No. 18-832

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

REPLY BRIEF FOR PETITIONER

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I. RESPONDENT'S ARGUMENTS FOR DENYING REVIEW ARE WITHOUT MERIT

A. The absence of a circuit split does not render this case unreviewable

Petitioner does not run from the fact there is no circuit split on this issue, as she addressed it head-on in her petition. (Pet. 11). While Respondent argues that concession is the death knell, this Court's rules show that is not the case. One of the enumerated "reasons the Court considers" for granting a petition for writ of certiorari is whether "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Certiorari is warranted under either of the two bases of Rule 10(c). The Eleventh Circuit's decision conflicts with relevant decisions of this Court, namely *American Export Lines v. Alvez*, 446 U.S. 274 (1980), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). To the extent the issue is not controlled by those precedents, however, whether spouses of personal injury plaintiffs may recover loss of consortium damages under general maritime law is an important federal question that should be settled here and now.

As for Respondent's argument that this Court should exercise its admiralty jurisdiction with "two goals in mind" (Opp. 6), neither goal presents an

impediment to granting certiorari. First, the "special solicitude for the wellbeing of seafarers" is not relevant here because neither Mrs. Petersen nor her husband is a seafarer. Second, granting certiorari and deciding this issue on its merits will achieve definitive "national uniformity," as the Court's decision will bind all circuit courts.

B. Respondent's attempts to limit or distinguish this Court's precedents are unpersuasive

The parties agree that four of this Court's precedents "inform the question presented" – namely, *Townsend* and *Alvez*, as well as *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). (Opp. 7). Respondent's discussion of these cases ignores the progression of their holdings, which shows that: (1) this Court recognized plaintiffs' right to loss of consortium damages under general maritime common law in *Gaudet* and *Alvez*; (2) in *Miles*, the Court eliminated loss of consortium damages in maritime *wrongful death* actions, based on Congressional acts limiting the scope of damages recoverable for death at sea; and (3) in *Townsend*, the Court expressly held that the *Miles* analysis (*i.e.*, the need to defer to Congress in determining the available remedies in maritime cases) does not apply to personal injury claims, which were available under maritime common law long before Congress legislated on the subject.

Respondent contends "*Gaudet* and *Alvez* have been widely recognized as confined to their facts." (Opp. 7). This is true as to *Gaudet*, but not for any reason relevant to this petition. Although the wrongful death claims at issue in that case would now be governed by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), *see Miles*, 498 U.S. at 30 n.1, this Court's holding *Gaudet* was governed by general maritime law. Based on these statutory amendments – and, more importantly, because *Gaudet* is a wrongful death case, not a personal injury case like this one – Petitioner does not rely on it *per se*. Rather, she discussed *Gaudet* to provide a complete picture of the evolution of this Court's maritime precedents addressing loss of consortium damages.

Petitioner does rely on *Alvez*, where this Court held 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." 446 U.S. at 276 (emphasis in original). Respondent offers little support for the argument that it has been "confined to [its] facts." (Opp. 7). It merely cites the Fifth Circuit's opinion in *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119, 123 (5th Cir. 1994), which stated this Court had purportedly recognized an "implicit limitation of *Alvez* to its facts." (Opp. 7-8). But that "implicit limitation" is based on the Fifth Circuit's misreading of *Miles*. As stated in the initial petition, the circuit courts' interpretation of *Miles* (and this Court's

subsequent holding in *Townsend*) is at the heart of the question presented in this case.

Respondent is correct that "neither *Gaudet* nor *Alvez* adopted a per se rule making available loss-of-consortium claims in *all* cases of maritime law." (Opp. 8) (emphasis in original). But neither did those cases, or any of this Court's precedents since, hold that spouses of "non-seafarers"[1] who suffer non-fatal injuries are barred from seeking loss of consortium damages under general maritime law. Thus, this Court must look to *Miles* and *Townsend* to determine whether they mandate the limitation that Respondent proposes, or if, as Petitioner argues, this Court is free to approve a remedy available under general maritime law for more than a century.

Respondent's discussion of *Miles* supports Petitioner's argument. There, this 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." *Miles*, 498 U.S. 33 (emphasis added). Respondent correctly notes that holding was based on "balancing principles of judge-made federal maritime law against the limitations on liability Congress placed in the Death on the High Seas Act and the Jones Act." (Opp. 8). Similarly, this Court had previously declined to recognize a right to loss of society damages in another maritime wrongful death case, holding that the remedy for such

[1] Petitioner agrees with Respondent that a "non-seafarer" is someone who is neither a Jones Act seaman, nor a qualifying longshoreman or harbor worker under the LHWCA. (Opp. 1).

actions was governed by the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301 *et seq*. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1978). Both *Miles* and *Higginbotham* are distinguishable because they are wrongful death cases – a critical distinction the Court highlighted in *Townsend*.

In *Townsend*, this Court expressly addressed its holding in *Miles* that "Congress' judgment must control the availability of remedies for wrongful death actions brought under general maritime law." *Townsend*, 557 U.S. at 419 (citing *Miles*, 498 U.S. at 32-36). The Court explained that deference to statutory remedies discussed in *Miles* was not warranted in *Townsend* because "both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* at 420.

Just as in *Townsend*, Petitioner can show that both the general maritime cause of action (*i.e.*, a personal injury claim for negligence) and the remedy (damages for loss of consortium) were well established before passage of the Jones Act. (*See* Pet. 10 (discussing cases and a treatise establishing availability of both the cause of action and remedy under maritime common law since the 19th Century)). Respondent's opposition is silent on this point.

Respondent discusses, at length, the Eighth Circuit's decision in *Doyle v. Graske*, 579 F.3d 898 (8th Cir. 2009), the only other circuit court decision to consider this issue after *Townsend* was decided. (Opp. 9-11). But

the *Graske* court's explanations for its holding cannot be squared with this Court's precedents.

First, *Graske* is just wrong that maritime common law lacks a history of recognizing loss of consortium claims. *Graske* based this conclusion on *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, 265-66 (2d Cir. 1963), which purportedly "found no maritime cases relating to claims by wives for loss of consortium other than two district court decisions denying such claims." This Court rejected that notion long ago. *Alvez*, 446 U.S. at 280-81 ("*Gaudet* provides the conclusive decisional recognition of a right to recover for loss of society that *Igneri* found lacking.").

Second, *Graske*'s justification that it must "heed the policy choices made by Congress" ignores the holding in *Townsend* that such deference is not warranted when considering personal injury claims, which were recognized at common law long before Congress enacted the Jones Act and DOHSA. Indeed, that (erroneous) deference to Congress was the primary basis for the decision in *Graske*. 579 F.3d at 907 ("After reviewing the relevant policy pronouncements by Congress, we conclude that allowing recovery for loss of consortium here would give rise to two serious disparities between general maritime law and legislative policies. These anomalies counsel against recognizing a right to recovery.").

Nor should this Court be troubled by the "anomalies" raised in *Graske* and discussed in Respondent's opposition. As for the "disparity" in allowing consortium

damages for spouses of those who are injured, but not those who are killed (Opp. at 10), the reality is that the beneficiaries of damage awards in maritime wrongful death actions are the decedent's spouses, parents, and/or children. *See* 46 U.S.C. § 30302 (providing in DOHSA cases the "action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative"); *Moore-McCormack Lines v. McMahon*, 235 F.2d 142, 145 (2d Cir. 1956) (under Jones Act, recovery is for benefit of "the widow, or husband, or children, or parents, of, if none, the next of kin dependent on the deceased person"). Thus, there is a diminished need for an additional category of damages, as those parties already are entitled to recover significant damages in their own right.

Respondent also cites *Graske*'s discussion of the "odd disparity" in allowing spouses of non-seafarers to recover loss of consortium damages while denying spouses of seafarers, which would purportedly "undercut the special solicitude" for seamen. (Opp. 10). Petitioner notes that seamen already enjoy considerable advantages that reflect this "special solicitude" for their welfare. One example is the "featherweight" burden of causation applicable to Jones Act negligence claims. *McClow v. Warrior & Gulf Nav. Co.*, 842 F.2d 1250, 1251 (11th Cir. 1988). Another is the availability of a common law claim for maintenance and cure, whereby ship owners owe a duty to provide food, lodging, and medical care to a seaman who is injured or becomes ill while in the service of the ship, until the seaman reaches maximum medical improvement – a

duty that attaches regardless of the shipowner's fault. *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971).

In sum, the decision below does not comport with this Court's holdings in *Alvez* and *Townsend*. The Eighth Circuit's opinion in *Graske*, although it postdates *Townsend*, reflects the same misreading of *Miles* that this Court rejected as unsound. The Court should grant the petition to ensure that this important question of federal maritime law is resolved in accordance with its precedents.

C. *Dutra Group v. Batterton* plainly addresses issues closely related to this case

The parties have fully briefed and this Court recently heard oral argument in *Dutra Group v. Batterton*, No. 18-266, so Petitioner need not devote much text to explaining the issues in that case. The question in *Batterton* is whether punitive damages are available for an unseaworthiness claim asserted under general maritime law. Here, the question is whether loss of consortium damages are available for a personal injury/negligence claim asserted under general maritime law. Critically, both cases turn on the parties' competing interpretations of *Miles* and *Townsend*.

The petitioner in *Batterton*, the ship owner, relies heavily on *Miles*, arguing that, because unseaworthiness is merely an alternative to a Jones Act claim, then

Miles mandates that courts cannot award remedies beyond those provided in the Jones Act. (*See Dutra Group v. Batterton*, No. 18-266, Pet.'s Br. at 15 ("Congress's decision to bar punitive damages in Jones Act negligence actions bars such damages in unseaworthiness actions brought by seamen")). The respondent in *Batterton*, an injured seaman, argues that the analysis of *Townsend* controls – *i.e.*, because unseaworthiness claims have been recognized under maritime common law since before the Jones Act, and because punitive damages were available for such claims before the Jones Act, the circuit court correctly held that punitive damages are available. (*See Dutra Group v. Batterton*, No. 18-266, Resp.'s Br. at 16 ("*Townsend* supplies the controlling principles")).

At oral argument, Justice Kavanaugh encapsulated the parties' competing positions as follows:

> JUSTICE KAVANAUGH: There – there seem to be – . . . two ways we can look at this. One is the *Miles* precedent, Jones Act, twin causes of action. The other is *Townsend* says punitives have historically been available and awarded in general maritime actions. The question's which of those principles to follow here.

(*Dutra Group v. Batterton*, No. 18-266, Oral Argument Tr., Mar. 25, 2019, at 26).[2] The discussion in Section I(B) above makes clear that the parties in this case,

[2] The official transcript is available on the Court's web site. *See* https://www.supremecourt.gov/oral_arguments/argument_transcript/2018.

likewise, base their positions on their respective interpretations of *Miles* and *Townsend*.

Here, Mrs. Petersen's position on the merits is stronger than the respondent's in *Batterton* in two ways. First, unlike the respondent in *Batterton*, the underlying claim in this case is not a "twin cause of action" that duplicates a statutory Jones Act claim. Instead, the substantive claim is a personal injury negligence claim brought by Mr. Petersen, a non-seafarer. Congress unquestionably has not spoken as to the appropriate remedy for such a claim and, thus, *Townsend*, not *Miles*, provides the correct analytical framework.

Second, in *Batterton*, Justice Ginsburg observed (and the respondent's counsel conceded) that "the evidence is very slim that there were punitive damages, in fact, awarded for unseaworthiness claims" before the Jones Act. (*Batterton* Tr. at 39). By contrast, this Court has recognized that loss of consortium damages were awarded in admiralty cases before enactment of the Jones Act. *See Gaudet*, 414 U.S. at 589 n.25 (collecting cases); *Alvez*, 446 U.S. at 280-81 (citing *Gaudet*).

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE QUESTION PRESENTED

Respondent argues the Court should not grant certiorari because this is an interlocutory appeal. That is no reason to deny the petition. In fact, several cases discussed above were decided in an interlocutory

posture, including *Alvez*, which Respondent discusses (Opp. 14), and *Townsend*, which it does not.

In *Townsend*, the issue arose in a declaratory judgment action where the injured seaman asserted a counterclaim seeking punitive damages for the denial of maintenance and cure. 557 U.S. at 408. The district court denied the shipowner's motion to dismiss the counterclaim, holding punitive damages were available, after which the Eleventh Circuit affirmed, and this Court granted certiorari. *Id.*

The decision below announces a broad rule that governs litigants and courts within that circuit, prompting many litigants not to seek consortium damages in their complaints at all or to forego their appellate rights when their consortium claims are dismissed based on existing state of the law. Just because a jury might ultimately find for the Respondent, that is no reason to defer settling this important issue while countless litigants forego a remedy to which they should be entitled under this Court's precedents.

Respondent also argues this case is a poor vehicle because it does not involve "exceptional circumstances" or "allegations of misconduct." (Opp. 14). That reflects a gross misunderstanding of this Court's holding in *Townsend*. Neither *Townsend* nor any of this Court's precedents has ever held that loss of consortium damages are limited to cases involving "exceptional circumstances" or "allegations of misconduct." Rather, in *Townsend*, this Court held that *punitive damages* are available "for the willful and wanton disregard of the

maintenance and cure obligation." 557 U.S. at 424. The Court also discussed prior maritime cases that, likewise, held punitive damages are permissible where there has been "lawless misconduct" or "tortious acts of a particularly egregious nature." *Id.* at 411. None of those requirements apply to determining the availability of loss of society or loss of consortium damages.

III. RESPONDENT CLAIMS THIS CASE RAISES NO ISSUES OF NATIONAL IMPORTANCE, THEN ARGUES IT COULD HAVE DIRE, FAR-REACHING CONSEQUENCES

Respondent argues this case does not present an "issue of national importance," then takes a contradictory position by making the standard sky-will-fall argument that imposing additional liability would unduly "burden our commercial fleet," resulting in added costs being "passed on to all of us who rely upon the myriad goods and services American vessel owners and operators provide." (Opp. 15-16). Respondent's gloomy forecast is overstated. More than a decade has passed since this Court decided *Townsend*, allowing the far more costly remedy of punitive damages in maritime cases, yet there is no evidence of runaway verdicts, and no sign that our nation's commercial fleet has suffered any hardship.

If anything, Respondent's assertions about the high stakes weigh in favor of granting the petition. This Court is presently considering, in *Batterton*, the availability of punitive damages for unseaworthiness

claims. An amicus brief submitted at the certiorari stage urged granting the petition because the threat of punitive damages "would make these companies less competitive with foreign maritime operators and increase the prices that their consumers pay." (*See Dutra Group v. Batterton*, No. 18-266, Amicus Br. of At-Sea Processors Assoc., *et al.*, at 7); *id.* ("The question presented is vitally important to the maritime industry and to the national economy.")).

Petitioner understands that Respondent would prefer not to be held fully accountable for its negligence. But, given that modern cruise ships "house thousands of people and operate as floating cities," *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1239 (11th Cir. 2014), there is no principled reason why cruise ship operators should be immune to a category of tort damages that has been available for land-based negligence for centuries. *See Gaudet*, 414 U.S. at 589 ("In fact, since the 17th century, juries have assessed damages for loss of consortium . . . in civil actions brought by husbands whose wives have been negligently injured."). The time is right for the Court to resolve this important issue once and for all.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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