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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF AT-SEA PROCESSORS ASSOCIATION, PACIFIC SEAFOOD PROCESSORS ASSOCIATION, GROUNDFISH FORUM, NATIONAL FISHERIES INSTITUTE, FREEZER LONGLINE COALITION, AND ALASKA BERING SEA CRABBERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The At-sea Processors Association (APA) represents six companies that own and operate sixteen U.S.-flagged catcher/processor vessels that participate principally in the Alaska pollock fishery and west coast Pacific whiting fishery. By weight, these fisheries account for more than one-third of all fish harvested in the United States each year.

Pacific Seafood Processors Association (PSPA) is a nonprofit seafood industry trade association. Its corporate members are major seafood processing companies with operations in Alaska and Washington. PSPA was founded in 1914 to foster a better public understanding of the importance of the seafood industry and has been in continuous and active operation since that time.

Groundfish Forum (GF) is a trade association that represents five companies that operate 19 trawl catcher processor vessels in the yellowfin sole, rock sole, flathead sole, Atka mackerel, Pacific Ocean

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties have filed blanket consents to the filing of *amicus* briefs with the Clerk.

perch, and Pacific cod fisheries off Alaska. GF's mission is to promote the sustainable harvest and economic viability of fisheries while ensuring resource conservation, habitation protection, and practicable bycatch management.

The Freezer Longline Coalition (FLC) is a trade association representing participants in the freezer longline sector of the Alaska cod fishery. FLC includes 11 Washington and Alaska-based members that operate 30 vessels in the federal waters of the Bering Sea, Aleutian Islands, and the Gulf of Alaska. FLC members are united in their commitment to sustainable fishing practices in the North Pacific.

The National Fisheries Institute (NFI) represents hundreds of companies from all facets of the commercial seafood industry in the United States, including seafood harvesters, vessel owners, and processors dependent on those harvesters for product. NFI member companies produce, process, distribute, and serve to hundreds of millions of American consumers a sustainable, highly nutritious protein.

Members of the Alaska Bering Sea Crabbers (ABSC) fish for King, Snow, and Bairdi crab in the Bering Sea. They are also actively involved in scientific research, policy development, and marketing. ABSC is committed to ensuring the long-term sustainability of its members' fishery.

Amici's members have a strong interest in the resolution of this case. As marine operators, each is subject to the Jones Act and to general maritime law doctrines such as unseaworthiness. *Amici* file this brief to explain why permitting plaintiffs to recover punitive damages in connection with unseaworthi-

ness claims would be harmful to the American maritime industry and incongruent with long-standing legal doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The maritime industry is the lifeblood of the economy of the United States—and of the world. It transports 90 percent of the world's goods.[2] It directly and indirectly accounts for 2.6 million American jobs and contributes $100 billion to the U.S. economy annually.[3] And it contributes hundreds of billions of dollars' worth of fish each year to the food supply.[4] The Ninth Circuit's holding that punitive damages are available under the maritime doctrine of unseaworthiness threatens to subject this critical industry to a potentially massive increase in damages exposure—a result that is erroneous as a matter of law and misguided as a matter of policy. This Court should therefore reverse the judgment below and hold that punitive damages may not be recovered for unseaworthiness claims.

The doctrine of unseaworthiness is the predominant means of recovery for seamen injured on the job. The impact of making punitive damages available for unseaworthiness claims, therefore, would be sweeping: Maritime operators' litigation costs would

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[2] See Natasha Geiling, *How the Shipping Industry Is the Secret Force Driving the World Economy*, Smithsonian.com, Oct. 15, 2013, perma.cc/E3R6-XSEN.

[3] Navy League of the U.S., *America's Maritime Industry* 14, perma.cc/AA7W-PAZB.

[4] See NOAA, Press Release, U.S. Fishing Generated More Than $200B in Sales in 2015; Two Stocks Rebuilt in 2016, May 9, 2017, perma.cc/C5SY-FVN3.

markedly increase, resulting in higher prices for consumers, and the U.S. maritime industry would be put at a disadvantage compared with industries in countries whose law precludes punitive damages.

The decision below not only threatens grave harm to the maritime industry; it is also wrong on the merits. There appear to be no cases awarding punitive damages in connection with an unseaworthiness claim before the enactment of the Jones Act in 1920. And even if respondent were able to locate an aberrational punitive award in a pre-Jones Act unseaworthiness case, the dramatic changes in the purpose, size, and frequency of punitive damage awards since that time counsel against allowing punitive damages in such cases today. Moreover, permitting punitive damages in unseaworthiness cases would destroy the uniformity between the unseaworthiness remedy and the Jones Act remedy and would lead to windfall recoveries in situations in which Congress clearly intended that plaintiffs recover only compensatory damages. For all of these reasons, the decision below should be reversed.

ARGUMENT

A. Permitting Punitive Damages In Unseaworthiness Cases Would Disrupt The Maritime Industry And The National Economy.

Allowing plaintiffs to recover punitive damages in connection with unseaworthiness claims would have a critical impact on the U.S. maritime industry. Vessel owners' potential liability, and their vulnerability to settlement pressure, would rise dramatically—causing an increase in litigation costs that would make these companies less competitive with foreign

maritime operators and increase the prices that their consumers pay.

1. As this Court observed almost fifty years ago, "[t]he unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970); see also *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 208 (1996) (unseaworthiness has "eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed"). The question whether punitive damages are available in unseaworthiness actions is thus a matter of paramount importance.

Opening the door to punitive damages in unseaworthiness cases would make such cases far more difficult for defendants to litigate. As a leading authority on tort law has explained, the "risk of suffering a crushing punitive damages penalty" discourages defendants from litigating claims on the merits, leading to "so-called 'blackmail settlements'" in which claims are settled for more than they are "reasonably worth." James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts*, 52 GA. L. REV. 719, 747 (2018). Indeed, "uncounted thousands of cases settle on terms different than those on which they would otherwise settle because of the possibility of punitive damages." Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 625 (1997).

This Court has recognized the same dynamic in the class-action context, where class certification—or even the mere styling of a lawsuit as a putative class action—exerts tremendous pressure on a defendant

to settle. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (describing "the risk of 'in terrorem' settlements that class actions entail"); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

To be sure, this Court has held that punitive damages in maritime cases generally should not exceed the amount of compensatory damages (*Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 513 (2008)), and that guidance would presumably apply to punitive damages for unseaworthiness if such damages were held to be available. But since the decision in *Exxon Shipping*, courts have *not* uniformly limited punitive damages to the amount of compensatory damages in maritime cases. See, *e.g.*, *Warren* v. *Shelter Mut. Ins. Co.*, 233 So. 3d 568, 599 (La. 2017) (reducing $23 million punitive award to $4.25 million where compensatory damages were $125,000 on ground that $4.25 million is twice the total value of the court's estimation of the harm caused by the conduct); *McWilliams* v. *Exxon Mobil Corp.*, 111 So. 3d 564, 579 (La. Ct. App. 2013) (upholding $12 million punitive award in case involving $5.5 million in actual damages); *Clausen* v. *Icicle Seafoods, Inc.*, 272 P.3d 827, 834, 836 (Wash. 2012) (refusing to reduce $1.3 million punitive award where compensatory damages for maintenance and cure were $37,420 and attorneys' fees and costs, which court included in denominator, were $428,105). Moreover, even a 1:1 cap would be cold comfort, because compensatory damages in unseaworthiness

cases can reach into the multiple millions of dollars.[5] Even allowing double the already-considerable damages available in unseaworthiness cases would put maritime operators in a highly precarious position.

The predictable effect of making punitive damages available in unseaworthiness cases, therefore, will be to coerce maritime defendants into settling even dubious unseaworthiness claims, raising their litigation costs. Because those costs are likely to be passed on to consumers, the result will be higher prices for fish and any other commodity harvested or transported by ships.[6]

2. Permitting punitive damages in this context would also undermine the American maritime industry's ability to compete with other countries. Many European countries follow the civil-law tradition, under which punitive damages are generally una-

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[5] See, *e.g.*, *Doss* v. *M/V K2*, 2016 WL 6962501, at *2 n.13 (E.D. La. Nov. 29, 2016) (indicating that plaintiff was seeking $1.5 million in compensatory damages); *Burdett* v. *Matson Navigation Co.*, 2015 WL 419694, at *1 (D. Haw. Jan. 30, 2015) (indicating that plaintiff was seeking $7 million in compensatory damages).

[6] The fact that grave consequences have not followed from this Court's decision in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), which made punitive damages available in maintenance-and-cure cases, does not mean that the effects of a ruling for respondent here would be similarly benign. As the respondent in *Townsend* conceded, instances of willful failure to provide maintenance and cure are "rare." Resp. Br. at 32, *Townsend* (U.S. Jan. 19, 2009), 2009 WL 154578. By contrast, punitive damages claims under the doctrine of unseaworthiness—the "principal vehicle for recovery" by injured seamen (*Moragne*, 398 U.S. at 399)—will likely be much more common and the amounts at stake in such cases much more substantial.

vailable in civil cases. See John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 510 & n.16 (2007) (citing sources from Switzerland, Italy, Belgium, Spain, Germany, Finland, Greece, Poland, Russia, the Czech Republic, and the Netherlands); see also *Exxon Shipping*, 554 U.S. at 497 ("Noncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland."). The same is true in Japan. See 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 22.2(B)(10) (7th ed. 2015). And in China, punitive damages are available only in certain consumer cases. See Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS L. CHINA 321, 321-22 (2014).

Under respondent's view, therefore, maritime defendants' damages exposure would be dramatically greater under U.S. maritime law than under the law of other nations. Imposing that potential liability on the American maritime industry would undoubtedly raise the industry's costs—driving business toward maritime companies that use ships flagged in other countries and that have less exposure to U.S. maritime law. For example, with the single exception of Canada-flag tuna vessels fishing in U.S. waters under the U.S.-Canada Albacore Treaty, *amici* are unaware of any foreign-flagged vessels permitted to fish anywhere in the nation's Exclusive Economic Zone. Thus, affirming the decision below would raise costs for U.S. seafood harvesters but would not affect foreign harvesters who fish outside the United States

and export their catch to the U.S. market.[7] It would also encourage foreign plaintiffs to bring claims in U.S. courts, where punitive damages would now be available. Cf. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 403-04 (1975) ("[T]he United States is now virtually alone among the world's major maritime nations in not adhering to the [Brussels Collision Liability] Convention with its rule of proportional fault—a fact that encourages transoceanic forum shopping.").

B. The Decision Below Is Erroneous.

Fortunately, these deleterious effects need not be suffered, because the court of appeals' decision is wrong on the merits. That is so, first and foremost, because, as petitioner explains (Pet. Br. 26-30), the court of appeals' decision cannot be reconciled with this Court's holding in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990). But even leaving *Miles* aside, the decision below is indefensible—because there is no historical precedent for awarding, in unseaworthiness cases, modern-day punitive damages, and because awarding such damages in unseaworthiness cases would undermine the remedial scheme of the Jones Act.

1. The court of appeals' decision rests on an inapposite premise. In concluding that punitive damages should be available for unseaworthiness claims,

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[7] To be sure, under the multifactor test articulated by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), a tort involving a foreign-flagged ship may sometimes be adjudicated under U.S. maritime law. But this is the exception rather than the rule. As the Court explained in *Lauritzen*, "the weight given to the [flag] overbears most other connecting events in determining applicable law." *Id.* at 585.

the court of appeals relied on this Court's statement in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 407 (2009), that, "[h]istorically, punitive damages have been available and awarded in general maritime actions." Based on that statement, the court of appeals assumed that punitive damages were available in unseaworthiness cases prior to the passage of the Jones Act. Pet. App. 12a.

But the *Townsend* Court's statement, made in a maintenance-and-cure case, does not apply in the context of unseaworthiness actions. At least one study has found some evidence of punitive damages being awarded or contemplated in nineteenth-century maintenance-and-cure actions. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 118 (1997).[8] By contrast, the same study—along with a canvass by five concurring judges on the Fifth Circuit—identified only *one* early unseaworthiness case that even arguably involved an award of punitive damages. See *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 395-96 (5th Cir. 2014) (en banc) (Clement, J., concurring); Robertson, *supra*, at 107-08. And that case, *The Rolph*, 293 F. 269 (N.D. Cal. 1923), is far too slender a reed to support making punitive damages available in unseaworthiness cases. *The Rolph* did not purport to award any punitive or exemplary damages, or

[8] This historical precedent for awarding punitive damages in maintenance-and-cure cases cannot support making punitive damages available in unseaworthiness cases; as this Court has recognized, the maintenance-and-cure cause of action—a contract-based cause of action by which sick or injured seamen can recover expenses while recuperating—is "unlike" the "indemnity" created for unseaworthiness. *Aguilar* v. *Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943).

even mention the possibility of doing so; rather, the court based the plaintiffs' damages on their "injuries" and their "expectation of life and earnings." *Id.* at 272. And in any event, the case *post*dated the passage of the Jones Act in 1920 and thus cannot support the notion that punitive damages were awarded in unseaworthiness cases prior to the Jones Act.

The lack of historical precedent for punitive damages in unseaworthiness cases is corroborated by the fact that, during the thirty years after the passage of the Jones Act (1920-1950), injured seamen almost exclusively brought Jones Act claims rather than unseaworthiness claims. *McBride*, 768 F.3d at 397 & n.20 (Clement, J., concurring) (citing G. Gilmore & C. Black, The Law Of Admiralty 327 (2d ed. 1975)). That choice would have been irrational if punitive damages could be awarded in connection with unseaworthiness claims while being unavailable in connection with Jones Act claims. *Ibid.* In short, there is no basis upon which to conclude that punitive damages were historically available in connection with unseaworthiness claims.

2. Moreover, even if courts *had* awarded (or purported to award) "punitive" damages in some unseaworthiness cases in the years preceding the enactment of the Jones Act, that would not warrant allowing recovery of punitive damages appurtenant to unseaworthiness claims now. The nature and purpose of punitive damages have changed too much over the past century for pre-Jones Act cases to provide any meaningful precedent for awarding punitive damages in unseaworthiness cases today.

Today, punitive damages are thought of as serving exclusively punitive purposes: *i.e.*, inflicting retribution on the defendant and deterring the defend-

ant and others from committing similar misconduct in the future. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996) (explaining that punitive damages "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"). As such, they are often imposed in astonishing amounts. See, *e.g.*, *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal.") (citation omitted).

But punitive damages, as originally conceived in English courts, were nothing more than "a means of justifying damage awards in excess of the plaintiff's tangible harm." See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 614 (2003). Thus, although courts sometimes spoke of punitive damages as serving the purpose of deterrence, they "[j]ust as frequently * * * justified punitive damages as additional compensation for mental suffering, wounded dignity, and injured feelings—harms that were otherwise not legally compensable at common law." *Id.* at 615 (footnote omitted); see also, *e.g.*, Schlueter, *supra*, § 1:3 (explaining that when they were originally recognized, "punitive damages had the unique function of compensating for the incompensable intangible harms which would not normally be recognized at common law").

When the doctrine of punitive damages crossed the Atlantic to the United States, this compensatory justification for the doctrine persisted: As this Court has explained, "punitive damages * * * operated to compensate for intangible injuries" "[u]ntil well into the 19th century." *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 n.11 (2001). "So strong, in fact, were the compensatory roots of punitive damages that, in the mid-nineteenth century, many courts and scholars rejected the notion that punitive damages served any punitive purpose at all." Colby, *supra*, at 617. It was not until more recently, "[a]s the types of compensatory damages available to plaintiffs * * * broadened," that "the theory behind punitive damages * * * shifted toward a more purely punitive" one. *Cooper Indus.*, 532 U.S. at 437 n.11.

In light of this evolution in the purpose of punitive damages, even hard historical evidence of punitive damages being awarded in unseaworthiness cases in the nineteenth century—evidence that does not exist—would not be an adequate basis for holding that punitive damages may be awarded for unseaworthiness claims in the twenty-first century. Any "punitive" damages in early unseaworthiness cases would have been relatively modest in amount and would have served, at least in part, a compensatory function. That is a far cry from the sort of punitive damages that would be available under respondent's approach, which would be substantial—even exceeding compensatory damages (see p. 6, *supra*)—and aimed solely at punishing the defendant.

3. Irrespective of whether punitive damages were available in unseaworthiness cases prior to the Jones Act, it would not make sense to permit them to

be recovered in unseaworthiness cases today, in light of the passage of the Jones Act and the close relation between the two causes of action.

Unseaworthiness claims and Jones Act claims—and the remedies available thereunder—have long been closely linked. Congress enacted the Jones Act in response to this Court's holding in *The Osceola*, 189 U.S. 158, 175 (1903), that a seaman was "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." The negligence action brought into being by the Jones Act was thus "an alternative" to a traditional unseaworthiness claim, and a seaman accordingly was entitled to recover under a negligence theory or an unseaworthiness theory, but not both. *Pac. S.S. Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). That was so, this Court explained, because whether "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, "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*." *Ibid.* (emphasis added) (citation omitted).

The rule requiring a seaman to choose between an unseaworthiness claim and a Jones Act claim has since been abrogated (see *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222 & n.2 (1958)), but the two remedies remain closely related. Indeed, in light of the judicial expansion of the unseaworthiness cause of action over the course of the twentieth century, the two remedies now substantially overlap. See Gilmore & Black, *supra*, at 383. Today, many, if not most, plaintiffs can bring unseaworthiness claims to recover for injuries for which the *only*

available remedy at the time of the Jones Act's passage would have been a Jones Act negligence claim. See *McBride*, 768 F.3d at 400-01 (Clement, J., concurring).

In light of the increased overlap between Jones Act and unseaworthiness claims in modern times, the notion that punitive damages may be awarded in connection with unseaworthiness claims is untenable. It has long been established that punitive damages are not available under the Jones Act, because the Jones Act incorporated "unaltered" the remedies available under the Federal Employers Liability Act (FELA), which do not include punitive damages. *Miles*, 498 U.S. at 32; see *McBride*, 768 F.3d at 388 ("Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act."); *Miller* v. *Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) ("Punitive damages are not * * * recoverable under the Jones Act."); *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."). If the Ninth Circuit were correct that punitive damages *are* available for unseaworthiness claims, which now can effectively replicate Jones Act claims, Congress's intent in the Jones Act to limit seamen's right of recovery to compensatory damages would be thwarted by judicial fiat.

Indeed, permitting the recovery of punitive damages in unseaworthiness cases could relegate the Jones Act to near-complete irrelevance. Plaintiffs would have little reason to bring a Jones Act claim, which requires proof of negligence and offers only

compensatory relief, if they could bring an unseaworthiness claim, which offers the promise of strict liability (*Yamaha*, 516 U.S. at 208) and—as respondent sees it—the potential for punitive damages. Perhaps plaintiffs would continue to join Jones Act claims to unseaworthiness claims in order to ensure that both would be tried to a jury. Cf., *e.g.*, *Fitzgerald* v. *U.S. Lines Co.*, 374 U.S. 16, 21 (1963) (holding that, although jury trials are not required in admiralty cases, "a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts"). But that outcome—in which the Jones Act would serve, at most, as a vehicle for obtaining a jury trial on a different cause of action—cannot be squared with the "uniform plan of maritime tort law Congress created in * * * the Jones Act." *Miles*, 498 U.S. at 37. The only way for this Court to honor Congress's intent in enacting the Jones Act is to hold that punitive damages may not be recovered in unseaworthiness cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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