thus all the more remarkable that the Ninth Circuit has chosen to jettison the traditional rule.

B. The Ninth Circuit's Diverging Course on Vicarious Liability for Punitive Damages Cannot Be Justified by This Court's Decisions Concerning Due Process Implications of Punitive Damages.

The Ninth Circuit adhered to the traditional maritime limitation on punitive damages for eighty years. However, in the case of *Protectus Alpha Navigation v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379

(9th Cir. 1985), it inexplicably deviated from *The Amiable Nancy* and its own precedent in *Pacific Packing*. The court supplanted these authorities by applying the Restatement (second) of Torts § 909 (1969) which permits in a landside context punitive damages against a master for the act of a principal whenever the tortfeasor acts in a "managerial capacity." § 909(c). Because virtually all shipmasters have significant "managerial" responsibilities, application of the Restatement standard to a maritime context necessary undermines the traditional maritime limitation on vicarious liability.

In the case at bar, the Ninth Circuit concluded that the patent conflict between *Pacific Packing* and *Protectus Alpha* was not "irreconcilable," though it suggested "the question is close." *In re the Exxon Valdez*, 270 F.3d 1215, 1235 (9th Cir. 2001). Noting that a "three judge panel may reconsider the decision of a prior panel only when 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point,'" the court pointed to *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), as such an intervening case. 270 F.3d at 1236. In *Haslip*, however, this Court held that vicarious punitive damages do not violate the Due Process Clause. 499 U.S. at 15. Therefore, *Haslip* is not "closely on-point" because, as petitioners correctly submit, the relevant "point" is whether vicarious punitive damages are permissible under maritime law – not under the standard of constitutional due process. The controlling Supreme Court precedent in

a maritime context continues to be *The Amiable Nancy*, and guided by this precedent, the Ninth Circuit should have foresworn the error of *Protectus Alpha*, returning it to conformity with the First, Fifth, Sixth and Seventh Circuits.

II. THE DIVERGENCE BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS IN THE FEDERAL JUDICIAL SYSTEM BURDENS THE INTERNATIONAL SHIPPING INDUSTRY BY UNDERMINING THE UNIFORMITY THAT THE CONSTITUTION AND GENERAL MARITIME LAW SEEK TO PROMOTE.

This Court has frequently championed "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)); *see also*, *Petition of M/V Elaine Jones*, 480 F.2d 11, 31 (5th Cir. 1973), *cert. denied*, 423 U.S. 840 (1975) (finding that uniformity is "mandated" by *Moragne*). Just as it is today, maritime commerce was "the jugular vein of the Thirteen States." As such, "[t]he need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *Calif. v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (citing F. FRANKFUTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 7 (1927)).

This Court's commitment to the uniformity of maritime law is shared by the legislative and executive branches, as evidenced by numerous maritime treaties and statutes interpreted by the Court. *See, e.g., Intertanko v. Locke,* 529 U.S. 89, 103 and 108 (2000)[6] (finding both that "uniformity of regulation for maritime commerce" was one of the key "objectives" of the Ports and Waterways Safety Act of 1972, and that several "international treaties and agreements on standards of shipping . . . indicate that Congress will have demanded national uniformity regarding maritime commerce."); *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (finding that the Carriage of Goods by Sea Act of 1936 "is the culmination of a multilateral effort 'to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade,'" (citations omitted)).

The essential need for uniformity in maritime law derives from the fact that ocean-going vessels are subject to myriad jurisdictions as they navigate the world's territorial waters and ports of call. *See* GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 1 (1997) ("From its inception . . . maritime law involved navigation and trade between diverse communities so that judges were driven to find principles and application that would have common standards between people of different countries."). The transaction costs

[6] Consolidated with and reported as *United States v. Locke*, 529 U.S. 89 (2000).

of operating in maritime jurisdictions with divergent admiralty laws are burdensome at best, and at worst, the costs raise formidable barriers to trade. Given the international nature of maritime commerce, it is particularly important to achieve uniformity among the jurisdictions of the United States so that we may negotiate with a coherent voice the terms of trade and seafaring with foreign powers. *See Intertanko v. Locke,* 529 U.S. 89, 103 (2000) (acknowledging national uniformity in maritime law as a prerequisite for international maritime agreements). As Joseph Story explained,

> It is obvious, that this class of cases [civil acts, torts, and injuries done on the sea] has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states; and raise many questions of international law, not merely touching private claims, but national sovereignty, and national reciprocity . . . There is, therefore, a peculiar fitness in appropriating this class of cases to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication; and thus to become more satisfactory to foreigners.

JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1664 (1833).

The Ninth Circuit's recent decision creates a conflict among U.S. jurisdictions with regard to

liability for punitive damages and confuses what was once a uniform scheme of shipowner liability.

This conflict carries especially grave consequences for shipowners like *amici*'s members who are now forced to navigate two very different spheres of risk. Because ocean carriage is an inherently risky and peripatetic enterprise, shipowners go to great lengths to protect themselves and others from these risks by identifying perils, taking preventative safety measures, budgeting for casualties and insuring against major losses. In most jurisdictions, such preparations are effectual because shipowners can rationally approximate their liabilities – they know their duty is to make whole those parties who are wrongfully injured as a result of their vessel operations. That is no longer the case in the Ninth Circuit where shipowners face risks that are unpredictable and seemingly indefinite.

In addition to quantifiable, precautionary measures and recompense, shipowners with minimal, episodic contacts to the West Coast of the United States must now contend with untold punitive damages. Because punitive damages are generally not covered by insurers, shipowners will be forced to reconfigure their global business models simply to reallocate risk in this one coastal area of the United States.

It does not suffice to say that shipowners can reconcile two conflicting liability rules simply by taking the level of care necessary to avoid punishment under the more stringent rule. Vessel owners

already have every incentive to invest in state-of-the-art technology, to employ highly trained seamen, and to develop sophisticated operational protocols to prevent accidents. Notwithstanding these precautions, as Judge Kozinski points out, "[a]ccidents at sea happen – ships sink, collide and run aground – often because of serious mistakes by captain and crew, many of which could, with the benefit of hindsight, be found to have been reckless." *In re the Exxon Valdez*, 490 F.3d 1066, 1070 (9th Cir. 2007). Given the demonstrated willingness of juries to award colossal punitive damage awards, many vessel owners are just one major casualty away from bankruptcy if subjected to exemplary damages for the faults or errors of their vessel masters.

Regardless of whether the Ninth Circuit's position has merit as a matter of law or policy, it clearly creates a conflict between the circuits that is certain to have a profound and lasting negative consequence on interstate and international maritime commerce. As the final arbiter of maritime law, this Court alone has the power to restore clarity to maritime liability and "assure uniform vindication of . . . exclusive maritime substantive concepts." *Moragne*, 398 U.S. at 401. *Amici*, therefore, respectfully request issuance of a writ of certiorari to the court of appeals below.

CONCLUSION

For the foregoing reasons, INTERTANKO and INTERCARGO respectfully request the Court to grant the petition of Exxon Shipping Co., et al., for issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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