No. 17-449

IN THE

Supreme Court of the United States

AMERICAN TRIUMPH LLC AND AMERICAN SEAFOODS COMPANY LLC,

Petitioners,

v.

ALLAN A. TABINGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR PETITIONERS

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The Washington Supreme Court's decision incorrectly permitted respondent to pursue punitive damages in a personal injury action based on alleged unseaworthiness. The court erred by applying the framework articulated in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), which concerned a maintenance and cure claim, rather than *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), which, like this case, concerned the historically and legally distinct claim of unseaworthiness. The decision below conflicts with the Fifth Circuit's decisions in *McBride* v. *Estis Well Service, LLC*, 768 F.3d 382 (2014) (en banc), and 853 F.3d 777 (2017), *petition for cert. filed*, *Touchet* v. *Estis Well Service, LLC*, No. 17-346 (U.S. Sept. 5, 2017), and sev-

eral earlier decisions, all holding that *Miles* forecloses punitive damages for unseaworthiness claims. *See* Pet. 8-11.

None of respondent's arguments for why this Court should deny review are persuasive. First, respondent argues that the decision below is interlocutory. But this Court has jurisdiction under the "pragmatic" approach to finality articulated in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Second, respondent attempts to minimize the significance of the issue presented. But national uniformity is essential in maritime law. Third, respondent argues that the court below was correct in concluding that *Townsend*, rather than *Miles*, governs this case. But that argument rests on fundamental misapprehensions about the nature and history of unseaworthiness claims.[1]

The Court should therefore grant certiorari in this case. Alternatively, as suggested in petitioners' November 27, 2017 letter, the Court should grant certiorari in both this case and *Touchet* v. *Estis Well Service, L.L.C.*, No. 17-346, and consolidate them.

I. THE COURT HAS JURISDICTION TO HEAR THIS CASE NOW

Respondent argues (at 4-7) that jurisdiction is lacking because this case does not fit perfectly into one of the four specific categories of cases identified in *Cox*. But the test of finality under 28 U.S.C § 1257(a) is "pragmatic," not "mechanical." *Cox*, 420 U.S. at 477,

[1] Respondent does not defend several central aspects of the decision below—specifically, the conclusions that *Miles* is limited to wrongful death actions and to "claims rooted in statute" (Pet. App. 10a). As explained in the petition (at 19-22), those conclusions cannot be reconciled with *Miles*.

486. Those four categories encapsulate situations that recur enough to warrant recognition for the sake of judicial economy, but do not define the universe of cases where the Court has jurisdiction even though further proceedings in state court are anticipated. *See id.* at 477 (noting that there are "at least" four categories).

Respondent also argues (at 4-5) that jurisdiction is lacking because the question presented would become moot if, on remand, petitioners are held not liable. But in that event, the Washington Supreme Court's erroneous decision—harmful to important national interests and in conflict with other appellate decisions—would remain in place, unreviewed by this Court.[2] Given the "constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country," *Miles*, 498 U.S. at 27, that split should be eliminated as soon as possible. *See* Pet. 25-26; At-Sea Processers Ass'n (APA) Amicus Br. 6-7; Maritime Law Ass'n Amicus Br. 6-7.[3]

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[2] That decision could also remain in place if the parties were to settle. Contrary to respondent's cursory attempt (at 6 n.2) to brush aside the settlement pressure that punitive damages place on defendants, that pressure is very real, raises litigation costs, and can have significant, deleterious effects on the economy by raising consumer prices. *See* APA Amicus Br. 8-9; Coastal Marine Fund Amicus Br. 4-5.

[3] *Flynt* v. *Ohio*, 451 U.S. 619 (1981), is unhelpful to respondent. The Court concluded that "there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward"; the respondent was being prosecuted for obscenity, which "properly defined is beyond the reach of the First Amendment," and "no federal policy bars a trial" on the question whether specific material is obscene. *Id.* at 622. Here, the Washington Supreme Court has squarely decided an important federal question, and its answer conflicts with other appellate decisions.

II. THERE IS AN ACKNOWLEDGED AND MATURE SPLIT OF AUTHORITY ON AN IMPORTANT FEDERAL QUESTION

To minimize the significance of the issue presented, respondent asserts that this case involves "a single injury to a seaman's hand on a fishing boat" (Br. in Opp. 6). But the issue—whether punitive damages are available in unseaworthiness actions—is an exceptionally important one, with national and indeed global implications, as amici explain (*see* APA Amicus Br. 4-7). By introducing "significant uncertainty into one of the most important doctrines in maritime law" (*id.* at 7), the decision below could have harmful ripple effects for consumers, the maritime industry, and national security.

Respondent acknowledges (at 1, 7) the conflict with *McBride*, but suggests that it warrants "[f]urther percolation." Even if the decision below conflicted with only the Fifth Circuit, that conflict would suffice to warrant certiorari, given that Circuit's leading role in maritime cases.[4] Moreover, the issue of punitive damages in unseaworthiness cases has percolated for many years since *Miles*, and several other appellate courts have similarly decided that under *Miles*, punitive damages are not available on claims of unseaworthiness. *See* Pet. 8-11. Respondent dismisses those decisions because they preceded *Townsend*, but *Townsend* itself

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[4] *See* Garwood & Engerrand, *Recent Developments in Admiralty Law in the United States Supreme Court, the Fifth Circuit, and the Eleventh Circuit*, 18 Hous. J. Int'l L. 709, 710 (1996) ("the Fifth Circuit continues to deal with the greatest number of admiralty cases"); Delacroix, et al., *Admiralty*, 36 Loy. L. Rev. 541, 542 (1990) ("Due to its consistently well-reasoned interpretations and advancements of the law in the maritime arena, the … Fifth Circuit continues to maintain its position as one of the most respected admiralty courts in the United States.").

stressed that "[t]he reasoning of *Miles* remains sound." 557 U.S. at 420. Consequently, those pre-*Townsend* decisions remain good law, too. Nor is there reason to await the Ninth Circuit's decision in *Batterton* v. *Dutra Group*, No. 14-56775 (9th Cir.); whatever it decides will only reinforce the existing split.

III. THE DECISION BELOW IS ERRONEOUS

Respondent's principal merits argument is that *Townsend*, not *Miles*, governs this case. According to respondent, unseaworthiness claims were recognized before the Jones Act, and the Jones Act did not withdraw any remedies previously available in unseaworthiness actions, including punitive damages, so punitive damages are available today for unseaworthiness claims. There are many flaws with that argument.

A. Respondent fails to reckon with the differences between unseaworthiness and maintenance and cure, and accordingly with how *Townsend* distinguished *Miles*. As the petition explains (at 16-17, 19-22), *Miles*, not *Townsend*, analyzed the Jones Act's role in defining the scope of recovery available to seamen in unseaworthiness actions—an analysis *Townsend* explicitly left intact. 557 U.S. at 420. *Townsend* involved the separate question of a shipowner's maintenance and cure duty, and distinguished that duty as being "'independent'" of unseaworthiness, as having a "'different origin,'" and as applying "'different principles and procedures.'" *Id.* at 423 (quoting *Fitzgerald* v. *U.S. Lines Co.*, 374 U.S. 16, 18 (1963), and *Pac. S.S. Co* v. *Peterson*, 278 U.S. 130, 138 (1928)). Any analysis of the remedies permitted in unseaworthiness actions therefore must comport with *Miles*; *Townsend* offers no guidance for unseaworthiness actions, beyond affirming what *Miles* had already said.

Miles held that courts must assess the remedies available to seamen bringing unseaworthiness actions in light of the "limits" defined by the Jones Act. 498 U.S. at 32, 36. Because it would be "inconsistent" with a court's "place in the constitutional scheme" were it to "sanction more expansive remedies in a judicially created cause of action in which liability is without fault" (unseaworthiness claims) "than Congress has allowed in cases of death resulting from negligence" (Jones Act claims), the remedies available for unseaworthiness actions cannot extend beyond those available under the Jones Act. *Id.* at 32-33. That analysis—which respondent entirely ignores—decides this case: Punitive damages are not permitted under the Jones Act, and therefore, they are not permitted for unseaworthiness claims.

Respondent argues (at 11) that because the Jones Act was intended to expand seamen's remedies, it cannot preclude any general maritime remedies in unseaworthiness claims. But that argument is really a fight with *Miles*. Remedial though the Jones Act may be, *Miles* stressed the "limit[ations]" the Act placed on available damages to conclude that the same limitations should govern unseaworthiness actions. 498 U.S. at 32-33. The injured party could recover only pecuniary damages—a narrower recovery, according to *Townsend*, 557 U.S. at 411-412, than had been available to seamen in federal maritime actions before the Jones Act. More important to the Court than the Jones Act's remedial nature was the Court's "place in the constitutional scheme," in particular, its respect for Congress's leading role in defining remedies for seamen. *See Miles*, 498 U.S. at 32. The same imperative applies here: Because the Jones Act has long been understood to preclude punitive damages in negligence cases (a

point respondent does not seriously dispute), the same limitation should apply to unseaworthiness claims, which are now a near-twin of Jones Act negligence claims.

Norfolk Shipbuilding & Drydock Corp. v. *Garris*, 532 U.S. 811 (2001), lends respondent no aid; nor does *Townsend*'s statement that *Garris* "rejected" the "contention that *Miles* precludes *any* action or remedy for personal injury beyond that made available under the Jones Act," 557 U.S. at 421, *quoted in* Br. in Opp. 12 n.6. *Garris* stands for a much more modest proposition than respondent suggests. Although *Garris* held that the Jones Act did not preclude recognizing a wrongful death remedy for negligence under general maritime law, that decision (unlike *Miles* and this case) did not involve a Jones Act seaman, and the Court emphasized that "the Jones Act bears no implication for actions brought by nonseamen." 532 U.S. at 817-818. In contrast, *Miles* makes clear that the Jones Act *does* have implications for unseaworthiness claims brought by seamen. *See Miles*, 498 U.S. at 31-33, 36; pp.5-7, *supra*. On that point, *Miles* is consistent with *Garris*, which stressed a "prudential" principle that applies equally here: "Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress." 532 U.S. at 820. Moreover, *Garris*'s approval of wrongful death actions was consistent with the Jones Act, which (as *Miles* had already confirmed) provides the same remedy for seamen, whereas allowing punitive damages here would be directly inconsistent with the Jones Act's long-established limitations on remedies.

B. Respondent's argument proceeds from an incorrect premise—that the unseaworthiness cause of action preexisted the Jones Act. That submission misreads history and is odds with *Miles*.

In concluding that punitive damages were available in maintenance and cure actions, *Townsend* relied on "pre-Jones Act evidence" of a "common-law tradition of punitive damages [that] extends to maritime claims." 557 U.S. at 414-415. That common-law tradition is irrelevant here because the unseaworthiness doctrine underwent a "revolution" well after the passage of the Jones Act. *Miles*, 498 U.S. at 25. As *Miles* explained, the Court's decision in *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96 (1944), "transformed the warranty of seaworthiness into a strict liability obligation." 498 U.S. at 25.

Respondent attempts a tortured argument that no such "revolution" occurred. Pointing (at 16-18) to *The Osceola*, 189 U.S. 158 (1903), he contends that unseaworthiness actions in strict liability existed before the Jones Act. But as the Court explained in *Miles*, what made *Mahnich* revolutionary was that—guided by the Jones Act's disallowance of the fellow-servant defense to negligence claims—it repudiated that defense for unseaworthiness claims as well, making the shipowner liable for unseaworthiness "irrespective of fault and irrespective of the intervening negligence of crew members." *Miles*, 498 U.S. at 25; *see Mahnich*, 321 U.S. at 100, 102-103 ("It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness …."). Respondent's selective quotation (at 16-17) from the Gilmore and Black treatise does not account for *Miles*'s more extensive discussion of that treatise,

which noted that, before the *Mahnich* "'revolution in the law,'" unseaworthiness was "'an obscure and little used remedy.'" 498 U.S. at 25 (quoting Gilmore & Black, *The Law of Admiralty* §§ 6-38, 6-39, at 383, 384 (2d ed. 1975)).

The stark differences between unseaworthiness claims before and after the Jones Act renders *Townsend* irrelevant here. The common-law tradition discussed in *Townsend* was relevant to maintenance and cure claims because such claims are "ancient," *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527 (1938), and have "remained unchanged in substance for centuries," *McBride*, 768 F.3d at 415 (Higginson, J., dissenting); *see Townsend*, 557 U.S. at 413 (relying on fact that "the legal obligation to provide maintenance and cure dates back centuries …, and the failure of a seaman's employers to provide him with adequate medical care was the basis for awarding punitive damages in cases decided as early as the 1800's"). "[B]oth the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* at 420. The same cannot be said for contemporary unseaworthiness law, which emerged in 1944. Whether punitive damages were available for federal maritime claims before the Jones Act is irrelevant to their availability for a cause of action largely created by the courts decades after the Act's passage.

C. Even if the *Townsend* framework were applicable here, respondent's opposition would fall far short of what it requires. It is not enough to assert—as respondent does (at 10-20)—that punitive damages were available historically for actions under federal maritime law generally. Respondent would have to show that "[n]othing in maritime law undermines the applicability

of th[at] general rule" to unseaworthiness specifically. *See Townsend*, 557 U.S. at 412. Critical to *Townsend*'s distinguishing of *Miles* was not only that *Miles* did "not address … maintenance and cure actions in general," but also that *Miles* did "not address … the availability of punitive damages *for such actions*" specifically. *Id.* at 419 (emphasis added); *see also id.* at 414 (noting punitive nature of damages awarded for maintenance and cure claims in some pre-Jones Act cases). Townsend thus requires a relationship between the remedy sought—punitive damages—and the claim brought—maintenance and cure. Respondent cannot establish such a relationship for unseaworthiness actions; he has offered no case where a court awarded punitive damages to a seaman in an unseaworthiness action before *Mahnich*'s revolution, let alone before the Jones Act was enacted.

D. Respondent also argues that the Jones Act's limitation of recovery to "pecuniary loss," recognized in *Miles* (498 U.S. at 32), is irrelevant here because punitive damages are pecuniary in nature. That argument is meritless.

As the petition explains (at 12-15), what the Jones Act permits are *compensatory* damages. The Court has been clear on that point for close to a century. In *Pacific Steamship Co.* v. *Peterson*, 278 U.S. 130 (1928)—a decision respondent ignores—the Court explained that "whether or not [a] seaman's injuries were occasioned by the unseaworthiness of the vessel or by … negligence [under the Jones Act], … there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to *but one indemnity by way of compensatory damages*." *Id.* at 138 (emphasis added). *Miles* articulated the Jones Act's limitations not in terms of pecuni-

ary *damages* but recovery for pecuniary *loss*, 498 U.S. at 32, which leads to the same conclusion as *Peterson*: Damages under the Jones Act are available for compensatory purposes only. Because punitive damages are not compensatory (*see* Pet. 14 n.6), punitive damages are not permitted under the Jones Act. Under *Miles*, then, punitive damages are also not permitted in unseaworthiness actions. 498 U.S. at 32-33, 36.

Penned in by *Miles*, respondent is left to argue (at 14-15 & n.8) that punitive damages are "obviously 'pecuniary'" because pecuniary damages are those that can be "estimated and monetarily compensated," and "[p]unitive damages are estimated and awarded monetarily." That view is wrong—indeed, it would drain the concept of "pecuniary" of all meaning. Damages are "pecuniary" because the *loss*, not the *remedy*, can be defined monetarily, as respondent's own authorities recognize. *See Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 132-133 (1956) (distinguishing between punitive and compensatory damages based on whether the injury was "pecuniary"). Punitive damages are not pecuniary (and further, not compensatory) because they do not measure loss at all. If punitive damages were "pecuniary" simply because they are awarded in money, then *all* damages would be "pecuniary," including the loss of society damages that *Miles* expressly held unavailable under the Jones Act (and in unseaworthiness actions) because loss of society is "non-pecuniary." 498 U.S. at 31-33.

E. Finally, respondent claims (at 19-20) that recognizing the availability of punitive damages for "injured seamen asserting claims of unseaworthiness" will promote uniformity because punitive damages "have long been available to other types of maritime litigants." The more salient comparison, however, is to

the Jones Act, under which seamen cannot obtain punitive damages on an alternative liability theory to unseaworthiness. And respondent's uniformity is illusory. The sole decision he cites that recognizes punitive damages under general maritime law is *Townsend*, which concerns the distinct maintenance and cure action. As respondent's description of the other cited cases shows, they are not germane to personal injury claims by seamen based on unseaworthiness.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] *Callahan* v. *Gulf Logistics, LLC*, 2013 WL 5236888 (W.D. La. Sept. 16, 2013), also appears incorrectly decided, relying on an overbroad reading of *Townsend*.