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

AMICUS CURIAE BRIEF OF ATLANTIC SOUNDING COMPANY, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Atlantic Sounding Co., Inc. employs seamen in its marine operations across the United States and has a direct interest in the remedies available to those workers under the general maritime law, as exemplified in the decision of this Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), which was relied upon by the Ninth Circuit below to hold that punitive damages are available in seamen's unseaworthiness actions. *Batterton v. Dutra Group*, 880 F.3d 1089, 1091-96 (9th Cir. 2018).

Atlantic Sounding has engaged the services of Kenneth G. Engerrand, who has taught admiralty law for more than 40 years and published numerous articles on the roles of Congress and the Courts on the formation of principles of general maritime law, to address in detail the critical issue in this case—the relationship between the Jones Act and the principles of judicially declared maritime law.[1]

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[1] In accordance with Rule 37.6., counsel for Amicus Curiae certifies the following:

(A) The undersigned authored this brief in whole, and no counsel for any party authored this brief in whole or in part.

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The general maritime law has been dominated by civil codes and legislation for thousands of years, and that is exemplified in the United States where Congress has exercised its paramount authority over seamen's remedies since the first Congress. Unlike its decision to retain the seamen's contract-based remedy of maintenance and cure, Congress has modified seamen's tort remedies for injury and death with the intent to occupy the field. Having exercised its superior authority over seamen's tort claims with respect to the specific issue in this case—damages in the seamen's tort liability cause of action—Congress has left this Court with no role in our constitutional scheme to supplement the settled plan of rights and responsibilities established by Congress.

ARGUMENT AND AUTHORITIES

I. The Roles of Congress and the Courts in Formulating Maritime Remedies

The issue presented to this Court involves the roles of Congress and the courts in formulating

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(C) No person, other than the Amicus Curiae, contributed money that was intended to fund preparing or submitting this brief.

The written consent of all parties to the filing of this brief has been provided as both Petitioner and Respondent have filed blanket consents to the filing of amicus curiae briefs in support of either or neither party.

maritime remedies, particularly the authority of judges to fashion elements of recovery in an area where Congress has repeatedly legislated and has occupied the field. This issue is not new to admiralty, nor is it a creation of recent decisions like *Miles v. Apex Marine Corp.*[2] "The view that admiralty judges fashion enlightened legal doctrines free of legislative restraint does not reflect the course that admiralty judges have steered in formulating the general maritime law in seas that have been dominated by civil codes and legislation for thousands of years."[3]

The "[j]udicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal Government in general terms,"[4] reflecting "the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations."[5] Once the general maritime law was adopted, however, the question arose as to which branch of government had the authority to modify the maritime law. Over 160 years ago, Chief Justice Taney declared that the maritime law was subject to regulation by Congress: "The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose,

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[2] 498 U.S. 19 (1990).

[3] W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 TUL. L. REV. 1355, 1359 (2001).

[4] *The St. Lawrence*, 66 U.S. (1 Black) 522, 526 (1861).

[5] *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572-73 (1874).

hardly be questioned."[6] Justice Bradley later explained: "But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department."[7] Therefore, the Court summarized: "[I]t must now be accepted as settled doctrine that in the consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."[8]

II. Congress "Occupied the Field" of "Liability for Injuries to Seamen"[9]

Exercising its "paramount power" to determine maritime law, Congress has formulated rights and remedies for maritime workers since the inception of the nation. In fact, the first Congress enacted a statute regulating the payment of wages to seamen.[10] In the context of the remedies available to injured seamen and longshoremen, Congress has enacted maritime legislation that has radically restructured the principles

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[6] *The Genesee Chief*, 53 U.S. (12 How.) 443, 459-60 (1851).

[7] *The Lottawanna*, 88 U.S. at 576-77.

[8] *So. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

[9] *Lindgren v. United States*, 281 U.S. 38, 45, 47 (1930) (quoting *Patrone v. Howlett*, 237 N.Y. 394, 397, 143 N.E. 232, 233 (1924)).

[10] Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133. Congress has periodically amended the statute, and current legislation regulating the employment of seamen is codified at 46 U.S.C. §§ 10301-10321, 10501-10509, 10601-10603, 10701-10711, 10901-10908, 11101-11112.

of general maritime law that had been enunciated by this Court.

As it was "established that in the courts of the United States no action at law can be maintained for [wrongful death] in the absence of a statute giving the right,"[11] the Court held in *The Harrisburg* that no action for wrongful death "will lie in the courts of the United States under the general maritime law."[12] While land-based workers such as longshoremen were afforded a negligence remedy against their employer by the general maritime law,[13] the Court in *The Osceola* denied seamen the same relief, holding that "seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure."[14] Thus, the general maritime law afforded injured seamen wages, maintenance and cure, and "indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship."[15]

Lacking a maritime remedy, the widow of a longshoreman who was killed on navigable waters sought relief under a state workers' compensation statute, but the Court struck down her attempt in *Southern Pacific Co. v. Jensen* because it violated the Constitution's requirement that the grant of admiralty jurisdiction to

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[11] 119 U.S. 199, 213 (1886).

[12] *Id*.

[13] *See Atl. Transp. Co. v. Imbrovek*, 234 U.S. 52, 63 (1914).

[14] 189 U.S. 158, 175 (1903).

[15] *Id*.

the federal courts "must have referred to a system of law coextensive with, and operating uniformly in, the whole country."[16] The Court decreed that the cure for the absence of a remedy lies with Congress, which has the "paramount power" to amend the general maritime law.[17]

Congress overhauled the remedies for both seamen and longshoremen in response to the decisions of this Court in *The Harrisburg, The Osceola*, and *Southern Pacific Co. v. Jensen*. In 1917, Congress enacted legislation to afford a state workers' compensation remedy to both seamen and longshoremen.[18] Although the Supreme Court recognized that "Congress could have enacted a compensation act applicable to maritime injuries,"[19] the Court did not believe it was constitutional for Congress to authorize states to provide the compensation remedy for maritime workers as "such an authorization would inevitably destroy the harmony and uniformity" required by the Constitution.[20]

After its effort to provide seamen and longshoremen with a workers' compensation remedy was invalidated, Congress decided to treat seamen and land-based workers differently, giving special treatment to seamen while treating land-based maritime

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[16] 244 U.S. at 215 (quoting *The Lottawanna*, 88 U.S. at 575).

[17] *Id.* The Court stated: "Congress can alone act upon it and provide the needed regulations." *Id*. at 217.

[18] *See* Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

[19] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

[20] *Id.*

workers like other non-maritime laborers. Thus, Congress enacted the Jones Act,[21] extending to seamen the same negligence remedy afforded to interstate railroad workers in the Federal Employers' Liability Act,[22] and granting a state workers' compensation remedy to non-seamen.[23]

The congressional committee recognized the difference between the seamen's remedy of maintenance and cure and their tort claim for damages for unseaworthiness when it legislated the tort cause of action based on negligence under the Jones Act:

> A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. . . . The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. ([Schuede] *v.* Zenith S. S. Co., 216 Fed., 566, 570) [(N.D. Ohio 1914)]. The special treatment which seamen have always had under the acts of Congress was recently emphasized by the provision in the merchant marine act of 1920 extending to seamen but not to other maritime workers the same rights of

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[21] Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007, currently codified at 46 U.S.C. §§ 30104-30105.

[22] 45 U.S.C. §§ 51-60 (hereinafter referred to as "FELA").

[23] Act of June 10, 1922, ch. 216, 42 Stat. 634.

> recovery in case of work accidents now enjoyed by interstate railway employees.[24]

Consequently, after Congress had initially granted both seamen and longshoremen a workers' compensation remedy, Congress decided that seamen should be treated differently. Congress modified the seamen's tort cause of action for "negligence or fault" by enacting the Jones Act while retaining the seamen's distinct actions for maintenance and cure and wages that arise from the seamen's contract of employment.[25]

The Congressional effort to provide a state workers' compensation remedy to land-based maritime workers met with the same fate in this Court as the original attempt to provide a state workers' compensation remedy to seamen and longshoremen. However, in *Washington v. W.C. Dawson & Co.*, the Court explained the wide discretion Congress had "to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment," such as "a general Employers' Liability Law."[26]

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[24] S. REP. NO. 94, 67th Cong., 1st Sess. 2 (1921). *Schuede* involved an unseaworthiness action for damages brought in state court based on defective rigging. *Schuede,* 216 F. at 566.

[25] *See*, *e.g.*, *Cortes v. Baltimore Insular Line*, *Inc.*, 287 U.S. 367, 371 (1932), in which Justice Cardozo explained that maintenance and cure is a "duty . . . imposed by the law itself as one annexed to the employment. . . . Contractual it is in the sense that it has its source in a relationship that is contractual in origin, but given its relation, no agreement is competent to abrogate the incident." (Citing *The Osceola*).

[26] 264 U.S. 219, 227 (1924).

Recognizing that the way to accomplish the goal of providing a workers' compensation remedy to maritime workers had been "clearly pointed out"[27] by this Court, Congress debated the scope of the federal compensation statute that became the Longshore and Harbor Workers' Compensation Act.[28] One of the major subjects of debate was whether all maritime workers, including seamen, should be subject to the uniform federal remedy that became the LHWCA:

> Initially, Congress was "reluctant" to include seamen in the bill for the reasons it had previously articulated.[29] However, the subject was reopened on the request of the shipping companies that seamen be included[30] and because "it was felt that perhaps the very bill might be imperiled if it did not have uniformity."[31] Consequently the counsel for the

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[27] 68 CONG. REC. 5413, 69th Cong., 2d Sess. (1927) (statement of Rep. O'Connor).

[28] The Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (hereinafter referred to as "LHWCA").

[29] 68 CONG. REC. 5410, 69th Cong., 2d Sess. (1927) (statement of Rep. Graham).

[30] *See*, *e.g.*, Hearing on S. 3170, Before the House Committee on the Judiciary, To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments, 69th Cong., 1st Sess. 202, 216 (1926); Hearing on H.R. 9498, Before the House Committee on the Judiciary, To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments, 69th Cong., 1st Sess. 50, 58, 101, 153, 195 (1926) (hereinafter cited as Hearing on H.R. 9498).

[31] 68 CONG. REC. 5410, 69th Cong., 2d Sess. (1927) (statement of Rep. Graham).

> American Steamship Owners' Association testified[32] "that if workmen's compensation is a sound economic policy," then "everybody in the industry," should be covered, including the "master and crew and everybody connected with the steamship."[33]

Seamen protested being included in the federal compensation statute because they did not want to give up their maintenance and cure remedy in exchange for workers' compensation. They spoke through Andrew Furuseth, President of the International Seamen's Union of America:

> One of the best arguments in favor of compensation on shore is, that the help comes practically at once, while liability is at best slow. On shore and in harbor, as applied to harbor workers, that is true. The worker is at home or with friends and the commission is near and accessible; but the seaman is away from country, home, and friends. The vessel is away from the commission. She may be in Asia, South Sea Islands, Australia, or Africa, away even from consuls or commercial agents, and if the care and cure is abolished, the men are likely to be thrown on shore to be eaten by strange dogs.[34]

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[32] Hearing on H.R. 9498, *supra* note 30, at 50.

[33] Kenneth G. Engerrand, *The Fleet Rule for Seamen Status*, 2 LOY. MAR. L.J. 92, 104 (2003). *See id.* at 94-107 for a comprehensive discussion of the legislative history of the Jones Act.

[34] Hearing on H.R. 9498, *supra* note 30, at 112.

Siding with the seamen, Congress decided not to include seamen within the federal workers' compensation statute,[35] excluding "a master or member of a crew of any vessel" when the LHWCA was enacted.[36]

The Jones Act extends to seamen the rights of recovery in the FELA: "Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."[37] The FELA contains provisions setting forth the liability of the carrier for negligence,[38] and the diminution of recovery for the employee's negligence,[39] but the compensation for liability is simply "in damages."[40] The "damages" were defined by the Court in *Michigan Central R.R. v. Vreeland*[41] seven years before the incorporation of the FELA by the Jones Act.

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[35] Chief Justice Hughes recognized the effect of the seamen's preference to remain outside the provisions of the federal compensation statute in *Nogueira v. N.Y., N.H. & H.R. Co*., 281 U.S. 128, 136 (1930), citing the Congressional debate at 68 CONG. REC. 5908, 69th Cong., 2d Sess. (1927). In the debate cited by Chief Justice Hughes, Senator Norris explained: "The seamen, through their organized representative here, Andrew Furuseth, wanted to remain out. They were satisfied with their condition and did not want to be included in this law." 68 CONG. REC. 5908, 69th Cong., 2d Sess. (1927) (statement of Sen. Norris).

[36] The crewmember exclusion is currently codified at 33 U.S.C. § 902(3)(G).

[37] 46 U.S.C. § 30104.

[38] *See* 45 U.S.C. § 51.

[39] *See id*. § 53.

[40] *Id.* § 51.

[41] 227 U.S. 59 (1913).

Construing the FELA in *Vreeland*, the Court stated: "By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states."[42] With respect to damages, the Court concluded: "It is a liability for the loss or damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only."[43] The Court noted that "in giving an action for the benefit of certain members of the family of the decedent, [the FELA] is essentially identical with . . . Lord Campbell's Act,"[44] and that Act and "all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."[45]

As with Lord Campbell's Act, the Court stated that the damages under the FELA "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."[46] As there must be "some reasonable expectation of pecuniary assistance or support of which they have been deprived," the Court held that "[c]ompensation for such loss

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[42] *Id*. at 66.

[43] *Id*. at 69.

[44] *Id.*

[45] *Id*. at 71.

[46] *Id*. at 70.

manifestly does not include damages by way of recompense for grief or wounded feelings."[47] Similarly, the term pecuniary " 'excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value.' "[48] As the jury instruction in *Vreeland* was not "confined to a consideration of the financial benefits which might reasonably be expected from [the decedent] in a pecuniary way" and which were "capable of being measured by any material standard," the verdict had to be reversed.[49]

The Court explained the damages recoverable in FELA cases in *American R.R. v. Didricksen*: "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."[50] Consequently, by enacting the Jones Act, Congress knowingly amended the tort remedy for seamen provided by the general maritime law with the favorable negligence standard provided in the FELA but with the limitations on recovery provided by that statute, as the

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[47] *Id*.

[48] *Id*. at 71 (quoting *Tilley v. Hudson River R.R*., 24 N.Y. 471, 476 (1862)).

[49] *Vreeland*, 227 U.S. at 73. The Court distinguished care and advice, which can be measured by a pecuniary standard. *See id*. at 73-74.

[50] 227 U.S. 145, 149 (1913); *see also Gulf, Colo., & Santa Fe Ry. v. McGinnis*, 228 U.S. 173, 175-76 (1913).

Court recognized in *Miles*: "When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well."[51]

In summary, after this Court held that seamen had maritime remedies of wages, maintenance and cure, and an indemnity for unseaworthiness of the vessel, but no negligence remedy, Congress tried to give seamen a state workers' compensation remedy, but that statute was declared unconstitutional. Next, Congress amended the seamen's tort remedy by extending to seamen "the same rights of recovery in case of work accidents [then] enjoyed by interstate railway employees."[52] Finally when enacting a uniform federal compensation statute for maritime workers, Congress considered providing seamen with a simple, uniform federal workers' compensation remedy, but instead decided that seamen should retain their tort remedy, modified by the Jones Act, to supplement their contract-based remedies of maintenance and cure and wages.

The effect of the Jones Act on seamen's maritime remedies was addressed by this Court in *Panama R.R. v. Johnson*[53] and *Lindgren v. United States*.[54] In

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

[52] S. REP. NO. 94, *supra* note 24, at 2.

[53] 264 U.S. 375 (1924).

[54] 281 U.S. 38 (1930).

Panama R.R. the seaman's employer argued that the Jones Act was unconstitutional because it "enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field."[55] Although the Court considered that argument to present a "grave question" with respect to the "constitutional validity" of the Jones Act,[56] the Court was able to interpret the Act in a way so as to preserve its constitutionality. When the Jones Act provided that seamen may maintain an action for damages at law and that the FELA would apply to that action, the Court distinguished between the tort action for damages, to which the FELA applied, and the contract-based remedies of maintenance and cure and wages: "So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure."[57]

Just as the FELA "took possession of the field of the employers' liability to employees in interstate transportation by rail,"[58] so too did the Jones Act take possession of "the entire field of liability for injuries to

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[55] *Panama R.R.*, 264 U.S. at 387.

[56] *Id*. at 390.

[57] *Id*. at 391.

[58] *Lindgren*, 281 U.S. at 45.

seamen."[59] Comparing the Jones Act and FELA, the Court in *Lindgren* found it "plain that the [Jones Act] is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution," and that "there is nothing in it to cause its operation to be otherwise than uniform."[60] The Court explained that the incorporation of the FELA "establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen" and that the Jones Act "is as comprehensive of those instances in which by reference to the [FELA] it excludes liability, as of those in which liability is imposed."[61] Thus, the Court stated that the Jones Act "covers the entire field of liability for injuries to seaman" and is "paramount and exclusive."[62] As the Jones Act "occupied the field and became a part of the general maritime law,"[63] the Court held that the plaintiff had "no resort" to state law "to establish a measure of damages not provided by that Act."[64] Thereafter, this Court has not wavered from its deference to Congress's paramount role in defining seamen's remedies: "Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we

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[59] *Id*. at 47.

[60] *Id*. at 44.

[61] *Id*. at 46-47.

[62] *Id*. at 47.

[63] *Id*. at 45.

[64] *Id*. at 47.

should now disturb the settled plan of rights and liabilities established by the Jones Act."[65]

The reference in *Gillespie* to this Court's special responsibility for fashioning rules in maritime cases is as determinative in the present case as it was in *Gillespie* and later in *Miles*. When Congress has addressed the damages for workers such as seamen, as it did in the enactment of the Jones Act, the special solicitude shown to seamen must give way to the "settled plan of rights and responsibilities established by the Jones Act."[66] And the effect of Congressional legislation is not limited to preemption of state remedies but has a greater impact with respect to displacement of federal remedies in light of the preeminent role of Congress in fashioning principles of general maritime law, as discussed *infra*.[67]

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[65] *Gillespie v. United States Steel Corp*., 379 U.S. 148, 155 (1964) (citing *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-21 (1963)).

[66] *Gillespie*, 379 U.S. at 155.

[67] Thus, although this Court in *Miles* stated that "[t]he Jones Act . . . does not disturb seamen's general maritime claims for injuries from unseaworthiness," 498 U.S. at 29, the Court displaced the damages available in unseaworthiness cases in deference to the damages available in the Congressional Jones Act remedy that had occupied the field:

> 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 Torrengano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme

III. Seamen May Not Recover Punitive Damages in Actions Alleging Unseaworthiness

The issue presented to this Court is not whether *Miles* addresses punitive damages or whether *Miles* should be applied narrowly or broadly. The question is simply whether the Court should, by supplementing the damages provided by Congress with an element of recovery that was not afforded by the Jones Act, "disturb the settled plan of rights and remedies established by the Jones Act,"[68] in which Congress "cover[ed] the entire field of liability for injuries to seamen."[69] That issue was not new to the Court in *Miles*. Its answer was not affected by the Court's decision in *Atlantic Sounding Co. v. Townsend*.[70] Like Congress, this Court has long recognized the distinction between the seamen's remedies arising from their employment relationship (maintenance and cure and wages) and their separate tort remedy based on negligence or unseaworthiness.

In *Pacific S.S. Co. v. Peterson*, the Court addressed the effect of the Jones Act on seamen's general

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> 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.

Id. at 32-33.

[68] *Gillespie*, 379 U.S. at 155.

[69] *Lindgren*, 281 U.S. at 47.

[70] 557 U.S. 404 (2009).

maritime claims: wages, maintenance and cure, and "indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship."[71] The seaman's employer argued that the recovery of maintenance and cure was an election that barred recovery under the Jones Act.[72] The Court disagreed as "the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages," which the Court considered to "grow[] out of" "the 'personal indenture' created by the relation of the seaman to his vessel."[73] The remedies of wages and maintenance and cure do not "'displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts,'"[74] and "a recovery in one proceeding for wages and maintenance and cure does not preclude the recovery in a subsequent proceeding of indemnity for injuries resulting from unseaworthiness."[75] "[T]he right to maintenance, cure and wages, implied in law as a contractual obligation arising out of the nature of employment, is independent of the right to indemnity or compensatory damages for any injury caused by negligence."[76] The Court explained that, in contrast to maintenance and cure,

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[71] 278 U.S. 130, 134 (1928).

[72] *See id*. at 135.

[73] *Id.* at 136-37 (quoting *The Montezuma*, 19 F.2d 355, 356 (2d Cir. 1927)).

[74] *Peterson*, 278 U.S. at 137 (quoting *The A. Heaton*, 43 F. 592, 596 (C.C.D. Mass. 1890)).

[75] *Peterson*, 278 U.S. at 137.

[76] *Id.* at 138.

there is a single legal wrong for negligence and unseaworthiness for which the seaman "is entitled to but one indemnity by way of compensatory damages:"

> The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. . . . But, whether or not 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."[77]

In consideration of the difference between maintenance and cure and the damage remedies of negligence and unseaworthiness, seamen are not required to elect between "the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, cure and wages under the old rules."[78]

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[77] *Id.*

[78] *Id.* at 139.

The effect of the Jones Act on the seaman's damage claim for unseaworthiness is much different than its effect on the claims for wages and maintenance and cure. In *McAllister v. Magnolia Petroleum Co.* the Court imposed a similar time limitation for bringing unseaworthiness cases as that contained in the Jones Act.[79] In contrast to maintenance and cure, the Court stated that "if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so n a single proceeding."[80] The Court explained that unseaworthiness and negligence are "but alternative 'grounds' of recovery for a single cause of action."[81] Consequently, "[a] judgment in the seaman's libel for unseaworthiness was held to be a complete 'bar' to his subsequent action for the same injuries under the Jones Act."[82] Professors Gilmore and Black summarized the relationship between the Jones Act and unseaworthiness counts: "The Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery."[83] "[T]he Jones Act count and the unseaworthiness count are Siamese twins."[84]

When this Court overruled *The Harrisburg* and held "that an action does lie under general maritime

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[79] 357 U.S. 221, 225 (1958).

[80] *Id*. at 224.

[81] *Id*. at 225.

[82] *Id*.

[83] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-38 at 383 (2d ed. 1975).

[84] *Id.*

law for death caused by maritime duties" in *Moragne v. States Marine Lines, Inc.*,[85] the Court proceeded cautiously in light of the "numerous and broadly applicable statutes."[86] The Court explained: "The legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved." The policy thus established has become itself a part of our law."[87] The Court described the effect of congressional action: "The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect."[88]

The effect of the sphere of Congressional enactments on the damages that could be recovered in actions under the general maritime law was presented to the Fifth Circuit in *Law v. Sea Drilling Corp*.[89] Consigning the federal statutes to "the scrap heap,"[90] the court freely supplemented the congressional balance (that limited recovery to pecuniary damages) by permitting recovery of non-pecuniary loss of society, stating: "It is time that the dead hand of *The Harrisburg*—whether in the courts or on the elbow of the

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[85] 398 U.S. 375, 409 (1970).

[86] *Id*. at 390.

[87] *Id*. at 390-91.

[88] *Id*. at 392.

[89] 510 F.2d 242 (5th Cir.), *reh'g denied*, 523 F.2d 793 (5th Cir. 1975).

[90] *Law*, 523 F.2d at 796 (quoting THE LAW OF ADMIRALTY, *supra* note 83, § 6-33 at 370).

congressional draftsmen of DOHSA—follow the rest of the hulk to an honorable rest in the briney [sic] deep."[91]

In *Mobil Oil Corp. v. Higginbotham*[92] this Court disagreed sharply with the Fifth Circuit's consignment of federal statutes to the scrap heap. Following its decision in *Law v. Sea Drilling*, the Fifth Circuit held that damages for loss of society were recoverable in the case of deaths on the high seas.[93] The issue presented to this Court was whether damages for loss of society were recoverable under the general maritime law where the death occurred on the high seas. The plaintiffs argued "that admiralty courts have traditionally undertaken to supplement maritime statutes and that such a step is necessary in this case to preserve the uniformity of maritime law."[94] The Court did not "pause to evaluate the opposing policy arguments," reasoning: "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses."[95] The Court stated: "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right."[96] The Court recognized that DOHSA

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[91] *Law*, 523 F.2d at 798 (referring to the Death on the High Seas Act, 46 U.S.C. §§ 30301-30308, hereinafter referred to as DOHSA).

[92] 436 U.S. 618 (1978).

[93] *Id*. at 618-19 & n.1.

[94] *Id*. at 624.

[95] *Id.* at 623.

[96] *Id.* at 624.

"announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages."[97] The Court concluded: "In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."[98] As "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements,"[99] the Court reversed the decision of the Fifth Circuit that the beneficiaries could recover nonpecuniary damages for loss of society.

Miles v. Apex Marine Corp. involved the death of a seaman in state waters as a result of both negligence and unseaworthiness.[100] As recovery was permitted under the Jones Act (negligence) and general maritime law (unseaworthiness), the issue was presented whether nonpecuniary loss of society was available because of the unseaworthiness finding. The Court in *Miles* discussed the effect of statutory enactments on the maritime law, noting: "Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty

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[97] *Id*. at 625.

[98] *Id.*

[99] *Id.*

[100] *See id.* at 21-22.

principles."[101] The Court described the effect of congressional enactments on the general maritime law:

> In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.[102]

Although the enactment of the Jones Act "does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness," the Court held that "the Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA."[103] Thus, the damages for the maritime unseaworthiness count do not "supplement" the damages allowed by the Jones Act negligence count, as the "logic of *Higginbotham* controls our decision here."[104] The Court reiterated its reasoning from *Higginbotham* for the "preclusive

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[101] *Id.* at 24.

[102] *Id.* at 27.

[103] *Id.* at 29.

[104] *Id.* at 31.

effect of the Jones Act for deaths of true seamen:"[105] "But in an 'area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.' "[106]

Like DOHSA, which contains an express provision for recovery of pecuniary damages,[107] the FELA, whose provisions were adopted by the Jones Act, "consistently [has] been interpreted as providing recovery only for pecuniary loss."[108] Thus, the Jones Act incorporates the FELA's pecuniary loss limitation and "precludes recovery for loss of society,"[109] which, like punitive damages, is a nonpecuniary loss.

As it had done in *Higginbotham* with respect to DOHSA, the Court in *Miles* limited recovery under the general maritime law to the damages allowed by Congress in the Jones Act:

> The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general

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[105] *Id*. at 32.

[106] *Id.* at 31 (quoting *Higginbotham*, 436 U.S. at 625).

[107] *See* 46 U.S.C. § 30303.

[108] *Miles*, 498 U.S. at 32 (citing *Vreeland*, 227 U.S. at 69-71).

[109] *Id.* As noted above, the Court explained:

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well.

Id.

> maritime claim here alleged that Torregano 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.[110]

Thus, the Court established "a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."[111]

The decision of this Court in *Atlantic Sounding Co. v. Townsend* draws the same distinction in remedies that Congress sought to enact in its amendment of the general maritime law in the Jones Act and LHWCA. *Townsend* involved a seaman's claim for punitive damages for the willful failure to pay maintenance and cure. The Court reiterated its reasoning from *Miles*, which the Court advised "remains sound."[112] The Court stated: "It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA."[113]

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[110] *Id.* at 32-33.

[111] *Id*. at 33.

[112] *Townsend,* 557 U.S. at 420.

[113] *Id.*

In comparison to the Siamese twins of unseaworthiness and Jones Act negligence, where the two theories are "inseparable and indivisible parts of a single cause of action,"[114] the Court in *Townsend* recognized that "a seaman's action for maintenance and cure is 'independent' and 'cumulative' from other claims such as negligence, and that 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].'"[115] The Court agreed that "the Jones Act and the unseaworthiness remedies are additional to maintenance and cure: the seaman may have maintenance and cure and also one of the other two."[116] Unlike the seaman's remedy for damages based on negligence and unseaworthiness, where Congress has occupied the field, "the Jones Act does not address maintenance and cure or its remedy."[117] Thus, in contrast to unseaworthiness, for maintenance and cure it is "possible to adhere to the traditional understanding of maritime

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[114] Kenneth G. Engerrand & Scott R. Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J. MAR. L. & COM. 327, 348 (1981) (citing *McAllister*, 357 U.S. at 224-25). Although the Court in *McAllister* recognized the three bases for recovery, maintenance and cure, negligence under the Jones Act, and unseaworthiness, *id*. at 224, the Court differentiated the negligence and unseaworthiness remedies from maintenance and cure, describing the Jones Act and unseaworthiness claims as "but alternative 'grounds' of recovery for a single cause of action." *Id*. at 225.

[115] *Townsend*, 557 U.S. at 423 (quoting *Peterson*, 278 U.S. at 138, 139).

[116] *Id*. at 424 (quoting THE LAW OF ADMIRALTY, *supra* note 83, § 6-23 at 342).

[117] *Townsend,* 557 U.S. at 420.

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.'"[118]

As Congress has occupied the field for seamen's damage actions and has spoken directly to the amount of damages recoverable in the seamen's liability action for damages, the issue is whether the limitation to pecuniary damages with the FELA and Jones Act precludes an award of punitive damages for the tort action based on unseaworthiness. For the reasons expressed by this Court in *Vreeland*, the courts recognize that: "Punitive damages are non-pecuniary. Under our precedent, therefore, they may not be awarded on a claim of negligence based on the Jones Act. Any argument that they should be available ought to be addressed to Congress."[119] "It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the [FELA]."[120] Consequently, "since the Supreme Court's authoritative interpretation of FELA antedated enactment of the Jones Act, *Miles* mandates the conclusion

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[118] *Id*. at 420-21 (quoting *Miles*, 498 U.S. at 31).

[119] *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984).

[120] *Miller v. Am. President Lines, Ltd*., 989 F.2d 1450, 1457 (6th Cir. 1993); *see also Horsley v. Mobil Oil Corp*., 15 F.3d 200, 203 (1st Cir. 1994); *Kozar v. Chesapeake & Ohio Ry*., 449 F.2d 1238, 1240 (6th Cir. 1971).

that punitive damages are not available in an unseaworthiness action under general maritime law."[121]

The distinction Congress made between the cause of action for damages and the distinct remedy for maintenance and cure is no different in the case of injury than it is for death. The Jones Act was enacted to create a damage remedy for injury or death to supplement the maintenance and cure remedy afforded by the general maritime law. The occupation of the field by the enactment of the Jones Act is the same in both cases, and the same incorporation of the limitations of the FELA applies. In fact, *Townsend*'s careful distinguishing of *Miles*, while acknowledging that the analysis in *Miles* remains sound, was based on decisions such as *Pac. S.S. Co. v. Peterson*, which involved an injury to a seaman, not a wrongful death. Quoting *Peterson*, the Court in *Townsend* "emphasiz[ed] that a seaman's action for maintenance and cure is "independent" and "cumulative" from other claims such as negligence and that 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]."[122]

Whether the seaman was killed, as in *Miles*, or injured, as in *Peterson*, this Court has recognized that "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the

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[121] *Horsley*, 15 F.3d at 203.

[122] *Townsend*, 557 U.S. at 423 (quoting *Peterson*, 278 U.S. at 138).

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."[123] Consequently, Congress' occupation of the field for a seaman's liability claim, whether for death or injury and whether for negligence or unseaworthiness, or both, simply leaves this Court with nothing to supplement.

CONCLUSION

Congress exercised its paramount power to amend the maritime law when it occupied the field for seamen's damages by the enactment of the Jones Act. Congress had given seamen state workers' compensation remedies and debated including them in the uniform federal compensation statute, the LHWCA. However, Congress decided to retain seamen's contract-based remedies of wages and maintenance and cure while occupying the field of tort liability for injuries to seamen with the Jones Act. In contrast to the claims for maintenance and cure and wages, the damage claims of unseaworthiness and Jones Act negligence overlap completely as Siamese twins because a seaman is "entitled to but one indemnity by way of compensatory damages" for a "single wrongful invasion of his primary right of bodily safety and but a single legal

[123] *Peterson*, 278 U.S. at 138.

wrong," whether the "injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined."[124] Thus, when Congress adopted the pecuniary loss limitation from the FELA, the courts were not free to supplement that limitation. As Congress has exercised its superior authority with respect to the specific issue presented—damages in the seaman's liability claim—this Court should not "disturb the settled plan of rights and remedies established by the Jones Act"[125] by consigning the congressional determination of damages to the scrap heap.

Respectfully submitted,

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[124] *Id.*

[125] *Gillespie*, 379 U.S. at 155.