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P R O C E E D I N G S

(10:08 a.m.)

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

Mr. Dellinger.

ORAL ARGUMENT OF WALTER DELLINGER  
ON BEHALF OF THE PETITIONERS

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

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

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

The first of the three reasons that the 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 way back to *Story and The*  
10 *Amiable Nancy*, but no one even raised the question of  
11 punitive or exemplary damages in those cases. So what  
12 is the long-settled line of decisions of this Court in  
13 maritime 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 acts.

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

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 that rule has been --

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 of the court 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 --

4 JUSTICE KENNEDY: You mean the captain --

5 MR. DELLINGER: -- or the shipowner.

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

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

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

21 MR. DELLINGER: That is correct.

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

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

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

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

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

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

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

25           MR. DELLINGER: Well, there are two



1 responses to that question.

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

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

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

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

24           MR. DELLINGER: There is no question,  
25 Justice Souter, but that communications have -- have

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

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

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

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

23 MR. DELLINGER: That is correct. And it is  
24 the rule that this Court adopted in *Lake Shore versus*  
25 *Prentice*, and it is -- it is --

1 JUSTICE SCALIA: Which was a land case.

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

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

8 MR. DELLINGER: That is correct --

9 JUSTICE SOUTER: Okay.

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

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

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

22 When Justice Gray embraced that rule in the  
23 Lake Shore case, he did so because he thought it  
24 inappropriate to impose punitive elements on someone who  
25 was not actually the wrongdoer. And when Justice

1 O'Connor wrote in Kolstad, she spoke of the important  
2 principle underlying common law limitations on vicarious  
3 liability for punitive damages.

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

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

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

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

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

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

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

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

8           MR. DELLINGER: Well, for two reasons:

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

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

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

1 not authorized to make policy, do so?

2 So at the end of the --

3 JUSTICE GINSBURG: Are you --

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

6 MR. DELLINGER: Yes.

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

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

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

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

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

22 JUSTICE STEVENS: I don't see -- one company  
23 says the captain hires the crew members who could cause  
24 all sorts of damage. And another company says somebody  
25 on shore can do it. You have a different rule between

1 those two?

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

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

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

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

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

23 But for punishment the notion is that it is  
24 the -- that -- that at least eight States have and has been  
25 the maritime-law rule is that you need to show that

1 there is -- there is --

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

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

10 JUSTICE STEVENS: And if there was negligence  
11 in hiring the third mate here, if he was negligently  
12 hired by somebody on shore, there would be liability, but  
13 if he was negligently hired by the captain, there would  
14 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 at 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 repentment 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. Let me turn to --

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. Tompkins  
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's 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 era of Swift versus  
10 Tyson by Erie against Tompkins, it was no longer a  
11 broad area in the -- of law.

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

14 MR. DELLINGER: Now, in the lower courts the  
15 rule has continued as a maritime-law rule. 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: Mr. Dellinger, let me just  
21 interrupt. To what extent is present maritime law  
22 informed by State 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 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 --  
9 that we sail -- the courts sail -- now sail in occupied  
10 waters in making maritime law because of the amount of  
11 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 -- it was never listed 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 rule 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's 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, or reserves 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 pass upon it because  
4 the court of appeals passed upon it. Secondly, the court  
5 of appeals correctly said that as the -- the plaintiffs  
6 had told the judge, that motion, he need not rule on  
7 because it is the same motion that the -- that had been  
8 made earlier. Now the earlier motion was based upon the  
9 TAPAA Act, as -- that it featured 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 it 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 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 JUSTICE SCALIA: Mr. Dellinger, did you say  
22 you had a second and a third point?

23 MR. DELLINGER: Yes.

24 JUSTICE SCALIA: You going to get to  
25 them?

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

2 JUSTICE SCALIA: 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, like 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 careful --

18 JUSTICE KENNEDY: Well, you talk 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 a jury might choose, totally  
4 unsettles 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 sort of limitless, free-floating --

17 JUSTICE KENNEDY: Well, perhaps that's a  
18 segue to point number 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 in spite of --

24 JUSTICE KENNEDY: On point number 3 --

25 MR. DELLINGER: Oh, 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 this 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 preemptive 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 a  
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 -- I mean, how do we know  
25 that? 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: About 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: Yes, but you're going to say  
20 -- you're going to hear in two seconds -- they're going  
21 to 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 the -- 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, a particular aspect 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 a 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 have somebody --

14 CHIEF JUSTICE ROBERTS: So it'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  
24 that's in Exxon's own documents 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 to be an authority  
4 --

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

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

12 JUSTICE SCALIA: Twenty vessels.

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

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

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

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



1 MR. FISHER: He may not be. I don't think  
2 the question is whether he's responsible for policy.  
3 Again, it's whether he's the person in charge.

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

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

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

20 So at page 33 of our red brief --

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

25 MR. FISHER: There was no captain at issue

1 in Amiable Nancy. And, of course, there wasn't a  
2 captain at issue in Lake Shore, because it was a  
3 land-based case.

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

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

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

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

1 opinions. If you look at D.C. law, the D.C. Court of  
2 Appeals itself and the D.C. Circuit in another case have  
3 said -- and this is the Arthur Young case, 631 A.2d 354,  
4 and the GMAC case at 273 F.2d 92 --

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

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

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

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

25 JUSTICE KENNEDY: But they have not conceded

1 the accuracy or correctness of instruction 33. And  
2 that's because he was not entitled to set aside the  
3 policy on intoxication.

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

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

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

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

23 MR. FISHER: Well, I don't want to act like  
24 a dog chasing his tail here, Justice Kennedy, but the  
25 idea is that to ask whether the corporation is culpable,

1 you have to ask which people. And what happened in this  
2 Court's own decision in Kolstad said in implementing  
3 Lake Shore that you look to the managerial agents. And  
4 that's what other States say.

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

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

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

24 So when I read that, I thought that this  
25 Lake Shore case is just picking up the earlier case; and

1 that's the Federal law. And you've given me examples  
2 where the State law has changed; and I have no doubt you  
3 are right. You read the cases very well.

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

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

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

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

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

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

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

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

1 MR. FISHER: No, it would not be, Mr. Chief  
2 Justice. What we did --

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

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

12 CHIEF JUSTICE ROBERTS: Well, just to take --  
13 take the Ludlow. Mr. Dellinger says that's a case where  
14 the Court found that the owner was not vicariously  
15 liable.

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

23 So I think it is entirely fair to say that  
24 you have more or less an open issue before you today.  
25 What I think I want to be sure the Court understands,



1    though, is that there is not a stare decisis problem  
2    that this Court has to confront with respect to the  
3    first question.  You have a spattering of a few old  
4    cases that lean in different directions.

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

7                    MR. FISHER:  Pardon me?

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

16                   MR. FISHER:  Yes.

17                   JUSTICE BREYER:  Why do you say there is no  
18   stare decisis problem?

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

1 Nancy and Lake Shore.

2           So I don't think this Court has ever  
3 considered it to be any stare decisis problem, even if  
4 all of the lower courts were lined up against us, which  
5 is far from the -- far from the case here. What you  
6 have is a just few lower courts in either direction. I  
7 gather that's one of the reasons why this Court decided  
8 to grant certiorari in this case, because there's some  
9 dispute among the lower courts as to exactly how this  
10 principle works in maritime law.

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

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

14           (Laughter.)

15           MR. FISHER: I said one of the reasons,  
16 Justice Scalia.

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

1           MR. FISHER: Kolstad starts from the  
2 proposition of managerial agent is the proper way to  
3 implement a complicity rule.

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

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

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

25           MR. FISHER: On the --

1 JUSTICE KENNEDY: Or the last part of the  
2 instruction 36, I think.

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

11 JUSTICE KENNEDY: Well, but that -- that  
12 goes to measure, not to liability.

13 MR. FISHER: Absolutely.

14 JUSTICE KENNEDY: It was the first phase.  
15 And that's the instruction, it seems to me, that you  
16 have to explain.

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

1 on the books outside of discrimination cases.

2 We think --

3 CHIEF JUSTICE ROBERTS: What is your  
4 position of how to look at the case if you have a  
5 managerial employee who acts contrary to corporate  
6 policy? Is the corporation still exposed to punitive  
7 damages?

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

9 CHIEF JUSTICE ROBERTS: In a case like this.

10 MR. FISHER: Yes. We think -- and that's --  
11 and that's what the instruction Justice Kennedy --

12 CHIEF JUSTICE ROBERTS: So what can a  
13 corporation do to protect itself against punitive  
14 damages awards such as this?

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

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

19 MR. FISHER: Well --

20 CHIEF JUSTICE ROBERTS: And you're saying --  
21 that's the question I'm asking. What if there is a  
22 breach of the corporate policy? I don't see what more a  
23 corporation can do. I mean, your -- other than --  
24 other than what? I mean it has to say that the policy  
25 is this, and if somebody breaks the policy, they're

1 liable for compensatory damages, which can as this case  
2 shows be in the billions of dollars, and of course the  
3 individual is liable for punitive and other awards.

4 But what more can the corporation do other  
5 than say here is our policies? And try to implement  
6 them.

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

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

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

1 Hazelwood is the one who made that policy decision.

2 JUSTICE STEVENS: Let me just throw this  
3 thought on the table. If the policy is made by the board  
4 of directors, can the president unilaterally change the  
5 policy? The Chief seems to be suggesting he could?

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

7 JUSTICE STEVENS: It seems to me we have  
8 your problem, the president of the company is the same  
9 as the vice president.

10 MR. FISHER: Well, I think that's the point  
11 that I was trying to make.

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

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

25 We showed 33 instances in the record of

1 Exxon employees drinking with Hazelwood or learning that  
2 he drank. Up and down the corporation, as the district  
3 judge explained, for three years, upper management was  
4 receiving reports that this man was drinking aboard the  
5 vessel.

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

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

13 MR. FISHER: I think you assume --

14 JUSTICE BREYER: -- for purposes of this  
15 argument?

16 MR. FISHER: Well, two -- two points,  
17 Justice Breyer:

18 On answering the first question presented --

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

20 MR. FISHER: -- you assume that's the case --

21 JUSTICE BREYER: That's fine.

22 MR. FISHER: -- unless we can show -- unless  
23 we can make an overwhelming harmless-error show.

24 JUSTICE BREYER: On the second and third,  
25 this is what --



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

3           JUSTICE BREYER: -- some time available. I  
4 would like you to address at some point at your  
5 convenience what should the standards be if, in fact,  
6 the captain of a ship, or responsible for conditions,  
7 for example, negligence or recklessness is now going to  
8 be not only imputed to the corporation but subject for  
9 punitives.

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

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

23           What happens when a sailor slips and is  
24 hurt, and it's very serious to that sailor, et cetera?  
25 What principles do you have to suggest, if any, for

1 creating a fair system that isn't just arbitrary?

2 MR. FISHER: Well, I think this is the  
3 perfect segue from the first and third question, because,  
4 as I transfer there, I want to point out that I think the  
5 only reason that we heard in the first -- the first  
6 portion of the argument for absolving Exxon of  
7 responsibility in the situation is because of the  
8 dangerousness of captaining vessels like this.

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

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

24 And then just because there haven't been  
25 that many cases doesn't tell you that they've been

1 frowned upon in some instance. It just means that we  
2 haven't had that many cases that have resulted in  
3 reported decisions.

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

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

16 JUSTICE KENNEDY: Correct me if I'm wrong.  
17 You've read the case -- our case in Cooper, don't we say  
18 that the appellate court has to examine de novo to  
19 determine the adequacy or the excessiveness of the award  
20 to deter.

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

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

1           MR. FISHER: Yes. I'm not going to fight  
2 you on that, Justice Kennedy. There was an earlier  
3 sentence in Cooper that says if no constitutional issue  
4 is raised, the only thing an appellate court should do  
5 is review for abuse of discretion. But I think that  
6 ultimately you end up in the same place, which is that  
7 there's a de novo review of the excessive -- of whether  
8 the award is excessive based on the facts that have been  
9 -- that have been tried.

10           And if this Court is going to adopt a set of  
11 guideposts for maritime law, we think the proper place  
12 to look is the due process cases this Court has already  
13 decided.

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

21           JUSTICE SCALIA: What about -- what about  
22 looking to the Clean Water Act? And I wanted to ask you  
23 this question about the Act. Assuming we agree with you  
24 that -- that it was too late to raise the Clean Water  
25 Act as a separate preemptive factor in the case, why

1 was it too late in the appellate court to raise the  
2 Clean Water Act as an additional reason why maritime law  
3 should not be interpreted to allow punitive damages and,  
4 in part 3 of the case, as a factor why punitive damages  
5 of the amount at issue here should not be allowed?

6           It seems to me there it's not a new  
7 argument. It's just an additional factor for arguments  
8 that had already been made.

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

14           So, if you were to look to the Clean Water  
15 Act, you initially have the problem that Justice Souter  
16 mentioned. You have the apples and oranges problem.  
17 The Clean Water Act sets a fine according to the  
18 environmental harm. Now, the State of Alaska had that  
19 estimated in its -- and this is in its brief -- and that  
20 came out to be -- I believe the number is about  
21 \$2.6 billion.

22           So, if you were to look -- if you were to  
23 put aside the apples-to-oranges problem and look to the  
24 Clean Water Act, then you get almost the number that  
25 we're standing here with today.

1           If you look at the harm a different way, you  
2 still get an extremely large number. You get \$500  
3 million of compensation to the plaintiffs. And then on  
4 top of that, we think in light of the way this Court has  
5 addressed ratio analysis in its other cases, you need to  
6 take account of the fact that there are vast injuries  
7 that have not resulted in any compensation.

8           So to do any kind of --

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

19           MR. FISHER: Well, I think it would be  
20 because that -- they never made that argument in the  
21 district court, and they didn't make that argument to  
22 the Ninth Circuit either.

23           JUSTICE SCALIA: Well, you don't have to make  
24 every tiny, little argument. I mean, you can think of  
25 additional points on appeal so long as it's under the

1 same major heading. And the major heading here is not  
2 the Clean Water Act preempts punitive damages; the  
3 major heading is, rather, modern admiralty law does not  
4 permit. And, you know, they had made other arguments  
5 about prior cases; they had talked about State law; and  
6 this is just another argument: By the way, here's  
7 another one. There's the Clean Water Act.

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

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

21 JUSTICE SCALIA: It's close, but it doesn't  
22 -- it doesn't really say preemption, and so it's -- it's  
23 just another factor to consider when you decide what the  
24 evolving law of admiralty requires.

25 JUSTICE GINSBURG: There was a statute that

1 was raised in the district court. And the district  
2 court, they raised this TAPAA Act, and they thought that  
3 that was the statutory guide, and that was the reason why  
4 there should not be punitive damages, but -- so that was  
5 one of the things the court of appeals said under the  
6 head of waiver. They're substituting one federal  
7 statute for another.

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

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

17 CHIEF JUSTICE ROBERTS: Counsel, awhile ago  
18 you were about to make a point on the Limitation of  
19 Liability Act.

20 MR. FISHER: Yes.

21 CHIEF JUSTICE ROBERTS: But I was -- I would  
22 have thought that cuts heavily against you on the third  
23 point. In other words, if we're looking to guidance,  
24 you look to Federal law. And whether it's directly  
25 applicable or not, the Limitation of Liability Act



1 reflects a very strong Federal policy about restricting  
2 liability on shipowners, adopted at a time when it was  
3 intended to encourage maritime -- the maritime economy.  
4 And why isn't that something we should look to, at least  
5 under question three?

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

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

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

22 MR. FISHER: Well, I think -- I think you  
23 should look to it and understand that Congress has  
24 declined to give the protection. In OPA 90, which was  
25 passed right after the spill in direct response to the

1 spill, Congress made explicit that the Limitation Act  
2 should never apply to spills of Trans-Alaska oil. And  
3 the TAPAA did the same thing in the Glacier Bay case.

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

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

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

22 We know something now that Justice Story did  
23 not know, and that is we've had an awful lot more  
24 experience with punitive damages practice. And we've  
25 spent the last decade or so of this Court dealing with

1 the problem of how to set constitutional limits for  
2 awards which sort of by most people's standards verged  
3 on the excessive.

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

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

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

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

18 Why shouldn't we recognize the difficulty of  
19 trying to deal with indeterminate limits which we've  
20 proven in the constitutional context and say, therefore,  
21 we've simply got to come up with a number, because no  
22 other way is going to give us any kind of an  
23 administrable standard; and our number -- and I'm not  
24 saying this should be it -- but our number is going to  
25 be double the compensatory damages? That's the limit.

1                   Would that be an illegitimate thing for us  
2 to do or an unwise thing for us to do?

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

5                   (Laughter.)

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

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

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

20                   MR. FISHER: We think that's one place this  
21 Court can look. But again, a common law court, we  
22 believe, sets standards, not a bright-line rule. If you  
23 were to adopt some sort of bright-line statute, you'd  
24 have to deal with any number of legislative problems  
25 that the several States have dealt with and Congress,

1 when it has passed these kinds of limits.

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

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

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

17 MR. FISHER: Well, the theory --

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

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

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

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

8           Now, there's also --

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

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

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

24          Now, I think Exxon's primary argument on  
25 deterrence grounds is that we've paid \$3.4 billion out

1 of our pocket already as a result of this spill, and  
2 that's a lot of money. The reality is, once they get  
3 their tax credit and insurance benefits for that money,  
4 the number is really under \$2 billion. But it's still a  
5 lot of money.

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

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

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

20 MR. FISHER: There was no jury, of course,  
21 in the criminal case.

22 CHIEF JUSTICE ROBERTS: Right.

23 MR. FISHER: But there was a jury in our  
24 case. The district judge reviewed that and said, after  
25 being instructed in instruction number 36 in our case --

1 and this is something that we tried -- the chairman of  
2 Exxon took the stand in trial and gave the jury a chart  
3 of all the money that Exxon had paid out of its pocket  
4 and told the jury: We've been deterred enough, so you  
5 shouldn't award any punitive damages. And the jury, of  
6 course, rejected that argument that Exxon made.

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

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

17 MR. FISHER: Yes.

18 CHIEF JUSTICE ROBERTS: So he was operating  
19 under that understanding of the law.

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

22 In the criminal case, the statement of facts  
23 supporting the guilty plea in the criminal case -- and  
24 remember, we're only talking about environment in the  
25 criminal case -- and in terms of punishment, the only



1 money for punishment in the criminal case is \$25  
2 million. All the rest of the money is, as the district  
3 court said, to clean up Exxon's mess or to put money  
4 into the environment.

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

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

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

25 There are 50 segments in Trial Compilation

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

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

8 And in reviewing the award the district  
9 judge said: Now, with that level of complicity and  
10 reprehensibility, I think the jury could have decided  
11 that Exxon should be punished. Now I don't want to leave  
12 --

13 JUSTICE BREYER: What is the relevance?

14 MR. FISHER: -- deterrence.

15 JUSTICE BREYER: What's the relevance of the  
16 leg that we're assuming Exxon, other than the captain,  
17 did bad things? You seem to be now talking about the  
18 evidence that they did bad things. But that's the leg  
19 that they did --

20 MR. FISHER: We -- as the district judge said  
21 -- this is what he deemed a critical factor supporting the  
22 punitive award.

23 JUSTICE BREYER: Well, then doesn't that show  
24 then that there had to be a finding that they did the  
25 bad thing?

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

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

22           Now, it was also common knowledge in the  
23 organization, and this came out at trial, that the idea  
24 of putting a drunken master in charge of a supertanker  
25 was a potential for disaster and incalculably raised the

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

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

22 JUSTICE GINSBURG: Mr. Fisher --

23 MR. FISHER: -- and the amount of money that  
24 they've had to pay.

25 JUSTICE GINSBURG: -- your time is running

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

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

10 JUSTICE GINSBURG: So you don't have the  
11 problem of litigant A getting these punitive damages and  
12 then B, C and D all wanting punitive --

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

20 You have -- in contrast to State Farm, in  
21 the most recent -- second most recent case this case  
22 had -- in State Farm you had two plaintiffs who stood  
23 before this Court having received \$500,000 each in  
24 compensatory damages for the emotional distress of 18  
25 months of not knowing whether an insurance claim was

1 going to be paid. What you have today are 32,000  
2 plaintiffs standing before this Court, each of whom have  
3 received only \$15,000 for having their lives and  
4 livelihoods destroyed and haven't received a dime of  
5 emotional distress damages.

6 If there are no further questions, I'll  
7 submit.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 Mr. Fisher.

10 Mr. Dellinger, you have four and a half  
11 minutes.

12 REBUTTAL ARGUMENT OF WALTER DELLINGER

13 ON BEHALF OF THE PETITIONERS

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

19 With respect, it is difficult to decide what  
20 level of employee should implicate a company; but it is  
21 divisible I think, as Justice Kennedy suggested. It is  
22 based on whether that employee has authority over the  
23 policy, and even a ship captain may have authority over  
24 some policies; he did not here. At the end of the day  
25 what the Ninth Circuit held was that Exxon was liable --

1 could be liable for 2.5 billion, simply because against  
2 its policies, Hazelwood left the deck. That's all that  
3 would need to be found.

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

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

18 Now if you talk about the -- the amount  
19 where you have that kind of deterrence, for an  
20 unintentional act that -- of the amount that's already  
21 paid, I heard no response to what one would say to  
22 Justice Kennedy's opinion in State Farm as an outer,  
23 outer limit. In State Farm the Court said where  
24 compensatory damages are substantial, then perhaps --  
25 it was in a constitutional context -- perhaps an amount

1 equal to compensatories would be the most.

2 What was substantial there was 1 million  
3 dollars. This -- the compensatories here were 400 or 500  
4 times the -- what the Ninth Circuit found -- 504 million  
5 dollars. Yes, Justice?

6 JUSTICE GINSBURG: That's because -- that's  
7 because it's a class. If you take them individually,  
8 each individual -- did Mr. Fisher say 15 thousand  
9 something?

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

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

25 Here, where it's 500 times what was



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

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

25           CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

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

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