No. 17-449

In the Supreme Court of the United States

AMERICAN TRIUMPH LLC AND AMERICAN SEAFOODS COMPANY LLC,

Petitioners,

v.

ALLAN A. TABINGO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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

EVAN M. TAGER
Counsel of Record
MICHAEL B. KIMBERLY
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
etager@mayerbrown.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

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 U.S. each year.[1]

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

[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. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. All parties consented to the filing of this brief.

catcher processor vessels in the yellowfin sole, rock sole, flathead sole, Atka mackerel, Pacific Ocean perch, and Pacific cod fisheries off Alaska. Groundfish Forum's mission is to promote the sustainable harvest and economic viability of fisheries while ensuring resource conservation, habitation protection, and practicable bycatch management.

United Catcher Boats (UCB) was established in 1993 to provide a strong, unified voice for the owners of vessels that trawl for groundfish in the Bering Sea, Gulf of Alaska, and West Coast commercial fisheries. Many UCB member vessels also have a long history of fishing Bering Sea crab in addition to their groundfish trawl fisheries.

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 which 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) is the nation's largest commercial seafood advocacy organization, comprising more than 300 member companies that span the full length of the commercial seafood supply chain. NFI and its member companies support science-based, free-market policies designed both to maximize consumer choice and to ensure the sustainability of U.S. and global fish stocks for future generations.

The Alaska Bering Sea Crabbers' (ABSC) members 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 the issue of punitive damages under maritime law is exceptionally important to the American maritime industry.

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 2.5 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] In holding that punitive damages are available under the maritime doctrine of unseaworthiness, the decision below exposes this critical industry to a potentially massive increase in damages exposure—a result that is meritless as a matter of law and misguided as a matter of policy. This Court should grant

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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.

review of this important question and reverse the judgment below.

The doctrine of unseaworthiness is the predominant means of recovery for seamen injured on the job. The impact of the Washington Supreme Court's decision to make punitive damages available for unseaworthiness claims, if allowed to stand, will accordingly be sweeping. It will markedly increase maritime operators' litigation costs, result in higher prices for consumers, make the U.S. maritime industry less competitive with the industries in countries whose law precludes punitive damages, and lead to forum-shopping, as domestic and foreign plaintiffs alike elect to sue in Washington (and any other forum that subsequently joins that side of the split). These very troubling consequences warrant this Court's immediate intervention, before the split of authority on this issue deepens any further.

The decision below not only threatens grave harm to the maritime industry; it is also wrong on the merits. Permitting punitive damages in unseaworthiness cases destroys the uniformity between the unseaworthiness remedy and the Jones Act remedy and will lead to windfall recoveries in situations in which Congress clearly intended that plaintiffs recover only compensatory damages. The decision below accordingly should be reversed.

ARGUMENT

A. The Court Should Address The Question Presented Now.

The question presented—as to which lower courts undeniably are divided—arises frequently and thus cries out for this Court's attention. As this Court observed more than 40 years ago, "[t]he un-

seaworthiness 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 to maritime operators and seamen alike.

Although the Washington Supreme Court is the only court to date that has authorized punitive damages for unseaworthiness claims, the split of authority created by the decision below merits this Court's immediate attention. As this Court has recognized, it is especially important that maritime law be uniform from jurisdiction to jurisdiction, because "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities." *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 676 (1982); see also, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (noting "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'") (quoting *Moragne*, 398 U.S. at 402). It is self-evidently harmful to the maritime industry for maritime operators in one State to be subject to greater potential liability than those in other States—or for one maritime defendant's legal exposure to vary depending on where its vessels operate and where shipboard accidents happen to occur. See Geoffrey L. Wendt, *The Fog of Uncertainty Enshrouding Employer Punitive*

Damage Liability Under General Maritime Law, 2 MARITIME L. BULL. SPECIAL INSERT 1, 100 (2010).

The effects of the lower court's decision will also be widely felt. Injured seamen will now surely bring unseaworthiness claims in Washington state court to the extent possible. And federal law generally ensures that such cases will stay in state court once brought there: It preserves the right to bring admiralty suits in state court (28 U.S.C. § 1333(1)), and once a plaintiff sues in state court, the case generally cannot be removed unless some other basis for federal jurisdiction exists. See, *e.g.*, Michael F. Sturley, *Removal into Admiralty: The Removal of State-Court Maritime Cases to Federal Court*, 46 J. MAR. L. & COM. 105, 105 (2015). Some district courts have concluded that the Federal Courts Jurisdiction and Venue Clarification Act of 2011 changed the law to permit the removal of admiralty cases to federal court (see, *e.g.*, *Ryan* v. *Hercules Offshore, Inc.*, 945 F. Supp. 2d 772 (S.D. Tex. 2013)), but "the overwhelming majority of district courts" have rejected that view. *Forde* v. *Hornblower New York, LLC*, 243 F. Supp. 3d 461, 467 (S.D.N.Y. 2017).

Although personal jurisdiction rules and the *forum non conveniens* doctrine may limit the extent to which cases can be brought in Washington courts, they are unlikely to prevent forum shopping entirely: Many shipping companies and other maritime employers do business in Washington and could be haled into court there successfully. See, *e.g.*, Wash. State Dep't of Commerce, *Washington State Maritime* 3 (noting that "Washington is the 4th largest exporter in the United States"; that "[m]ore than 20 international shipping lines utilize" Washington's 75 ports; and that the Seattle-Tacoma Northwest Sea-

port Alliance port is the "4th largest container gateway in the United States"), goo.gl/LVMn61. And as this Court has noted in a related context, a difference between U.S. and foreign law is likely to encourage foreign plaintiffs to bring claims in U.S. courts. See *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.").

In short, the decision below introduces significant uncertainty into one of the most important doctrines in maritime law, by creating a critical disparity between defendants' potential liability for unseaworthiness in Washington state court and their risk of such liability elsewhere. The impact of this disparity will be to burden maritime defendants and undermine the uniform system of maritime law. That prospect warrants this Court's intervention without delay.

B. The Question Presented Is Vitally Important To The Maritime Industry And To The National Economy.

A ruling by this Court that plaintiffs may recover punitive damages for unseaworthiness claims would have a critical impact on the U.S. maritime industry. Defendants' 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. 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* 21 (Cornell L. Studies Research Paper No. 17-33, 2017), goo.gl/nAikVK. 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.").

Although this Court has held that punitive damages in maritime cases should not generally exceed the amount of compensatory damages (*Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 513 (2008)), that is cold comfort when compensatory damages can reach into the multiple millions of dollars. Moreover, the

Washington Supreme Court breached the 1:1 barrier within only a few years of this Court's erection of that barrier. See *Clausen* v. *Icicle Seafoods, Inc.*, 272 P.3d 827, 834-36 (Wash. 2012) (upholding $1.3 million punitive award that was 35 times the compensatory damages or three times the total of the compensatory damages and attorneys' fees in maintenance-and-cure case). So vessel owners sued in Washington have no assurance that they won't be mulcted for punitive damages that are several times the potentially high amounts of compensatory damages at stake.

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 or any other commodity harvested or transported by ships.

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 unavailable 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 *Baker*, 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).

Maritime defendants' damages exposure is thus dramatically greater under the lower court's view of U.S. maritime law than under the law of other nations. Imposing that potential liability on the American maritime industry will invariably raise the industry's costs—driving business toward maritime companies that use ships flagged in other countries and have less exposure to U.S. maritime law.[5]

C. Punitive Damages Are Unavailable In Seaworthiness Actions.

The need for this Court's review is made all the more powerful because the decision below is manifestly wrong. As petitioner explains (Pet. 12-16), the Washington court's decision conflicts with this Court's holding in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990)—but even if *Miles* had never been decided, the decision below would be just as indefensible.

Unseaworthiness claims under general maritime law and Jones Act claims have always been closely

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[5] 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.

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," but was limited to the traditional maritime-law remedies of maintenance and cure and unseaworthiness. The negligence action brought into being by the Jones Act was considered "an alternative of the right to recover indemnity * * * on the ground that [a seaman's] injuries were occasioned by unseaworthiness," and a seaman was entitled to recover under only a single cause of action, at his election. See *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 combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Ibid.* (citation omitted).

To be sure, the "election" 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, 223 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 G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 383 (2d ed. 1975)). 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.

E.g., *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 400-01 (5th Cir. 2014) (en banc) (Clement, J., concurring).

In light of the contemporary overlap between Jones Act and unseaworthiness claims, the Washington Supreme Court's punitive damages holding is unsustainable. It has long been established that punitive damages are not available under the Jones Act. See, *e.g.*, *Miles*, 498 U.S. at 32 ("Incorporating [the Federal Employers' Liability Act] unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well."). If the lower court were correct that punitive damages *are* available for unseaworthiness claims instead, Congress's intent to limit seamen's right of recovery for shipboard torts to an "indemnity" for compensatory damages would be thwarted by judicial fiat. See *Pac. S.S. Co.*, 278 U.S. at 138.

Indeed, if punitive damages were available in unseaworthiness cases, the Jones Act itself would be relegated to near-complete irrelevance. After all, few rational plaintiffs would choose to bring a Jones Act claim, which requires proof of negligence and offers only compensatory relief, if they could bring an unseaworthiness claim, which brings with it the promise of strict liability (*Yamaha*, 516 U.S. at 208) and—as the court below sees it—the potential for punitive damages. An outcome like that cannot be squared with the "uniform plan of maritime tort law Congress created in * * * the Jones Act." *Miles*, 498 U.S. at 37.

CONCLUSION

The petition should be granted.

Respectfully submitted.

EVAN M. TAGER
Counsel of Record
MICHAEL B. KIMBERLY
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
etager@mayerbrown.com

Counsel for Amici Curiae

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