NO. 18-266

In the Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

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

BRIEF OF AMICUS CURIAE THE INLAND RIVER HARBOR AND FLEETING COALITION IN SUPPORT OF PETITIONER

NEAL W. SETTERGREN
COUNSEL OF RECORD
GILES B. HOWARD
GOLDSTEIN AND PRICE, L.C.
ONE MEMORIAL DRIVE, SUITE 1000
ST. LOUIS, MO 63102
(314) 516-1700
NEAL@GP-LAW.COM

JANUARY 28, 2019 *COUNSEL FOR AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE[1]

The Inland River Harbor and Fleeting Coalition ("The Coalition") is an association of companies that operate on the Inland or Western Rivers of the United States. The Coalition is made up of Evansville Marine Service, Inc., JB Marine Service, Inc., Osage Marine Services, Inc., Upper River Services, L.L.C., and Wepfer Marine, Inc. The Coalition works together to address certain issues that are common to their segment of the maritime industry.

Collectively, the companies of The Coalition operate approximately 100 commercial vessels, which are crewed by many hundreds of seamen. These vessels and seamen work regularly in at least nine states: Arkansas, Illinois, Indiana, Kentucky, Minnesota, Missouri, Mississippi, Tennessee, and Wisconsin. As a whole, the domestic maritime industry moved 873,100,000 short tons of cargo in 2017. The important work performed by the companies of The Coalition is one crucial link in America's network of river transportation. As such, The Coalition is uniquely positioned to inform this Court about several key aspects of the legal issue presented in this case.

This is the first time The Coalition has filed an Amicus Curiae Brief. The Coalition is interested in the issue before the Court as each of its members are routinely involved in defending unseaworthiness and

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties have filed a blanket consent to amicus curiae briefs.

other maritime claims. The stakes of this decision are enormous for The Coalition and the country's entire maritime industry. For the reasons set forth below, The Coalition supports Petitioner and urges the Court to reverse the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

Respondent asks this Court to permit the recovery of punitive damages for unseaworthiness in contravention of the tort recovery system Congress created for seamen. Doing so requires setting aside this Court's precedents and disregarding the policy judgments of Congress. Moreover, affirming the Ninth Circuit's decision will create several anomalies harmful to the constitutionally-mandated uniformity of maritime law.

In 1920, Congress enacted the Jones Act, 46 U.S.C. § 30104, which authorized seamen to recover against their employers for negligence. A seaman's recovery for negligence under the Jones Act is limited to pecuniary losses. In 1990, this Court held that the Jones Act's bar on the recovery of non-pecuniary damages in a seaman's negligence action meant that the recovery of non-pecuniary damages was similarly barred in an unseaworthiness suit for a seaman's wrongful death. *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990). In *Miles*, a unanimous Court reasoned that it would be inconsistent with the Court's Constitutional role to sanction a more expansive remedy for the judicially-created cause of action for unseaworthiness than the

remedies Congress had sanctioned in the Jones Act. Under *Miles*, Respondent should likewise be barred from recovering punitive damages for unseaworthiness.

The Supreme Court's 2009 decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) is distinguishable and does not change the outcome dictated by *Miles* and this Court's pre-*Miles* unseaworthiness decisions. In *Townsend*, the Court held that punitive damages were an available remedy to seamen for an employer's willful failure to pay maintenance and cure. However, such claims are contractual obligations arising out of a seaman's employment. In authorizing this remedy, the Court reasoned that both the claim (maintenance and cure) and remedy sought (punitive damages) were well-established in the law when the Jones Act was enacted in 1920. The same cannot be said of Respondent's unseaworthiness claim. To the contrary, the strict liability unseaworthiness claim asserted by Respondent sounds in tort and was first recognized after 1920. Unseaworthiness previously referred to a fault-based claim concerning whether the shipowner exercised due diligence. This Court has repeatedly held—both before and after 1920—that the remedy for a breach of the duty of seaworthiness is compensatory damages. This Court has never approved punitive damages for a breach of the duty of seaworthiness and, applying the rationale of *Miles* and *Townsend*, it should not do so now.

Congress's policy decision against the availability of punitive and other non-pecuniary damages for maritime workers is evident in the ordered system of tort recovery that Congress created in three statutes

in the 1920s: The Jones Act, the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308, and the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901–950. Together, these three statutes govern the statutory tort remedies available to maritime workers. None of these statutes permit the recovery of punitive damages. Congress has further occupied this field by comprehensively regulating vessel seaworthiness through a system of inspections and certifications for most commercial vessels. This Court's precedents caution against the creation of more expansive remedies for judge-made general maritime claims than statutory claims. In addition, punitive damages are not a necessary remedy for unseaworthiness since vessels are already thoroughly regulated by Congress and operators have strong financial incentives to avoid unseaworthy vessels. Moreover, unseaworthiness and negligence are "Siamese Twins" in maritime law. This Court should not recognize punitive damages as a remedy for unseaworthiness when Congress has made a policy decision against such damages for its "Siamese Twin" (Jones Act negligence).

A ruling in Respondent's favor would undermine a fundamental purpose of maritime jurisdiction: the fostering of a uniform maritime law whose nationwide predictability encourages and safeguards maritime commerce. The holding below introduces several harmful anomalies into maritime tort law. First, because no federal maritime law rule governs the insurability of punitive damages and because not all states allow punitive damages to be covered by insurance, vessel operators and their insurers would be confronted with an unequal patchwork of varying state laws that will disrupt interstate commerce. Second, if

this Court overrules *Miles* in holding for Respondent, the availability of punitive damages for a seaman's wrongful death on the high seas (covered exclusively by DOHSA) would depend on an arbitrary geographic test whether the seaman was more or less than three nautical miles away from the Coast. Third, if this Court does not overrule *Miles* but instead limits the holding in *Miles* to wrongful death, a seaman's unseaworthiness claim for personal injury would inexplicably permit greater recovery than a wrongful death claim arising out of the same unseaworthy condition. This Court should stand by the uniform rule set forth in *Miles* and avoid the creation of these anomalies in the maritime law.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN CONCLUDING THAT SEAMEN MAY RECOVER PUNITIVE DAMAGES FOR A BREACH OF THE DUTY OF SEAWORTHINESS.

A. Congress Has Limited Seamen's Tort Recoveries Under the Jones Act to Pecuniary Losses, Which Exclude Punitive Damages.

Congress "has paramount power to determine the maritime law which shall prevail throughout the country." *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 43 (1934). In passing the Jones Act in 1920, Congress extended to seamen the same claim and remedy that were available to railroad workers under the Federal Employers Liability Act (FELA). Under both the FELA and the Jones Act, it is settled that

the remedy Congress provided is limited to recovering "pecuniary" losses. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles,* 498 U.S. 19, 32 (1990). Congress's choice to exclude recovery of non-pecuniary losses under the Jones Act supports a similar prohibition against recovering punitive damages for an unseaworthiness claim.

Because punitive damages are not pecuniary in nature, the law has barred their recovery under both the FELA and the Jones Act. *Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352, 354 (1915) (a complaint requesting punitive damages points to state law rather than the FELA as the basis for the claim); *Miles,* 498 U.S. at 32 ("Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.").

This Court has never approved an award of punitive damages for an injury or death under the Jones Act or the FELA. The Ninth Circuit's decision below acknowledges that punitive damages are unavailable under the Jones Act. *Batterton v. Dutra Group*, 880 F.3d 1089, 1092 (9th Cir. 2018) ("'[p]unitive damages are non-pecuniary' and so are not allowable under the Jones Act") (*quoting Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984)).

In 1990, this Court addressed whether two categories of non-pecuniary damages—loss of society and lost future earnings—could be recovered under general maritime law for the death of a seaman caused by unseaworthiness.[2] To answer these questions, the

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[2] The district court had already dismissed the seaman's claim for punitive damages. *Miles,* 498 U.S. at 22.

Court was guided by the Jones Act's pecuniary limitation on damages, noting:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

Miles, 498 U.S. at 27.

Because the Jones Act limits recovery to pecuniary damages, this Court unanimously held that loss of society was unavailable in a general maritime law unseaworthiness claim for wrongful death. *Id.* at 32-33. On this point, the Court reasoned:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Id. at 32-33; *see also Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978) (there is no occasion to supplement maritime damages when "Congress has struck the balance for us").[3]

Miles similarly barred recovery for lost future earnings since allowing such a recovery would go "well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." 498 U.S. at 36. Because Miles' representative could not recover for his lost future earnings under the Jones Act, this Court held the representative could likewise not do so under the general maritime law. *Id.*

Despite the Jones Act's bar on recovering non-pecuniary damages and this Court's decision in *Miles*, the Ninth Circuit authorized Respondent to seek recovery of punitive damages for unseaworthiness. The Ninth Circuit's decision cannot be reconciled with this Court's rulings in *Miles*. *See* 1 T. Schoenbaum, *Admiralty and Maritime Law* § 5:10 (6th ed. 2019) ("Thus, it appears that *Miles* applies to exclude the recovery of punitive damages by Jones Act seamen in suits against their employers or a vessel for unseaworthiness. But is this holding compatible with

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[3] *Miles* presented these issues in the context of a seaman's wrongful death. However, *Miles* does not present any reason why the Jones Act's pecuniary limitation on damages does not apply equally to non-fatal claims as well. *See also McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (en banc) ("no one has suggested why [*Miles*'] holding and reasoning would not apply to an injury case"). A contrary rule would create the anomalous and unjust result that a non-fatal injury would allow recovery for more categories of damages than a death claim. *McBride*, 768 F.3d 382.

[the Court's 2009 decision in] *Townsend*? The answer to this question is yes, on several grounds.").[4]

B. Unlike the Maintenance and Cure Claim in *Townsend*, There Is No Historical Tradition of Punitive Damage Awards for Seamen Injured by Unseaworthy Conditions.

Nineteen years after *Miles*, this Court decided *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), which held that seamen could recover punitive damages for an employer's willful failure to pay "maintenance and cure" under general maritime law. Maintenance and cure refer to the no-fault system for seamen to receive curative medical care and a daily living allowance while recuperating from an injury or illness that arises while in service to a vessel. 557 U.S. at 407-08. Maintenance and cure claims arise from a seaman's employment, are contractual in nature, and are distinct from tort claims. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-28 (1938). Importantly, the decision in *Townsend* noted that the "reasoning of *Miles* remains sound." 557 U.S. at 420.

In explaining its decision in *Townsend,* the Court examined the history of the obligation to provide maintenance and cure to seamen, which "dates back centuries as an aspect of general maritime law" and was first recognized in American maritime law "in

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[4] This Court regularly cites to Schoenbaum's treatise on Admiralty and Maritime Law in its maritime decisions. *See, e.g., Lozman v. City of Riviera Beach,* 568 U.S. 115 (2013); *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994). *Townsend* is compatible with the applicable holdings of *Miles* for reasons that are discussed in Sections I.B and I.C, *infra*.

two lower court decisions authored by Justice Story" in 1823 and 1832. 557 U.S. at 413. The Court reasoned that the general maritime claim at issue in *Townsend* (maintenance and cure) and the remedy sought (punitive damages) were both well-established before the passage of the Jones Act in 1920. *Id.* at 420. Neither part of that proposition, however, is true for unseaworthiness claims. Unlike in *Townsend,* Congress could not have been "envisioning the continued availability" of Respondent's unseaworthiness claim seeking punitive damages since neither the claim (strict liability unseaworthiness) nor the remedy (punitive damages) existed when the Jones Act was passed in 1920. *Id.* at 416.

1. The Type of Strict Liability Unseaworthiness Claim Brought by Respondent Did Not Exist When the Jones Act Was Passed in 1920.

The Court in *Townsend* cautioned that the three primary maritime claims for injury or death of a seaman—negligence, unseaworthiness, and maintenance and cure—are not necessarily interchangeable due to each one's own unique development:

> As this Court has repeatedly explained, "remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures."

557 U.S. at 423 (*quoting Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963)); *see also McAllister v.*

Magnolia Petroleum Co., 357 U.S. 221, 224–25 (1958); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927).

Like in *Miles*, this case concerns a claim for unseaworthiness. Different from the maintenance and cure claim at issue in *Townsend,* a seaman's ability to recover for personal injury through unseaworthiness is not centuries-old, but instead arose in "the late nineteenth century." *Mitchell v. Trawler Racer, Inc.* 362 U.S. 539, 544 (1960). At its inception, a seaman could not recover for unseaworthiness on the basis of strict liability, but could only recover if he was "injured in the service of a ship as a consequence of the owner's failure to exercise due diligence." *Id.* This Court first recognized such a recovery for unseaworthiness in *The Osceola*[5], when it held "[t]hat the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 189 U.S. 158, 175 (1903).[6] Such was the state of a general maritime law claim for unseaworthiness at the time Congress promulgated the Jones Act.

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[5] *The Osceola* denied seamen a claim for negligence, which prompted Congress, 17 years later, to enact the Jones Act to provide seamen with a statutory tort recovery for injury or death due to their employer's negligence. *Townsend*, 557 U.S. at 415.

[6] As the majority in *Mitchell* recognized, the decisions of this Court following *The Osceola* suggest that the import of the enunciation of the unseaworthiness doctrine in *The Osceola* "was not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness." *Mitchell*, 362 U.S. at 546.

In contrast, the modern claim for unseaworthiness being pursued by Respondent is a strict liability claim that has its "humble origin as a dictum in an obscure case in 1922"—two years after passage of the Jones Act. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 496-97 (1971) (*citing Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922)). It was not until 1944, more than two decades after passage of the Jones Act, that the dictum in *Carlisle Packing Co.* became authoritative and this Court, in *Mahnich v. Southern S.S. Co.*, held "the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances . . . ." 321 U.S. 96, 100 (1944). As the *Miles* Court recognized, this transformation of unseaworthiness in the 1940s into "a species of liability without fault"[7] constituted a "radical change" in the general maritime law. *Miles*, 498 U.S. at 25. When the Jones Act was passed in 1920, the concept of unseaworthiness bore almost no resemblance to the claim being asserted by Respondent here.

2. Punitive Damages Were Not Historically Available for Unseaworthiness Claims.

Just as Respondent's strict liability unseaworthiness claim did not exist when the Jones Act was enacted, the remedy Respondent seeks (punitive damages) did not exist as a remedy for violating the duty of seaworthiness in 1920 or before. To the contrary, this Court repeatedly has recognized compensatory damages as the remedy for a breach of the duty of seaworthiness. Neither the district court nor the

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[7] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95 (1946).

Ninth Circuit below cited a single pre-Jones Act case awarding punitive damages for unseaworthiness. This telling omission demonstrates the lack of historical legal authority supporting Respondent's argument. This Court's precedents before and after the passage of the Jones Act demonstrate that compensatory damages were the remedy for unseaworthiness.

In 1903, the Court held that a seaman could not recover an "indemnity" for negligence, but could recover an "indemnity" for unseaworthiness. *The Osceola*, 189 U.S. at 175. The meaning of an "indemnity" in this context is significant because it demonstrates that the remedy for unseaworthiness contemplated by the Court before the Jones Act was compensatory damages. According to the first three editions of Black's Law Dictionary (1891, 1910, and 1933), the term "indemnity" was, at this time, "used to denote a compensation given to make the person whole from a loss already sustained". *Black's Law Dictionary* 614 (1st ed. 1891); *Black's Law Dictionary* 616 (2d ed. 1910); *Black's Law Dictionary* 949 (3d ed. 1933); *see also Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 493-94 (1875) (exemplary/punitive damages went beyond the limit of indemnity). Accordingly, the remedy, or "indemnity", referred to in *The Osceola* was one of compensatory damages.

In the decade immediately following passage of the Jones Act, this Court twice more made explicit that the remedy for unseaworthiness was an "indemnity" for compensatory damages. In *Pacific Steamship Co. v. Peterson*, the Court determined, first, that a seaman's right to maintenance, cure, and wages

was independent of a seaman's rights under the Jones Act; these two rights being "consistent and cumulative." 278 U.S. 130, 138 (1928) (emphasis added). Second, the Court in *Pacific Steamship* held that seamen could still elect to pursue an alternative right to recovery for unseaworthiness. *Id.* at 138-39. In reaching this second conclusion, the Court remarked that seamen were entitled only to compensatory damages under either the Jones Act or unseaworthiness:

> [W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, 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.

278 U.S. at 138 (citation omitted); *see also Carlisle Packing Co.*, 259 U.S. at 259 (if one of the crew was injured as the direct result of unseaworthiness, "he was entitled to recover compensatory damage") (citations omitted).[8]

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts,*

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[8] Even when the Court, in 1944, explicitly altered unseaworthiness to make it a strict liability claim, the remedy remained an "indemnity." *Mahnich,* 321 U.S. at 97-99.

Inc., 453 U.S. 247, 266–67 (1981).[9] Never once does the Court mention punitive damages in *Milwaukee & St. Paul Railway, Carlisle Packing Co, Pacific Steamship Co, Mahnich, Usner,* or any other decision as a remedy for unseaworthiness.[10] Instead, the Court consistently spoke, both before and after the enactment of the Jones Act, of the remedy for unseaworthiness as being an indemnity for compensatory damages.

In sum, *Townsend* is distinguishable because neither Respondent's unseaworthiness claim nor the remedy of punitive damages he seeks were well-established when the Jones Act was passed.[11] This is notably different from the ancient maintenance and cure claim at issue in *Townsend*. Precedent demonstrates that Respondent's unseaworthiness claim was first hinted at in dictum by this Court in a 1922 decision and did not realize its final transformation

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[9] The issue presented in this appeal is whether a claim may be stated to recover punitive damages for unseaworthiness under the general maritime law. If the Court answers that question in the affirmative, the next question is: what standard of proof will be required for such a recovery? In the event the Court addresses the second question, The Coalition submits that the standard of intentional or malicious misconduct from *City of Newport* should be the required quantum of proof. 453 U.S. at 266-67.

[10] The Ninth Circuit's decision below acknowledges that punitive damages are not compensatory damages. 880 F.3d at 1094; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492-93 (2008) (punitive damages are aimed not at compensation).

[11] Even the Ninth Circuit, as recently as 1987, concluded that the availability of punitive damages for unseaworthiness was not well-established. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 n.1 (9th Cir. 1987) ("[w]hether or when punitive damages are available under the general maritime law is not entirely clear.").

into a strict liability claim until 1944 in *Mahnich*. *Usner*, 400 U.S. at 496-97. Moreover, the remedy for the "relatively little used" claim of unseaworthiness was—both before and after the Jones Act was passed—compensatory damages (*i.e.* an "indemnity"), not punitive damages. *Miles*, 498 U.S. at 25 (citations omitted).

C. Tort Claims Under the Jones Act and for Vessel Unseaworthiness Are "Siamese Twins" Under the Law and This Court Should Not Authorize a Remedy for One That Congress Has Refused for the Other.

Unlike maintenance and cure—which are contractual obligations arising out of a seaman's employment—unseaworthiness is a tort claim that, as explained in *Pacific Shipping,* provides the same compensatory remedy as a negligence claim under the Jones Act. Although the Ninth Circuit below acknowledged that it was *Miles*, and not *Townsend,* that involved an unseaworthiness claim, it nonetheless concluded there was no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions. The Coalition submits that the Ninth Circuit is incorrect.

None of the general maritime law cases cited by the Court in *Townsend* addressed the availability of punitive damages for unseaworthiness.[12] In his brief

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[12] The case cited in *Townsend* on the more general subject of punitive damages in maritime law was *The Amiable Nancy*, 16 U.S. 546 (1818). That case was a marine trespass case in which members of the crew of the Scourge, a privateer owned by the defendants, boarded and plundered the Amiable Nancy. 16 U.S. at 547-48. While the Court recognized that exemplary damages

in opposition to the petition for writ of certiorari in this case, Respondent alleged that "evidence points to the availability of punitive damages in pre-Jones Act unseaworthiness cases" and identified three cases as supporting this proposition. Brief for Respondent in Opposition at 16, *Dutra Group v. Batterton*, No. 18-266. But two of the cases relied on by Respondent are not unseaworthiness cases at all and the other neither awarded punitive damages nor pre-dated the Jones Act.[13]

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might be available against those who perpetrated this intentional act of piracy, it also held that exemplary damages were unavailable against the Scourge's owners who did not participate in or countenance the trespass. *Id.* at 558-59. The Court in *Townsend* also cited *The City of Carlisle*, 39 F. 807 (DC Ore. 1889) and *The Troop*, 118 F. 769 (D.C. Wash. 1902) as maintenance and cure cases where "the failure of a vessel owner to provide proper medical care for seamen has provided the impetus for damages awards that appear to contain at least some punitive element." 557 U.S. at 414.

[13] Respondent relies on *The Rolph*, 293 F. 269 (N.D. Cal. 1923), aff'd, 299 F. 52 (C.A.9 1924), *The Troop*, 118 F. 769 (D. Wash. 1902), aff'd, 128 F. 856 (9th Cir. 1904), and *The City of Carlisle*, 39 F. 807 (D. Ore. 1889). Brief for Respondent in Opposition at 16 n.6, *Dutra Group v. Batterton*, No. 18-266. Of these three, *The Rolph* is the only case where the court found that the vessel in question was unseaworthy. 293 F. at 272. That case does not, however, address (or even mention) punitive damages. Moreover, it post-dates the Jones Act and therefore should not serve as evidence of what Congress understood the maritime law to be in 1920. Nothing in the opinion suggests that the award in *The Rolph* was for anything but compensatory damages. Notably, the district court quoted *The Osceola*'s language regarding indemnity and the Ninth Circuit, in affirming, phrased the question presented as "whether the vessel can be held liable to an indemnity for injuries . . . ." *The Rolph*, 293 F. at 272; *The Rolph*, 299 F. 52, 54 (C.A.9 1924). As noted above, *Townsend* recognized *The City*

In addition to the significant historical differences between claims for unseaworthiness and for maintenance and cure, *Townsend* expressly states that "[t]he reasoning of *Miles* remains sound." 557 U.S. at 420. Accordingly, any suggestion that *Miles* has been weakened or abrogated by *Townsend* should be rejected. Unlike *Townsend, Miles'* holding directly barred non-pecuniary remedies for unseaworthiness claims under general maritime law. Therefore, *Miles* cannot be fairly squared with the Ninth Circuit's decision below. If this Court extends *Townsend*'s holding to allow punitive damages in unseaworthiness claims, the holding and rationale of *Miles* will be undermined or abrogated altogether. To maintain the holdings of both *Miles* and *Townsend,* this Court should conclude that Respondent's unseaworthiness claim seeking punitive damages is barred under *Miles* and is distinguishable from *Townsend* on at least two grounds. First, *Townsend* involved a non-tort claim for maintenance and cure. Second, *Townsend* involved a claim and remedy that were well-established in the law prior to the Jones Act, which cannot be said of Respondent's unseaworthiness claim seeking punitive damages.

Claims for negligence and unseaworthiness, while legally distinct, are nonetheless too closely related in the law to have different remedies:

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of Carlisle and *The Troop* as instances where punitive damages appeared to have been awarded for the violation of the duty to provide maintenance and cure. Neither *The Troop* nor *The City of Carlisle* mention unseaworthiness and both were, as recognized in *Townsend*, instances where the courts applied the law of maintenance and cure.

> When a seaman is injured, he has three means of recovery against his employer: (1) maintenance and cure, (2) negligence under the Jones Act, and (3) unseaworthiness. Without elaborating on the nature of these three actions, it is sufficient to say that they are so varied in their elements of proof, type of defenses, and extent of recovery that a seaman will rarely forego his right to sue for all three. But if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding. That is a consequence of this Court's decision in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, which held that these claims were but alternative 'grounds' of recovery for a single cause of action.

McAllister, 357 U.S. at 224-25; *see also Pacific Steamship,* 278 U.S. at 138. Legal scholars have also explained that the two claims (negligence and unseaworthiness) are "Siamese Twins" under the law. A leading treatise on admiralty and maritime law, describes the relationship between the two claims, as follows:

> The Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery. As a matter of jurisprudential elegance or even of common sense it would have been desirable (and would still be desirable) to abandon the cumbersome fiction that two causes of action are involved and to restate the seaman's cause of action for death

> or injury as being what it is. That has not been done and, in all probability, will never be done. After ten or fifteen years of confusion, the admiralty lawyers and the admiralty judges came to understand that the Jones Act count and the unseaworthiness count are Siamese Twins.

G. Gilmore & C. Black, *Law of Admiralty* § 6-38, p. 383 (2d ed. 1975)[14]; *see also Magee v. United States Lines, Inc.,* 976 F.2d 821, 823 (2d Cir. 1992); *Karvelis v. Constellation Lines S.A.,* 806 F.2d 49, 51–52 (2d Cir. 1986). This "Siamese Twins" analogy aptly describes Respondent's injury claims, which involve allegations of both an unseaworthy condition and his employer's negligence arising from the same operative facts. His claims for unseaworthiness and negligence truly are but "a single cause of action" that should not have different legal remedies.

For more than 100 years, this Court has repeatedly stressed that uniformity is an overriding goal in establishing maritime law. *Miles,* 498 U.S. at 33; 1 Schoenbaum, *Admiralty & Maritime Law* § 5:10 (6th ed. 2018) ("The reasoning of *Miles* rests on two ideas, that the courts should not create damage awards that go beyond those mandated by applicable statutes; and that uniformity is an overriding goal in maritime law"). This arises from the constitutionally-based principle that federal maritime law should be a system

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[14] This Court regularly cites to Gilmore and Black's treatise for principles of admiralty and maritime law. *See, e.g. Townsend*, 557 U.S. 404; *Miles*, 498 U.S. 19.

of law coextensive with, and operating uniformly in, the whole country.

Permitting the recovery of punitive damages for an unseaworthiness claim while Congress has barred such a recovery for its "Siamese Twin" claim of negligence would undermine the uniformity that the law strives to achieve in maritime matters.

II. THIS COURT SAILS IN WATERS ALREADY CHARTED BY CONGRESS, WHICH CREATED A UNIFORM SYSTEM OF MARITIME TORT RECOVERY FOR SEAMEN THAT EXCLUDES PUNITIVE DAMAGES.

Tort recovery for injured seamen and vessel seaworthiness are both areas of law exhaustively regulated by Congress. This is another important distinction from the contractual maintenance and cure claim at issue in *Townsend*. In only two limited instances during the past 200 years has Congress enacted laws about maintenance and cure. *Townsend,* 557 U.S. at 415-17 (Congress has only addressed maintenance and cure issues in the context of: (1) foreign workers on offshore oil and mineral production facilities and (2) sailing school students and instructors). The same, however, cannot be said for either tort recovery for maritime workers or vessel seaworthiness issues. As discussed below, Congress has legislated expansively about both subjects.

A. Congress Has Created a Uniform System of Tort Recovery for Injured Maritime Workers That Excludes Punitive Damages.

While Congress has largely refrained from legislating regarding seamen's ancient contractual rights

to maintenance and cure, it has legislated broadly concerning tort recovery for injuries and death of maritime workers. Congress has enacted an "ordered system of recovery for seaman's injury and death." *Miles,* 498 U.S. at 36.

In 1920, Congress enacted the Jones Act to provide seamen with a negligence claim against their employers for injury or death. Remedies available under the Jones Act are limited to pecuniary losses. *Miles, supra.* That same year, Congress enacted the Death on the High Seas Act (DOHSA). 46 U.S.C. §§ 30301-30308. DOHSA created a claim for any person (including seamen) killed on the high seas, which are defined as beyond three nautical miles from shore. *Id.* When applicable, DOHSA is the exclusive remedy; liability may be based on negligence, unseaworthiness (for seamen), intentional conduct, or products liability law.[15] The measure of recovery under DOHSA is statutorily limited to pecuniary loss. 46 U.S.C. § 30303; *Dooley v. Korean Air Lines Co.,* 524 U.S. 116, 122 (1998); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201 (1st Cir. 1994) (DOHSA only permits recovery of damages for pecuniary loss); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 n.3 (6th Cir. 1993).

In 1927, Congress passed the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901-

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[15] Upholding the Ninth Circuit's decision would also create the troubling anomaly that seamen who are fatally injured due to a willful breach of the duty of seaworthiness on the high seas (within DOHSA's coverage) would be barred from recovering punitive damages, while seamen who are killed closer to shore (outside DOHSA's coverage) would be permitted such recovery. *See* Section III.B, *infra.*

950. The Longshore Act generally provides maritime workers who do not qualify as seamen with both injury and death benefits payable by their employers. Similar to state workers' compensation laws, the Longshore Act does not permit maritime workers to recover against their employers for punitive damages. *Miller*, 989 F.2d at 1457.

In summary, all three of the major Congressional enactments in the area of maritime tort recovery for injury and death demonstrate that Congress has made a policy determination against allowing maritime workers to recover punitive damages. *Miller*, 989 F.2d 1450. This Court should not permit the uniform policy judgments reflected in these Congressional enactments to be circumvented by allowing seamen to recover punitive damages for a judicially-created general maritime law unseaworthiness claim, especially when such a claim did not exist in its present form when Congress enacted the laws. *Miles*, 498 U.S. at 27 (admiralty courts should look primarily to Congress's legislative enactments for policy guidance).

B. Congress Has Occupied the Field of Vessel Seaworthiness by Enacting a Comprehensive Federal Scheme to Regulate Vessel Safety, and to Deter and Punish Those Who Operate Unseaworthy Vessels.

In addition to the pecuniary limit it placed on tort remedies for injured maritime workers, Congress has also legislated exhaustively in the area of vessel seaworthiness and safety standards. *Townsend*, 557 U.S. at 420 ("Congress and the States have legislated extensively in these areas."); *see also Miles*, 498 U.S. at 27. As shown below, Congress has enacted a system

of laws to address vessel seaworthiness, which includes civil and criminal penalties to deter and punish those who operate unseaworthy vessels. Because Congress has so comprehensively regulated vessel seaworthiness issues, this Court should not create a new means of punishment and deterrence in the form of punitive damages.

Congressional regulation of the shipping industry is far-reaching and includes a comprehensive safety and inspection protocol for vessels. 46 U.S.C. §§ 3301-3318; *see also* United States Coast Guard, *Flag State Control in the United States: 2017 Domestic Annual Report*, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC1/AnnualRpt/2017DomesticAnnualReport.pdf (documenting 18,424 Coast Guard inspections on 12,189 U.S. flag vessels).

The scope of federal regulations governing vessel seaworthiness issues continues to grow. By way of example, in 2004, Congress passed the Coast Guard and Maritime Transportation Act. 108 P.L. 293, 118 Stat. 1028. This statute sought to enhance vessel seaworthiness of towing vessels, including those operated by members of The Coalition, through a stringent (and mandatory) system of vessel inspections and uniform safety standards. This Act began a more-than-decade-long process of rulemaking that resulted in 46 C.F.R. Chapter I, Subchapter M, Parts 136-144, which mainly took effect in 2018 (collectively "Subchapter M"). Subchapter M is a landmark development for the towboat and barge industry because towing vessels must undergo extensive safety inspections to ensure compliance with uniform standards established by the Coast Guard.

A central feature of the federal vessel inspection programs (including Subchapter M) is that vessels must have Certificates of Inspection (COI) to operate. 46 U.S.C. §§ 3301-3318. Although the requirements vary based on the precise type of vessel involved, a COI may only be obtained through compliance with a Coast Guard approved safety and inspection program. Absent a vessel owner's compliance with these federally-enacted programs for the monitoring of vessel seaworthiness, a COI will not be issued and serious penalties may result. 46 U.S.C. § 3318. The Coast Guard is also equipped with the power to enforce regulatory violations through penalties and may suspend or revoke necessary maritime licenses.

As a result of Congress's expanding regulatory schemes, distinctions between the "Siamese Twins" of unseaworthiness and Jones Act negligence are increasingly difficult to decipher. Under the negligence *per se* doctrine applied in maritime law, violation of a maritime safety statute or regulation establishes negligence. *See Kernan v. American Dredging Co.*, 355 U.S. 426 (1958); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).[16] This legal principle is applicable "without regard to whether the injury flowing from the breach was the injury the statute sought to prevent." *Kernan,* 355 U.S. at 433. Moreover, comparative fault may provide no defense to negligence *per se*. *Fuszek v. Royal King Fisheries*, 98 F.3d 514, 517 (9th Cir. 1996). Accordingly, the "Siamese Twins" are too

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[16] *See also* Marc C. Hebert & Lindsey M. Ajubita, *Managing Liability and Insuring Risk in the World of Subchapter M: Legal Issues to Consider and the Obligations of Marine Operators*, 16 LOY. MAR. L.J. 289, 312 (Summer 2017).

interconnected in today's expansive regulatory scheme to permit different remedies.

The availability of punitive damages for unseaworthiness would fundamentally alter the balance of the system Congress created. Judge-made general maritime law should not supplement these laws to permit punitive damages when Congress has already acted to standardize vessel safety rules and enforcement mechanisms to govern nearly every type of commercial vessel. This Court should not second-guess Congress's policy choices.

Congress has also imposed criminal liability for knowingly sending or attempting to send an unseaworthy vessel to sea that is likely to endanger a life. 46 U.S.C. § 10908; *see also* 46 U.S.C. § 3318 (criminal and civil penalties for violations of vessel inspection statutes). Section 10908 authorizes punishment of up to five years imprisonment, a fine of up to $1,000, or both. Other portions of the same chapter address procedures for seamen to report unseaworthy vessels. *See, e.g., United States v. Rivera*, 131 F.3d 222 (1st Cir. 1997).

Despite the extensive federal statutory and regulatory laws regarding vessel seaworthiness, Congress has never sought to deter unseaworthiness through punitive damages. Therefore, this Court too should decline Respondent's invitation that it do so.

C. Extension of Remedies Beyond Congress's Uniform Plans for Maritime Tort Law and Seaworthiness Is Unnecessary to Deter Unseaworthiness and Will Impair the Ability of Maritime Parties to Settle Claims Efficiently.

Apart from civil and criminal liabilities, there is a more fundamental reason that punitive damages are unnecessary to deter unseaworthiness. Namely, vessel owners and operators have inherent financial incentives to avoid vessel unseaworthiness. Unseaworthy vessels are not profitable because they are more likely to sink, cause pollution, damage cargo, and injure crewmembers and others. In light of these already existing risks and liabilities, it is most unlikely that a vessel operator would gain financially by intentionally operating unsafe vessels.[17]

One practical impact of authorizing punitive damages is that it would inhibit a central goal of maritime law: the promotion of settlement and judicial economy. *McDermott*, 511 U.S. at 211. If authorized by this Court, claims seeking punitive damages for unseaworthiness will become boilerplate in seamen's complaints. The availability of punitive damages will prolong and complicate the resolution of maritime injury claims. The scope and expense of maritime litigation will increase. The very threat of punitive damages will bring unjustified value to these claims because the cost and risk of defending against such claims will be too steep. The danger of an astronom-

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[17] There are fewer inherent incentives for shipowners to fulfill maintenance and cure obligations, which were at issue in *Townsend*.

ical verdict for punitive damages[18], will discourage prudent maritime employers from defending meritless claims because they will instead be forced to avoid the risk of highly unpredictable and potentially devastating punitive damage awards. Moreover, as set forth in Section III, *infra*, whether such damages are insurable is governed by varying state laws, which further harms maritime commerce and uniformity.

III. ALLOWING SEAMEN TO RECOVER PUNITIVE DAMAGES FOR UNSEAWORTHINESS WOULD CREATE SEVERAL ANOMALIES HARMFUL TO THE CONSTITUTIONALLY-MANDATED UNIFORMITY OF MARITIME LAW.

This Court has repeatedly held that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime *commerce*." *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25 (2004) (internal quotation marks omitted) (emphasis in original); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991); *Sisson v. Ruby*, 497 U.S. 358, 367 (1990). One way in which the federal courts have protected and fostered maritime commerce is by maintaining a uniform and consistent maritime law. The importance of uniformity is well documented in this Court's jurisprudence, with the Court's pronouncement in *The Lottawanna* being a particularly famous enunciation of this doctrine:

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[18] *See, e.g., Clausen v. Icicle Seafoods, Inc.,* 272 P.3d 827 (Wash. 2012) (affirming award of $1,300,000 in punitive damages under *Townsend* when actual damages due seaman on maintenance and cure claim was $37,420).

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874).

Allowing an injured seaman to recover punitive damages under the general maritime law for unseaworthiness would create undesirable anomalies in federal maritime law. These anomalies would disrupt uniformity and deprive maritime operators of the consistency and predictability necessary to foster thriving maritime commerce.

A. The Insurability of Punitive Damages Varies by State.

There is no general maritime law rule governing whether punitive damages may be lawfully covered by insurance. *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (5th Cir. 1992). Because there is no specific and controlling federal maritime law rule, state law would apply to determine whether punitive damages are insurable. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). However, the insurability of punitive damages varies by state. Accord-

ingly, a ruling in favor of Respondent would create an unlevel interstate playing field where some vessel owners will be able to insure against the possibility of a punitive damage award for unseaworthiness but others will not.[19]

The patchwork of contradictory state laws is apparent in an examination of just those nine states in which members of The Coalition regularly operate. Punitive damages are insurable in Arkansas[20], Mississippi[21], Tennessee[22], and Wisconsin[23]. Under Illinois[24] and Indiana[25] law, punitive damages are insurable when vicariously assessed but are not insurable when directly assessed. Under Kentucky law, punitive damages are insurable so long as "the punitive damages are imposed for a grossly negligent act of the insured rather than an intentional wrong of the insured." *Continental Ins. Cos. v. Hancock*, 507 S.W.2d

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[19] The effect of permitting seamen to recover punitive damages for unseaworthiness will impact international maritime commerce as well as interstate maritime commerce. *Baker*, 554 U.S. at 496 ("Punitive damages overall are higher and more frequent in the United States than they are anywhere else").

[20] *Southern Farm Bureau Casualty Insurance Co. v. Daniel*, 440 S.W.2d 582, 584 (Ark. 1969).

[21] *Anthony v. Frith*, 394 So.2d 867 (Miss. 1981).

[22] *General Casualty Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956).

[23] *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985).

[24] *Beaver v. Country Mutual Insurance Co.*, 420 N.E.2d 1058, 1061 (Ill. 1981).

[25] *Norfolk & Western Railway Co. v. Hartford Accident & Indemnity Co.*, 420 F. Supp. 92, 95 (N.D. Ind. 1976).

146, 151-52 (Ky. 1973). Punitive damages are not insurable under Minnesota law when directly assessed, and it is unclear if they are insurable when vicariously assessed. *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487 (8th Cir. 1990). Whether public policy prohibits the insurability of punitive damages is an open question in Missouri. *See DeShong v. Mid-States Adjustment, Inc.*, 876 S.W.2d 5 (Mo. Ct. App. 1994) (finding the insurance policy did not cover punitive damages without deciding whether public policy would prohibit enforcement).

As the above survey of just nine states demonstrates, if this Court were to hold for Respondent, vessels could be operated on the same inland waterway (the Mississippi River, for example), performing the same work, but an operator whose insurance is governed by Wisconsin law could insure against punitive damages for unseaworthiness while an owner just across the river, whose insurance is governed by Minnesota state law, could not. The principle of maritime uniformity calls for this Court to avoid such inconsistencies and unfairness.

B. Holding for Respondent Will Create Unjustifiable Anomalies in General Maritime Law.

In *Miles*, this Court held that Congress must have intended to incorporate FELA's "pecuniary limitation on damages" into the Jones Act. 498 US at 32. The *Miles* Court, therefore, did not allow recovery for loss of society (a category of nonpecuniary damages) for unseaworthiness, holding, "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is with-

out fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33. The Court described this holding as "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.* at 33. Absent reversal, this Court will recognize that a class of workers (seamen) may recover a remedy (punitive damages) against their employers that every other class of workers, including railroad workers, is denied. Doing so will defeat the uniform rule that the Court restored in *Miles*.

If this Court holds for Respondent by overruling *Miles*, it will create a troubling anomaly in maritime law. If a seaman is killed as a result of a breach of the duty of seaworthiness while more than three nautical miles from shore, DOHSA's exclusive application will limit tort recovery to pecuniary losses. However, if that same seaman is less than three nautical miles from shore, the general maritime law will permit his representative to seek punitive damages. Such vastly different remedies based merely on the distance the vessel is from shore would violate this Court's long-held objective of pursuing uniformity in maritime matters with a healthy regard for Congress's policy judgments. *Miles,* 498 U.S. at 27, 32-33; *Mobil Oil Corp.*, 436 U.S. 618.

On the other hand, if this Court holds for Respondent without overruling its unanimous decision in *Miles*, a different anomaly is nonetheless created. Whether an injury is fatal should not be the key distinction regarding whether punitive damages are available to a seaman for a willful and wanton breach

of the duty of seaworthiness. Yet, that is the alternative to holding for Respondent without overruling *Miles*. Such an anomalous and illogical result should be avoided because it creates the perverse incentive that fatal injuries are worth less than non-fatal injuries due to the availability of punitive damages. If punitive damages "are aimed not at compensation but principally at retribution and deterring harmful conduct," such a result is unwarranted. *Baker*, 554 U.S. at 492.

CONCLUSION

Amicus Curiae respectfully requests that the Court reverse the Ninth Circuit's decision below and hold that punitive damages are not an available remedy for unseaworthiness.

Respectfully submitted,

NEAL W. SETTERGREN
COUNSEL OF RECORD
GILES B. HOWARD
GOLDSTEIN AND PRICE, L.C.
ONE MEMORIAL DRIVE, SUITE 1000
ST. LOUIS, MO 63102
(314) 516-1700
NEAL@GP-LAW.COM

COUNSEL FOR AMICUS CURIAE
THE INLAND RIVER HARBOR
AND FLEETING COALITION

JANUARY 28, 2019