No. 18-_____

In The
Supreme Court of the United States

ANN WILMA PETERSEN,

Petitioner,

v.

NCL (BAHAMAS), LTD.
d/b/a NORWEGIAN CRUISE LINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID DEEHL, ESQUIRE
DEEHL PLLC
2655 South Le Jeune Road, Suite 524
Coral Gables, Florida 33134
Telephone: (305) 448-9111
Facsimile: (305) 442-0441
Email: david@deehl.com

PAULO R. LIMA, ESQUIRE
Counsel of Record
ELIZABETH K. RUSSO, ESQUIRE
RUSSO APPELLATE FIRM, P.A.
7300 N. Kendall Drive, Suite 600
Miami, Florida 33156
Telephone: (305) 666-4660
Facsimile: (305) 666-4470
Email: prl@russoappeals.com
Email: ekr@russoappeals.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

Whether spouses of personal injury plaintiffs are entitled to recover loss of consortium damages under general maritime law in light of this Court's holding in *American Export Lines v. Alvez*, 446 U.S. 274 (1980), answering that question in the affirmative.

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

Petitioner, Ann Wilma Petersen ("Plaintiff" or "Mrs. Petersen"), was one of the plaintiffs in the District Court and one of the appellants in the Court of Appeals. Mrs. Petersen's husband, Robert, was also a plaintiff before the District Court and appellant in the Court of Appeals. However, the Court of Appeals remanded Mr. Petersen's claims for further proceedings, so he is not a party to this Petition.

Respondent, NCL (Bahamas) Ltd., d/b/a Norwegian Cruise Line ("Defendant" or "Norwegian"), was the defendant in the District Court and the appellee in the Court of Appeals. With respect to Norwegian's corporate ownership, Petitioner quotes below the corporate disclosure made by Norwegian on January 11, 2018 in the Court of Appeals:

> Norwegian is a wholly-owned subsidiary of NCL International, Ltd., a Bermuda company, which in turn is a wholly-owned subsidiary of Arrasas Limited, an Isle of Man company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company ("NCLC"). NCLC is [a] subsidiary of Norwegian Cruise Line Holdings Ltd., a Bermuda company publicly traded on NASDAQ ("NCLH"). NCLH in turn is owned by: Star NCLC Holdings Ltd., a Bermuda company ("Genting HK"); one or more of AIF VI NCL

PARTIES AND RULE 29.6 STATEMENT
– Continued

(AIV), L.P., AIF VI NCL (AIV II), L.P., AIF VI NCL (AIV III), L.P., AIF VI NCL (AIV IV), L.P., AAA Guarantor – Co-Invest VI (B), L.P., Apollo Overseas Partners (Delaware) VI, L.P., Apollo Overseas Partners (Delaware 892) VI, L.P., Apollo Overseas Partners VI, L.P., Apollo Overseas Partners (Germany) VI, L.P., AAA Guarantor – Co-Invest VII, L.P., AIF VI Euro Holdings, L.P., AIF VII Euro Holdings, L.P., Apollo Alternative Assets, L.P., Apollo Management VI, L.P. and Apollo Management VII, L.P., (collectively, the "Apollo Funds"); one or more of TPG Viking, L.P., TPG Viking AIV I, L.P., TPG Viking AIV II, L.P., and TPG Viking AIV-III, L.P. (collectively, the "TPG Viking Funds"); and public shareholders. As of January 31, 2016, the relative ownership percentages of NCLH's ordinary shares were approximately: Genting HK (11.1%), Apollo Funds (15.8%), TPG Viking Funds (2.3%) and public shareholders (70.8%).

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JURISDICTION

The Eleventh Circuit filed its opinion on September 5, 2018. (App. 1). The court denied Appellant's motion for panel rehearing by order dated October 18, 2018. (App. 34-35). This Court has jurisdiction to review the Eleventh Circuit's judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

There are no relevant constitutional or statutory provisions.

STATEMENT OF THE CASE AND FACTS

A. Facts Pertinent to Mr. Petersen's Injury and Mrs. Petersen's claim for loss of consortium

Mrs. Petersen's husband, Robert, suffered a serious head injury when he slipped and fell while walking across the deck aboard one of Norwegian's cruise ships,

the *Breakaway*. (App. 3-4). The fall occurred on October 22, 2015, while the Petersens were passengers aboard the *Breakaway* docked in Bermuda. (App. 3). Mr. Petersen was knocked unconscious in the fall and sustained bleeding on his brain, which caused him to suffer from continuing "headaches, impaired vision, equilibrium problems, speech problems, and memory problems." (App. 3-4).

B. Proceedings in the District Court

The Petersens filed suit against Norwegian, with Mr. Petersen asserting a negligence claim and Mrs. Petersen seeking to recover damages for loss of consortium. (App. 1-2). Because the injuries giving rise to suit occurred on navigable waters, the parties agreed that federal maritime law controls this case. (App. 7).

Norwegian moved for summary judgment as to Mr. Petersen's negligence claim, arguing that it had no duty to warn him because (1) the dangerous condition that caused Mr. Petersen's injury was open and obvious, and (2) Defendant had no notice of the dangerous condition. (App. 5). Norwegian also sought summary judgment on Mrs. Petersen's loss of consortium claim, arguing that "maritime law does not recognize a cause of action for loss of consortium." (App. 5).

The District Court granted Norwegian's motion as to both claims, and entered final judgment on November 20, 2017. (App. 6).

C. Proceedings Before the Eleventh Circuit

The Eleventh Circuit reversed the summary judgment as to Mr. Petersen's negligence claim and remanded the case for further proceedings. (App. 8-11). However, the court affirmed the summary judgment as to Mrs. Petersen's claim for loss of consortium. (App. 11-12). The court concluded that it was bound by its prior holding in *In re Amtrak Sunset Ltd. Train Crash in Bayou Carnot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997), and *Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565, 1565 (11th Cir. 1993), where it held that common law remedies of punitive damages and loss of consortium are not available to personal injury plaintiffs under general maritime law. (App. 11). The court summarily rejected the Petersens' argument that it should revisit its prior holdings in light of this Court's more recent decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). (App. 11-12).

Norwegian filed a petition for panel rehearing of the decision reversing the summary judgment on Mr. Petersen's negligence claim, which the court denied on October 18, 2018. (App. 34-35). Accordingly, while Mr. Petersen's negligence claim is now pending on remand before the District Court, the judgment in Norwegian's favor as to Mrs. Petersen's loss of consortium claim is final and subject to review.

REASONS WHY CERTIORARI IS WARRANTED

The Eleventh Circuit's decision ignores the prior decision of this Court in *American Export Lines v. Alvez*, 446 U.S. 274 (1980), which expressly held that spouses of persons injured on navigable waters are entitled to seek loss of society damages under general maritime law. Instead, the decision below relies on prior circuit court decisions, which applied an erroneous interpretation of this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) – an interpretation which this Court has expressly rejected in *Townsend*. Despite that rejection, the Eleventh Circuit has continued to misapply this Court's precedents to deny spouses of personal injury litigants the right to pursue claims for loss of consortium or loss of society under general maritime law.

Worse, the Eleventh Circuit is not alone in its error, as several other circuits also have misapplied *Miles* to reach the same erroneous result. The Constitution grants this Court the authority to develop federal maritime law. U.S. Const. art. III, § 2. The Court should exercise that authority now to prevent similarly situated litigants across the country from being denied a remedy that this Court has already held they are entitled to pursue.

This Court recently granted certiorari in a case that presents the same overarching issue at the heart of this appeal – *i.e.*, what remedies are available to litigants asserting claims under general maritime law for non-fatal injuries, in light of this Court's decisions in

Miles and *Townsend*. *See Batterton v. Dutra Group*, 880 F.3d 1089 (9th Cir. 2018), *cert. granted*, ___ S.Ct. ___, 2018 WL 4185911 (U.S. Dec. 7, 2018) (No. 18-266). Petitioner submits that granting review in this case, in tandem with *Batterton*, will afford this Court an ideal vehicle for providing definitive guidance to lower courts regarding the remedies available to personal injury litigants asserting claims under general maritime law.

I. THE COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

The Court should grant certiorari because the Eleventh Circuit's holding cannot be reconciled with this Court's precedents.

A. This Court has recognized the availability of loss of consortium damages under general maritime law

In *Sea-Land Services, Inc. v. Gaudet*, this Court held that the widow of a longshoreman killed as a result of injuries sustained in navigable waters was entitled to recover for "loss of support, services, and society" under general maritime law. 414 U.S. 573, 584 (1974). In so holding, the Court recognized that "since the 17th century, juries have assessed damages for loss of consortium – which encompasses loss of society – in

civil actions brought by husbands whose wives have been negligently injured." *Id.* at 589 & n.25 (collecting cases). The Court added that "[d]amages for loss of consortium have been awarded by courts of admiralty as well," for what is now more than a century. *Id.* at n.25 (citing *N.Y. & Long Branch Steamboat Co. v. Johnson*, 195 F. 740 (3d Cir. 1912), and 1 E. Benedict, Admiralty 366 (6th ed. 1940) ("When a personal injury to a wife is maritime by locality, her husband may recover his damages for loss of her services, loss of consortium, etc., in admiralty.")).

Six years later, this Court expressly extended the holding of *Gaudet* to hold that "general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." *Alvez*, 446 U.S. at 276 (emphasis in original). As it had done in *Gaudet*, the Court in *Alvez* recognized that "a clear majority of States permit a wife to recover damages for loss of consortium from personal injury to her husband." *Alvez*, 446 U.S. at 284 & n.11 (collecting cases).

B. Circuit courts, including the Eleventh Circuit, departed from this Court's holding in *Alvez*, based on their misreading of *Miles*

Notwithstanding *Alvez*, circuit courts retreated from its holding, based on a misinterpretation of this Court's later decision in *Miles v. Apex Marine Corp.*,

498 U.S. 19 (1990). In *Miles*, the Court held that "there is no recovery for loss of society in a general maritime action for the ***wrongful death*** of a Jones Act seaman." *Id.* at 33 (emphasis added). The Court based its holding on the fact that (1) the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301 *et seq.*, expressly limits recovery to "pecuniary" damages only; and (2) the Jones Act, 46 U.S.C. §§ 30101 *et seq.*, does not address what damages are recoverable, but case law in place at the time of its enactment suggested that "Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 31-32.

Although *Miles* was a wrongful death case, circuit courts extended its rejection of loss of society damages to bar those damages in ***personal injury*** claims asserted under general maritime law. A leading case – and the case on which the decision below ultimately rests – is *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992). There, the Fifth Circuit, citing *Miles*, held that a loss of consortium claim was not available to the wife of an injured seaman under general maritime law. *Id.* at 188. The Fifth Circuit reasoned that, even though *Miles* was a wrongful death case and *Michel* involved personal injury, the holding of *Miles* was dispositive because "the Supreme Court stressed the importance of uniformity concerning the claims available under the Jones Act and general maritime law." *Id.* at 191 ("We choose to follow the lead of *Miles* and hold that damages recoverable in general maritime cause of action for personal injury of a Jones Act seaman do not include loss of consortium.").

The Eleventh Circuit expressly adopted that holding from *Michel*. *See Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565, 1565 (11th Cir. 1993). The panel decision below, in turn, relied upon *Lollie*. (App. 11). Thus, the decision below is based squarely on the Fifth Circuit's expansive interpretation of this Court's decision in *Miles*.

C. This Court, in *Townsend*, expressly rejected the erroneous reading of *Miles* on which the decision below is based

This Court, in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), has since emphatically rejected the overly broad interpretation of *Miles* that is the basis for the holdings in *Michel*, *Lollie*, and the decision below.

In *Townsend*, just as in *Miles*, this Court was asked to determine the scope of the remedy available to a litigant asserting a cause of action under general maritime law – in *Townsend*, the question was whether punitive damages were available to a litigant asserting a claim for maintenance and cure. *Townsend*, 557 U.S. at 407. In holding that punitive damages were available, this Court expressly disavowed the expansive interpretation of *Miles* that the Jones Act or DOHSA governed the remedy available for a *personal injury* claim being asserted under general maritime law. *See id.* at 419 ("Petitioners' reading of *Miles* is far too broad.").

The Court held that the statute-based limitation on available remedies discussed in *Miles* applied only to wrongful death actions, not to personal injury claims, which (unlike wrongful death) have been recognized under general maritime law since long before the Jones Act and DOHSA were enacted. Justice Thomas, writing for the majority, explained:

> [I]t was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed; until then, there was no general common law doctrine providing for such an action. As a result, to determine the remedies available under the common-law wrongful death action, "an admiralty court should look primarily to these legislative enactments for policy guidance." [*Miles*, 498 U.S. at 27]. It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA.
>
> . . .
>
> Unlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established well before the passage of the Jones Act . . . It is therefore possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which

> "Congress has spoken directly." *See Miles*, *supra*, at 31.

Townsend, 557 U.S. at 420.

That analysis from *Townsend* applies squarely to this case. It is beyond dispute that personal injury negligence actions were recognized under maritime law before enactment of the Jones Act or DOHSA. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001) ("The general maritime law has recognized the tort of negligence for more than a century."). This Court has also noted that loss of consortium damages "have been awarded by courts of admiralty" prior to the passage of either statute. *See Gaudet*, 414 U.S. at 589 n.25 (citing *N.Y. & Long Branch Steamboat Co. v. Johnson*, 195 F. 740 (3d Cir. 1912), and 1 E. Benedict, Admiralty 366 (6th ed. 1940)). *See also The Sea Gull*, 21 F. Cas. 909 (No. 12,578) (C.C.Md. 1865) (holding the husband of a woman killed aboard a steamship could recover under admiralty law "for damages to him through injuries to her").

The *Townsend* Court also rejected the argument that the need for "uniformity" warrants denying a remedy in a personal injury action asserted under general maritime law – unless Congress has stated that limitation expressly in an applicable statute. 557 U.S. at 424 ("The laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action.").

In short, this Court's holding in *Townsend* wiped out the basis for the decision below – *i.e.*, the overly expansive reading attributed to *Miles* by the Fifth Circuit and then adopted by the Eleventh Circuit. Accordingly, this Court's holding in *Alvez* recognizing loss of consortium or loss of society claims in personal injury actions under general maritime law remains good law. The decision below conflicts directly with that holding.

II. REVIEW IS WARRANTED BECAUSE OTHER CIRCUITS HAVE COMMITTED THE SAME ERROR, DEPRIVING MARITIME LITIGANTS OF A REMEDY THIS COURT RECOGNIZED ALMOST FOUR DECADES AGO

This issue does not involve a split among the circuit courts of appeals. While that often weighs against granting certiorari, here it is a powerful reason why certiorari should be granted.

At least three other circuits have joined the Fifth and Eleventh Circuits in holding loss of consortium damages are not available for personal injury claims under general maritime law, ***based on the same erroneous reading of Miles***. *See Doyle v. Graske*, 579 F.3d 898, 908 (8th Cir. 2009) ("Given the value of uniformity recognized in *Miles*, we agree with the Fifth and Ninth Circuits that general maritime law does not allow recovery of loss-of-consortium damages by the spouses of nonseafarers negligently injured beyond the territorial waters of the United States.") (internal citation omitted); *Chan v. Society Expeditions, Inc.*, 39 F.3d

1398, 1408 (9th Cir. 1994) (holding "loss of consortium and loss of society damages are not available in these circumstances [personal injury claims brought by non-seamen] under general maritime law," based on "the goal of uniformity in remedies in maritime cases that the Supreme Court emphasized in *Miles*"); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) ("Under the analysis prescribed in *Miles* . . . , an admiralty court may not extend the remedies available in an unseaworthiness action under the general maritime law to include punitive damages or damages for loss of parental or spousal society.").

The Second Circuit also bars loss of consortium damages for the spouses of maritime personal injury plaintiffs, albeit that decision pre-dates all of this Court's jurisprudence on the subject. *Igneri v. Cie. De Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963). Indeed, Petitioner is not aware of any circuit that presently follows a different rule, which means that all similarly situated litigants in U.S. courts (*i.e.*, spouses of personal injury plaintiffs asserting claims under general maritime law) are being denied a remedy that this Court recognized as available to them almost 40 years ago.

Finally, the sheer number of litigants deprived of this remedy is undoubtedly significant. Recent cruise industry statistics show that more than 11.6 million passengers departed U.S. ports in 2016. *See* Cruise Lines International Association, *The Contribution of the International Cruise Industry to the U.S. Economy*

in 2016, at 11 (Oct. 2017).[1] Today's vessels are more than mere transportation, but "state-of-the-art cruise ships that house thousands of people and operate as floating cities." *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1239 (11th Cir. 2014). One popular travel publication listed the following on-ship activities available to passengers, all of which substantially increase the risk of serious injury: bungee trampolines, ropes courses with zip lines and swinging bridges, climbing walls, sky-diving simulators, surfing simulators, and water slides. Meredith Rosenberg, *The 12 Most Thrilling Cruise Ship Activities*, CONDE NAST TRAVELER (Aug. 5, 2014).[2]

In sum, the overwhelming majority of married personal injury litigants departing U.S. ports aboard these "floating cities" are being deprived of a remedy based on the lower courts' continuing misapplication of *Miles*.

III. THIS COURT RECENTLY GRANTED CERTIORARI TO DECIDE ISSUES CLOSELY RELATED TO THOSE PRESENTED IN THIS CASE

Earlier this month, this Court granted certiorari in *Batterton v. Dutra Group*, 880 F.3d 1089 (9th Cir.

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[1] *Available at*: https://cruising.org/docs/default-source/research/us_economicimpact-100217.pdf?sfvrsn=2 (last visited on Dec. 11, 2018).

[2] *Available at*: https://www.cntraveler.com/galleries/2014-08-05/most-thrilling-cruise-ship-activities (last visited Dec. 11, 2018).

2018), *cert. granted*, ___ S.Ct. ___, 2018 WL 4185911 (U.S. Dec. 7, 2018) (No. 18-266). The question presented in that case is: "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." Petition for Writ of Certiorari, at i, *Dutra Group v. Batterton*, No. 18-266 (U.S. Aug. 30, 2018). Thus, like the instant case, *Batterton* presents the issue of what remedies are available to litigants asserting general maritime causes of action to recover for personal injuries.

Like the arguments set out above, the petitioner's arguments in *Batterton* focus on this Court's holdings in *Miles* and *Townsend*, and the interplay between the two. This includes: (1) whether the discussion in *Townsend* regarding available remedies is limited to maintenance and cure claims or applies more broadly to other causes of action under general maritime law; and (2) whether the analysis in *Miles* is limited to wrongful death claims or also applies to distinct causes of action for personal injury under general maritime law. *See* Petition for Writ of Certiorari, at 17, *Dutra Group v. Batterton*, No. 18-266 (U.S. Aug. 30, 2018) ("*Townsend*'s framework does not apply to unseaworthiness actions"); *id.* at 20 ("*Miles* applies to both wrongful death actions and personal injury actions").

The issues presented in *Batterton* and in this case are closely related, yet the cases implicate distinct remedies (*i.e.*, punitive damages vs. loss of consortium) and distinct general maritime causes of action (*i.e.*, unseaworthiness vs. general negligence). By deciding

both of these cases, this Court can provide crucial guidance and eliminate the considerable confusion about available remedies that has sprung from the lower courts' interpretations of *Miles* and *Townsend*.

CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID DEEHL, ESQUIRE
DEEHL PLLC
2655 South Le Jeune Road,
Suite 524
Coral Gables, Florida 33134
Telephone: (305) 448-9111
Facsimile: (305) 442-0441
Email: david@deehl.com

PAULO R. LIMA, ESQUIRE
Counsel of Record
ELIZABETH K. RUSSO, ESQUIRE
RUSSO APPELLATE FIRM, P.A.
7300 N. Kendall Drive,
Suite 600
Miami, Florida 33156
Telephone: (305) 666-4660
Facsimile: (305) 666-4470
Email: prl@russoappeals.com
Email: ekr@russoappeals.com

Counsel for Petitioner