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

AMICI CURIAE BRIEF OF THE DREDGING CONTRACTORS OF AMERICA AND COUNCIL FOR DREDGING & MARINE CONSTRUCTION SAFETY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

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BRIEF OF THE DREDGING CONTRACTORS OF AMERICA AND COUNCIL FOR DREDGING & MARINE CONSTRUCTION SAFETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Dredging Contractors of America ("DCA") represents twenty-eight (28) companies that own and operate hundreds of dredging vessels in and around the oceans and territorial waters of the United States, inland waterways and on the Great Lakes. DCA, a non-profit trade association representing the U.S.-dredging industry and its members, is committed to supporting and protecting America's ports, waterways, wetlands, and beaches. On behalf of its members, DCA works to promote the quality and responsiveness of dredging service delivery in the United States, ensuring that America's ports, waterways, wetlands, and coasts are efficiently constructed and maintained in an environmentally sustainable manner using innovative methods and American ingenuity.

The Council for Dredging and Marine Construction Safety (CDMCS), consisting of twenty-five (25) companies and organizations, is the unified voice for safety in the dredging and marine construction

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

industry. The CDMCS is the leader for raising safety standards in the industry and for promoting a safety-first culture. Its diverse membership supports American maritime infrastructure and the wellbeing of maritime workers, coast-to-coast. The mission of CDMCS is to raise the industry standard on safety to protect workers, resolve safety disputes, and build a safety-first culture.

DCA, CDMCS and their member companies and organizations have a strong interest in the resolution of this case. As maritime industry owners and operators, each is subject to the Jones Act and to general maritime law doctrines such as unseaworthiness. *Amici* file this brief to explain why the issue of punitive damages attached to a claim of unseaworthiness is exceptionally important to the dredging industry.

BACKGROUND

A. The U.S. Dredging Industry's Importance to National and Economic Security

American dredging companies are vital to the U.S. economy by ensuring the nation's harbors and channels are maintained at the appropriate depth and properly widened to accommodate the substantial increase in the size of vessels visiting U.S. ports. Seaport cargo activity supports the employment of more than 23 million people in the United States – an increase of 9.8 million jobs since 2007.[2] Seaport-related jobs also

[2] Martin Associates, *The 2014 National Economic Impact of the U.S. Coastal Port System* (2014), *available at* http://aapa.files.

provide for $1.2 billion in personal income and local consumption.[3] For every $1 billion exports shipped through U.S. seaports, 15,000 jobs are created. Further, seaport cargo activity accounts for 26 percent of the U.S. economy. U.S. seaports generated nearly $4.6 trillion in total economic activity and more than $321 billion in federal, state and local taxes in 2014.[4] Dredging is critical to the success of waterborne commerce to and from the United States, particularly as a result of the newly expanded Panama Canal. Ships transiting the canal are more than twice the size of the vessels that could transit prior to June of 2015.[5]

In addition to its economic contributions, the maritime industry provides important national security benefits, ships, shipyards, mariners, and other elements of our domestic maritime infrastructure to America's military sealift capacity. Indeed, the U.S.-flag commercial shipping industry provides the U.S. military with a highly effective partner in the

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cms-plus.com/SeminarPresentations/2015Seminars/2015Spring/US%20Coastal%20Ports%20Impact%20Report%202014%20methodology%20-%20Martin%20Associates%204-21-2015.pdf.

[3] *Id.*

[4] *Id.*

[5] Owen Braley & William P. Doyle, *The Panama Canal Expansion Proves Real and Dredging Must Continue*, Maritime Logistics Professional (July 17, 2017), *available at* https://www.maritimeprofessional.com/blogs/post/the-panama-canal-expansion-proves-real-and-dredging-must-15220. (More than half of the containerships are 13,000-plus TEU vessels – neo-Panamax ships. These ships are coming from Asia to the U.S. East and Gulf Coasts. Prior to the expansion, the old locks could only fit containerships up to approximately 5,000 TEUs).

provision of military sealift services around the globe by delivering cost-effective service at a high level of performance quality and dependability.[6]

The commercial U.S.-flag maritime industry is the backbone to our nation's war fighting and emergency response mobility. Throughout our nation's history, in peacetime and in war, the U.S.-flag commercial shipping industry has not had to factor into its operations the impact of punitive damages under the Jones Act or personal injury claims within the suite of general maritime laws. This is important because our country needs as many private sector commercial domestic maritime partners as possible in order to sustain our war fighting and emergency response capabilities.

Allowing punitive damages for an injury based on an unseaworthiness claim may stifle new companies from entering the commercial maritime industry because the risks associated with punitive damage awards are too high. Further, commercial maritime operators may be driven out of the industry because the insurance premiums are too expensive, or they simply may not be able to secure insurance policies. Punitive damage awards could also put existing companies out of business. Therefore, this Court should not allow punitive damage remedies to attach to Jones Act personal injury claims or unseaworthiness claims because doing

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[6] Navy League of the United States, *America's Maritime Industry: The foundation of American seapower* (May 3, 2012), *available at* https://www.navyleague.org/file/programs/Maritime-Policy-Statement-Report.pdf.

so could pose a significant risk to our national and economic security.

B. U.S. Dredging Industry and Economic Benefits

The U.S.-flag dredging industry is part of the more than 40,000 American vessels built in American shipyards, crewed by American mariners, and owned by American companies that operate in our domestic waters 24 hours a day, 7 days a week, and 365 days a year. The U.S.-flag maritime industry sustains nearly 650,000 American jobs and generates $29 billion in labor compensation, $11 billion in taxes, and more than $100 billion in annual economic output. Allowing punitive damages could hurt the employment opportunities for U.S. Merchant Mariners (seamen) because companies may find the risks too great to invest in the U.S.-flag commercial shipping industry – and without companies, there are no commercial seafarer jobs.

The American dredging industry is amid a $1.5 billion dredging fleet expansion. In 2017, the U.S.-flagged hopper dredging fleet capacity increased by 34 percent with the addition of two large dredges built for Great Lakes Dredge & Dock Company and Weeks Marine. Thus, new capital construction investment includes four large cutter suction dredges, two large hopper dredges and approximately fifty (50) barges built in shipyards across the United States, including at Eastern Shipbuilding in Panama City, Florida, Conrad Shipyard in Morgan City, Louisiana, and Halimar

Shipyard, also in Morgan City. In addition, Callan Marine is constructing a massive 32-inch hydraulic cutter suction dredge at C&C Marine Shipyard in Belle Chasse, Louisiana. Dutra Group is currently building two 6,000 cubic yard hydraulic dump scows in Corn Island Shipyard in Grandview, Indiana. Weeks Marine is building a 30-inch cutter head suction dredge at C&C Marine Shipyard. Further, Manson Construction has commenced the design phase on a large-scale, self-propelled Glenn Edwards Class hopper dredge, and Cashman Dredging is procuring long-lead time equipment for the construction of two 6,000 cubic yard hopper dredges.

The private sector dredging industry's investment and capital decisions are made on the best available market data and with a level of certainty. Importantly, these investment decisions made by large and small businesses alike have never had to factor in the uncertainty of potential future maritime-related punitive damage awards against the companies.

The inability to anticipate when punitive damages would be assessed in Jones Act plaintiff suits, and the size of those potential punitive damage awards, could cause dredging companies to retain emergency funds to hedge against damage awards – funds they would otherwise invest in capital improvements or use for hiring additional workers. Further, insurance premiums would most certainly increase to keep up with the increased cost of litigating claims where the potential for punitive damages exist. Ultimately, as most dredging projects are funded through contracts with federal,

state and local governments, these costs would have to be passed on to the taxpayer – and that is not fair.

C. The U.S. Dredging Industry is Highly Competitive on Taxpayer Funded Projects

The U.S. dredging industry is highly competitive, with on average, more than fifty (50) different companies being awarded federal work each year and eighty (80) different companies bidding on that work each year. Congress recently acknowledged small businesses are very active in the dredging industry.[7] Congress has appropriated over $6 billion in awarded federal dredging projects over the past five years (fiscal years 2013-2017).[8] Further, states and local governments are contributing their own funds to help complete channel and harbor deepening as well as widening dredging projects. For instance, South Carolina has contributed $300 million of its own money, plus a $50 million loan in order to complete its

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[7] Nearly $2 billion is spent in contracts to small businesses for dredging related activities. Of the 40 companies that dredge for the Corps, 28 are small businesses (*based on fiscal year 2017*). *See* S. Rept. 115-294 – AMERICA'S WATER INFRASTRUCTURE ACT OF 2018.

[8] Total 5-Year Federal Dredging Program Awarded $6,009,875,887: FY17 = $1,288,882,502, FY16 = $1,022,910,102, FY15 = $1,397,740,044, FY14 = $968,244,688, FY13 = $1,332,098,551. *(Data compiled from contract data on FedBizOpps.gov, GovTribe.com, dredging abstracts provided by the U.S. Army Corps of Engineers, and input from U.S. dredging companies).*

Charleston Harbor deepening project.[9] Georgia has contributed nearly $266 million for its Savannah Harbor Expansion Project (SHEP) and its 2019 budget includes $35 million more in taxpayer funds.[10] Pennsylvania is contributing 35 percent or $140 million of the total $400 million for the Delaware River deepening project.[11] Finally, states and counties including in Michigan and Virginia are turning toward tax increment financing (TAF) to help support dredging projects.[12]

In a highly competitive and healthy dredging industry, the companies bidding for projects important to our nation have never had to factor into their dredging bids the potential for future punitive damage awards.

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[9] Emma Dumain, *More money could be coming for Charleston port project*, McClatchy DC (October 29, 2018), *available at* https://www.mcclatchydc.com/news/nation-world/national/regional/the-south/article220782365.html.

[10] Katie Nussbaum, *More funding approved for Savannah harbor*, Savannah Morning News (Savannah Now) (June 26, 2018), *available at* https://www.savannahnow.com/business/20180626/more-funding-approved-for-savannah-harbor-deepening.

[11] Andrew Maykuth, *Delaware River deepening: 30 years and 16 million cubic yards of sand, muck and rock later*, The Philadelphia Inquirer (Philly.com) (December 27, 2018), *available at* http://www.philly.com/news/delaware-river-dredging-deepening-finish-philaport-army-corps-20181227.html.

[12] *See* Governor Rick Snyder, *Bill signed to allow tax increment financing for waterfront improvement projects* (May 10, 2013), *available at* https://www.michigan.gov/snyder/0,4668,7-277-57577_57657-302666–,00.html; *see also* Virginia Association of Counties, *Tax Increment Financing for Dredging Passes House* (February 5, 2018), *available at* http://www.vaco.org/tax-increment-financing-dredging-passes-house/.

If dredging companies become subject to punitive damage claims and awards, then these companies would have to factor into their bid submissions computations that would ultimately have to be passed-on to the taxpayers.

It is Congress that authorizes all federal dredging projects and appropriates the funding. Moreover, it was Congress in 1986 that allowed non-federal sponsors (such as states and local governments) cost sharing authority to help pay for dredging projects.[13] Importantly, Congress has not authorized punitive damage remedies for personal injuries under the Jones Act or a general maritime claim of unseaworthiness. If this Court were to allow punitive damages in these instances, then it would upset the uniform balance in maritime law that dredging companies, and federal and state governments, have relied on for decades when assessing the cost of dredging projects. Punitive damages attached to maritime personal injury claims have been addressed by Congress, it is settled law, and this Court should not disturb the uniform rights and remedies that have provided certainty to the dredging community and the wider commercial maritime industry.

[13] *See* Water Resources Development Act of 1986, Public Law 99-662, 100 Stat. 4082-4273.

SUMMARY OF ARGUMENT

This Court should reverse the Ninth Circuit's decision and preserve an appropriate scope of relief for unseaworthiness claims. It is likely that allowing punitive damages to attach to an unseaworthiness claim would substantially increase the costs to ship owners through higher damages awards, higher settlements, and potentially higher insurance premiums (if insuring against punitive damages is legal). Simply put, Congress has not passed any laws allowing punitive damage remedies under the Jones Act or for injuries suffered from a breach of the general maritime duty to provide a seaworthy vessel.

ARGUMENT

I. Remedies: Wages, Maintenance and Cure, Unseaworthiness and Jones Act

There is a difference between available remedies pursuant to maritime law. There are remedies available to seamen that derive from the employer and employee relationship. These remedies include payment of wages and the responsibility to provide maintenance and cure. Then, there are tort remedies for personal injuries resulting from negligence while a seaman is in the service of the vessel; and tort remedies for personal injuries resulting from the unseaworthiness of a vessel.

As this Court previously observed, "[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 Merchant Marine Act of 1920, commonly known as the Jones Act, permits a seaman to bring a personal injury or wrongful death action based on negligence. 46 U.S.C. § 30104; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990). In 1944, twenty-four (24) years post-enactment of the Jones Act, the Supreme Court confirmed that the duty of the shipowner to supply a vessel and appurtenances adequate for the purposes of ordinary use was not based on negligence principles but was "absolute",[14] i.e., strict liability. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).[15]

Evolving over time, we get to *Miles*, where the Supreme Court addressed the scope of damages recoverable in actions for unseaworthiness. There, this Court

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[14] The United States Supreme Court first indicated that the shipowner's duty to furnish a seaworthy vessel was "absolute" in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922).

[15] *Mahnich*, 321 U.S. 96, 100 ("[T]he exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances. . . . If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness.").

declared: "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," i.e., unseaworthiness, "than Congress has allowed in cases of death resulting from negligence," i.e., the Jones Act. 498 U.S. at 32-33. Further, the Court held that the Jones Act "precludes recovery for loss of society" on unseaworthiness claims. *Id*. at 30, 32-33.

Subsequently, in *Atlantic Sounding Co. v. Townsend*, this Court held that punitive damages are available "for the willful and wanton disregard of the maintenance and cure obligation" – a general maritime legal duty requiring a shipowner to provide wages, food, lodging, and medical treatment to a wounded or ill seaman. 557 U.S. 404, 424 (2009). This Court explained that "punitive damages have long been an accepted remedy under general maritime law, and . . . nothing in the Jones Act altered this understanding." *Id*.

The Ninth Circuit in *Batterton v. Dutra* is relying on *Townsend*, finding that because punitive damages are available for general maritime law claims for maintenance and cure, then punitive damages are also available for a claim of unseaworthiness. However, in *McBride v. Estis Well Serv., LLC*, 768 F.3d 382, 391 (5th Cir. 2014), the Fifth Circuit found *Miles* controlling, reasoning that punitive damages are not permitted for personal injury and death claims under the Jones Act, and therefore, punitive damages are likewise not available for unseaworthiness claims.

In summary, this Court has ruled that shipowners are liable for punitive damages if the shipowner *willfully and wantonly* refuses to pay wages and/or provide food, lodging, and medical treatment to a wounded or ill seaman. However, this Court draws a transparent and distinct line separating a shipowner's willful and wonton conduct related to a maintenance and cure action from a personal injury claim based on negligence or unseaworthiness where punitive damage remedies are not allowed.

II. The Ninth Circuit Should Be Reversed Because Congress Did Not Intend Punitive Damage Remedies for Unseaworthiness Claims

In the historical and precedent setting decision, *The Osceola*, 189 U.S. 158, 177 (1903), this Court ruled in the "negative" when asked to decide whether a vessel, its owners or the master could be held responsible for injuries by negligence of the master or other crewmembers. The unanimous decision held, " . . . the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure whether the injuries were received from negligence or accident." *Id*. at 158. *Osceola* did confirm and settle important rights for seamen including when a mariner falls sick or is wounded while in the service of the vessel where the seaman is entitled to maintenance and cure and wages due for the entire voyage. Notably, the *Osceola* decision

clearly barred negligence claims brought by a seaman and instead left that matter for Congress.

It is important that settled maritime rights and remedies should not be undermined by interpreting unseaworthiness radically different than the laws enacted by Congress. Congress did enact legislation addressing negligence post-*Osceola*, providing a comprehensive approach towards remedies for a seaman's injury or death.

In response to *Osceola*, Congress first attempted to legislate protections for seamen by enacting the Act to Promote the Welfare of the American Seaman Act ("The Seamen's Act") in 1915.[16] Here though, this Court soon after determined that Congress did not appropriately legislate language that would allow seamen the right to assert a claim of negligence under the Seamen's Act.[17]

In Congress' second attempt to square *Osceola*'s negligence gap, it enacted the Merchant Marine Act of 1920, i.e., Jones Act.[18] In doing so, Congress borrowed

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[16] Act of March 4, 1915, ch. 153, sec. 20, Pub. L. No. 63-302, 38 Stat. 1164, 1185 (1915). Section 20 of the Seamen's Act provides: "In any suit to recover damages for any injury sustained on board [a] vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

[17] *Chelentis v. Luckenbach Steamship Co*., 247 U.S. 372, 384 (1918) (finding the Seamen's Act of 1915 addressed only the Osceola's so-called fellow servant rule, and not negligence).

[18] Act of June 5, 1920, ch. 250, sec. 33, Pub. L. No. 66-261, 41 Stat. 988, 1007 (1920) (codified as 46 U.S.C. app. § 688(a) (2000)).

directly from the Federal Employers Liability Act[19] ("FELA") extending to seamen the same regulatory recovery regime that applies to railway employees for personal injury or death.[20] Seamen could recover pecuniary losses but not for non-pecuniary losses. Importantly, punitive damages were not made available under the Jones Act because Congress incorporated the remedies available under FELA, which do not include punitive damages.

The *Batterton v. Dutra* decision below cannot be reconciled with this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990), holding that

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It is known as the "Jones Act," in honor of Sen. Wesley L. Jones (R. Washington), its principal sponsor.

[19] Act of April 22, 1908, ch. 149, Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified at 45 U.S.C. §§ 51-60 (2000)), known as FELA.

[20] Section 20, Merchant Marine Act of March 4, 1920 states:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to *railway employees* shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of *railway employees* shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (*emphasis added*).

the estate of a deceased seaman cannot recover loss of society damages in a wrongful death action based on either unseaworthiness or Jones Act negligence.[21] A key component of *Miles'* analysis was reliance upon *Michigan Central Railroad Co. v. Vreeland*,[22] interpreting that FELA's pecuniary loss limitation is incorporated into the Jones Act and therefore "precludes recovery for loss of society," which, like punitive damages, is a non-pecuniary loss.[23] Specifically, this Court wrote, "Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation."[24]

Further, this Court zeroed-in on the constitutional role of Congress as the legislator, and the need for courts to exercise judicial restraint where Congress has acted:

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[21] *Miles*, 498 U.S. at 21-22 (Administratrix of the estate sought compensation for loss of support and services and loss of society resulting from the death of her son, *punitive damages*, and compensation to the estate for her son's pain and suffering prior to his death and for his lost future income. At trial, the District Court granted Apex's motion to strike the claim for *punitive damages*, ruled that the estate could not recover for son's lost future income, and denied Miles' motion for a directed verdict as to negligence and unseaworthiness.).

[22] *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913).

[23] *Miles*, 498 U.S. at 32.

[24] *Id*.

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that [seaman] had been killed as a result of the unseaworthiness of the vessel. 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. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.[25]

Lower courts, both state and federal, had consistently followed this Court's reasoning in *Miles* as precluding punitive damages in unseaworthiness actions.[26] However, in a ruling issued by the Washington Supreme Court in 2017, that court held that "a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law." *Tabingo v. American Triumph LLC*, 391 P.3d 434 (Wash. 2017), cert. denied, 138 S. Ct. 648 (2018). The

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[25] *Id.*, 498 U.S. at 32-33.

[26] *See McBride*, 768 F.3d at 388-389; *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1455, 1457-1459 (6th Cir. 1993); *Wahlstrom v. Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993); *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).

Ninth Circuit has now joined the Washington Supreme Court by holding in *Batterton v. Dutra* that punitive damages are available in an action under general maritime law based on a claim that the vessel was unseaworthy. These two rulings upset the uniform and understood legal precedents followed by the entire U.S.-maritime industry.

In *McBride*, the Fifth Circuit comprehensively reviewed the availability of damages in maritime cases and concluded that punitive damages are not available in unseaworthiness actions. *McBride*, 768 F.3d at 389-390. As the Fifth Circuit explained, *Miles* rather than *Townsend* provides the most direct guidance on that question. *Miles* instructs that courts considering a remedy in unseaworthiness cases should look to whether Congress has authorized that remedy in the Jones Act. *Id*. at 387-390. *Townsend* did not disturb that understanding; indeed, "[t]he Court [in *Townsend*] could not have been clearer in signaling its approval of *Miles* when it added: 'The reasoning of *Miles* remains sound.' " *Id*. at 390 (quoting Townsend, 557 U.S. at 420). *Townsend* expressly distinguished claims for maintenance and cure, which were at issue there, from claims for unseaworthiness, which were at issue in *Miles* (and are at issue here in *Batterton v. Dutra*): Whereas "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,' " "the [Jones Act] negligence/unseaworthiness actions are alternative, overlapping actions derived from the same accident and look toward the same recovery." *Id*. at 389 & n.36

(quoting *Townsend*, 557 U.S. at 423). The Fifth Circuit concluded that the available remedies must be assessed by reference to the cause of action and that *Miles* remains undisturbed.

Miles remains undisturbed and is the controlling precedent for unseaworthiness actions. Where this Court can find that a seaman *killed* as a result of an unseaworthy vessel cannot recover non-pecuniary losses, it is logical then that this Court should find that a seaman *injured* as a result of an unseaworthy vessel cannot recover non-pecuniary losses. Finally, Congress has not legislated that punitive damages are an available remedy and therefore, this Court should find that punitive damages cannot be an available remedy for an unseaworthiness claim.

III. Allowing Punitive Damages Creates Uncertainty and Disturbs Uniformity in the Maritime Industry

It is likely that allowing punitive damages to attach to an unseaworthiness claim would substantially increase the costs to shipowners through higher damage awards, higher settlements, and potentially higher insurance premiums (if insuring against punitive damages is legal).

Jones Act negligence and unseaworthiness claims are usually raised as companion claims and rely on the same set of facts to establish liability. Given the

"featherweight"[27] standard necessary to establish negligence under the Jones Act, and the strict liability standard for unseaworthiness, it would be easier for claimants to raise punitive damage claims that arise out of simple negligence. If punitive damages are available for unseaworthiness claims, vessel owners and operators will expend significantly more time, effort and expense defending against the specter of punitive damages. This will raise the monetary value of settlements. Companies will be forced to settle claims rather than engage in expensive and time-consuming litigation. Such changes will lead directly to substantial increases in insurance premiums for all Jones Act employers, not just the few who may be assessed punitive damages.

Dredging companies and the wider commercial maritime industry rely on traditional insurance policies to provide predictability. Liability policies that cover Jones Act and unseaworthiness claims generally exclude punitive damages from coverage, and some states prohibit insurers from covering punitive damages by statute or based on public policy.[28]

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[27] The "featherweight" causation standard is applied in Jones Act seamen's cases. *See Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). ("Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.").

[28] *See Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

While certain large companies may be able to leverage insurers for this coverage, most small- and medium-size dredging contractors will not find a market offering coverage for punitive damages.[29] Some dredging companies may address this risk by retaining or diverting funds that would otherwise be used for increased productivity, hiring seamen and/or investing in capital improvements. Smaller dredging companies, however, may not have the financial ability to plan for a catastrophic punitive damage award. Ultimately, the cost of any insurance policy or design of a catastrophic fund will be factored into dredging contract proposals and, as such, costs would be passed onto the taxpayer – which is not fair to the dredging companies or the taxpayer.

CONCLUSION

Punitive damages should not be awarded to a Jones Act seaman in a personal-injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel. The general maritime claim here

[29] Some policies may be silent on the issue of coverage for punitive damages; in this circumstance, courts generally defer to the applicable state law for determination of whether punitive damages would be covered under the policy language. *See Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992). Such a result is inconsistent with the need for uniformity in maritime contracts, and would further hamper employers from being able to anticipate an uninsured punitive damage claim, as payment for a punitive damage award could be different depending on where the vessel is operating.

alleged is that a seaman has been injured as a result of the unseaworthiness of the vessel. It would be inconsistent with this 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 than Congress has allowed in cases of personal injury resulting from negligence.

The U.S. maritime industry has been living under a set of established laws and uniform rules with respect to unseaworthiness claims. Like the *Miles* Court concluded, damages available in unseaworthiness cases may not exceed the damages Congress allowed when it comprehensively addressed remedies for seamen in the Jones Act. Therefore, the U.S. Supreme Court should not impose a judicially created cause of action allowing punitive damages for unseaworthiness claims.

Respectfully submitted.

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