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

BRIEF OF *AMICI CURIAE* ALASKAN LEADER FISHERIES LLC, COASTAL MARINE FUND, FISHERMEN'S FINEST, INC., GLOBAL SEAS LLC, GOLDEN ALASKA SEAFOODS, LLC, NORTH STAR FISHING COMPANY LLC, NORTH STAR INSURANCE SERVICES, LLC, OCEAN PEACE, INC., O'HARA CORPORATION, TRIDENT SEAFOODS CORPORATION, UNITED CATCHER BOATS ASSOCIATION, AND UNITED STATES SEAFOODS, LLC IN SUPPORT OF PETITONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

INTEREST OF THE *AMICI CURIAE*

Amici Curiae Alaskan Leader Fisheries LLC, Coastal Marine Fund, Fishermen's Finest, Inc., Global Seas LLC, Golden Alaska Seafoods, LLC, North Star Fishing Company LLC, North Star Insurance Services, LLC, Ocean Peace, Inc., O'Hara Corporation, Trident Seafoods Corporation, United Catcher Boats Association, and United States Seafoods, LLC, submit this brief to support The Dutra Group's position that a Jones Act seaman cannot recover punitive damages on a claim for unseaworthiness.[1]

They and their members and clients operate American fishing vessels in the Atlantic Ocean, Pacific Ocean, and Bering Sea, employing many hundreds of seamen in challenging environments. They value safe working conditions as well as uniform maritime law to compensate seamen when liability exists under Jones Act and/or unseaworthiness theories of liability.[2]

SUMMARY OF ARGUMENT

This brief addresses four points to demonstrate why the Court should rule that a seaman cannot recover punitive damages on an unseaworthiness claim under *Miles* although punitive damages can be recovered for willful or wanton denial of maintenance and cure under *Townsend*.

First, a seaman's general maritime law claim for unseaworthiness has a distinct history and nature

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[1] Pursuant to Rule 37.6, *Amici Curiae* disclose that no counsel for a party authored any part of this brief. Likewise, no person or entity other than the *amici* or their members contributed money to fund its preparation. Letters on file with the Clerk show that all parties consent to its submission.

[2] The subjoined Addendum sets out more complete descriptions of the *Amici Curiae* and their operations.

that puts this case within the ambit of *Miles*, not *Townsend*. In the 1940's, this Court radically changed unseaworthiness to a theory of liability without fault. Since then, it has been popularly paired with a seaman's statutory Jones Act claim based on fault – two distinct theories of liability on a single cause of action for the same compensatory damages.

A seaman's cause of action to recover damages either for unseaworthiness or Jones Act negligence is entirely distinct from a seaman's independent right to receive maintenance and cure, for which there is no statutory analog. Maintenance and cure was the only subject of *Townsend*. *Miles* addressed unseaworthiness, the claim presented in this case. Under *Miles*, a seaman cannot recover punitive damages for unseaworthiness under general maritime law because no such damages are allowed under the Jones Act.

Second, this Court has consistently held that Congress has the superior role when it comes to setting policy for maritime law and limiting remedies. Courts are not at liberty to grant more expansive remedies for personal injury or death under general maritime law than what Congress allowed in maritime personal injury and death statutes.

Third, the overarching goal of uniformity in maritime law also weighs heavily against allowing a seaman to recover punitive damages on an unseaworthiness theory of liability where the same seaman has no such remedy under the Jones Act.

Fourth, in the 2018 edition of his treatise, noted maritime law scholar Professor Thomas J. Schoenbaum objectively analyzed the very question presented by this case. He concluded that *Miles* applies and bars recovery of punitive damages on a seaman's personal injury claim for unseaworthiness.

ARGUMENT

I. *MILES*, NOT *TOWNSEND*, APPLIES TO THE UNSEAWORTHINESS QUESTION PRESENTED.

Miles v. Apex Marine Corp., 498 U.S. 19 (1990), held that damages recoverable on a claim for unseaworthiness cannot exceed pecuniary damages recoverable on a negligence claim for the same incident under the Jones Act. The rationale is that Congress has superior authority to decide maritime law and courts cannot exceed whatever limits are imposed by maritime personal injury and death statutes. The Jones Act is the statutory scheme that governs seamen's personal injury or death claims for compensatory damages. Unseaworthiness is an alternative judge-made theory of liability for the same injury. The Jones Act therefore constrains courts to limit damages on unseaworthiness claims by the same limits that apply to a Jones Act claim.

Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009), addressed the very different issue of willful denial of maintenance and cure. That issue was beyond the reach and contemplation of *Miles*. Unlike unseaworthiness, maintenance and cure has no statutory counterpart. Seamen have long had an independent general maritime law right to maintenance and cure separate and apart from claims for compensatory damages under the Jones Act and for unseaworthiness. The Jones Act simply does not speak to the post-injury misconduct of willful or wanton failure to pay maintenance and cure examined in *Townsend*. *Townsend*, 557 U.S. at 420-21.

Miles, not *Townsend*, controls the unseaworthiness damages question presented in this case.

A. Since this Court radically changed it in the 1940's, a seaman's general maritime law claim for unseaworthiness has focused solely on the vessel's condition regardless of fault.

The modern seaman's general maritime law claim for unseaworthiness looks only at the condition of the vessel or its equipment in relation to the injurious incident. Fault concepts play no role. Either the vessel was reasonably fit for its intended purpose or it was not. But before Congress enacted the Jones Act in 1920, the unseaworthiness claim was quite different. The trigger for liability was fault of the owner – namely, whether the owner had failed to exercise due diligence to provide a seaworthy vessel.

Aside from sharing the same name, today's claim for unseaworthiness bears little resemblance to its predecessor. In its prior form, "[u]nseaworthiness was 'an obscure and relatively little used remedy,' largely because a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship." *Miles*, 498 U.S. at 25, quoting G. Gilmore & C. Black, *The Law of Admiralty*, § 6-38 at 383 (2d ed. 1975). In other words, liability could only attach for the vessel owner's "failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. 158, 175 (1903). Due to the now defunct "fellow servant rule," no liability could attach for negligence of crewmembers aside from a vessel owner's independent obligation to pay maintenance and cure. *Id.*

In the 1940's, this Court radically changed the trigger for unseaworthiness liability from owner misconduct to a vessel's injurious condition regardless of how the condition developed – a species of liability regardless of owner fault or crew negligence. *Miles*, 498 U.S. at 25; *Mahnich v. Southern S. S. Co.*, 321 U.S. 96, 100 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95 (1946). "As a consequence of this radical change, unseaworthiness '[became] the principal vehicle for recovery by seamen for injury or death.'" *Miles*, 498 U.S. 25-26, quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 399 (1970).

B. In 1920, the Jones Act gave seamen a claim for compensatory damages for employer negligence based on FELA, including FELA's judicial gloss limiting recovery to pecuniary damages.

Several years after the Jones Act was enacted in 1920, this Court explained that seamen had thereby acquired a new and independent "right under the new rule to *compensatory* damages for injuries caused by negligence [that] is not an alternative of the right under the old rule to maintenance, cure and wages." *Pacific Steamship Co. v. Peterson*, 278 U.S. 130, 136-37 (1928) (emphasis added).

Jones Act damages are limited to actual pecuniary losses because "[w]hen Congress passed the Jones Act, the *Vreeland* gloss on [the Federal Employers' Liability Act or 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." *Miles*, 498 U.S. at 32. *Vreeland* said that recovery under FELA was limited to pecuniary damages and "[a] pecuniary loss or damage must be

one which can be measured by some standard." *Michigan Central Railroad v. Vreeland*, 227 U.S. 59, 71 (1913). Thus, alleged losses that could not be so measured, such as for loss of society or grief, could not be recovered under FELA.

In quick succession, this Court twice further emphasized that FELA was intended only to compensate for a plaintiff's actual pecuniary loss. *American Railroad v. Didricksen*, 227 U.S. 145, 149 (1913) (FELA damages are "limited strictly to the financial loss thus sustained"); *Gulf, Colorado & Santa Fe Railway Co. v. McGinnis*, 228 U.S. 173, 175 (1913) (FELA "intended only to compensate . . . for the actual pecuniary loss" suffered).

C. Claims for unseaworthiness and Jones Act negligence are two distinct theories of liability on the same indivisible cause of action for the same compensatory damages.

A claim for unseaworthiness is merely an alternative theory of liability to a claim for Jones Act negligence on the very same cause of action. *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325 (1927) (*res judicata* barred injured seaman's second suit for Jones Act negligence after he lost first suit alleging unseaworthiness because the two claims were a single indivisible cause of action); Gilmore & Black, § 6-38, at 383 (describing unseaworthiness and Jones Act counts as conjoined twin theories on a single cause of action).

As they are merely alternative theories of liability on the same cause of action, it necessarily follows that recoverable damages for unseaworthiness and Jones Act negligence cannot differ. Schoenbaum, *Admiralty and Maritime Law*, § 5:10, at 336, 337 (6th ed. 2018).

D. A seaman's right to receive maintenance and cure after an injury arises stands completely independent of claims for unseaworthiness and Jones Act negligence, and it has no statutory counterpart.

Maintenance and cure has ancient roots that long predate enactment of the Jones Act in 1920. The modern claim for unseaworthiness pressed in this case focused solely on the alleged injurious condition of the vessel did not even exist until the 1940's.

A seaman's right to maintenance and cure aims to save her or him from being left destitute after illness or injury strikes while in service to a vessel. "Maintenance" includes food and lodging at the expense of the injured seaman's vessel, and "cure" refers to medical treatment. *Townsend*, 557 U.S. at 413, citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001), and Gilmore & Black, § 6-12, at 267-68.

Seamen hold this separate and independent right to maintenance and cure in addition to their claims for compensatory damages under theories of unseaworthiness and Jones Act negligence. *Townsend*, 557 U.S. at 423-24. It is a stop-gap protective device and does not address compensatory damages.

The right to maintenance and cure attaches immediately upon injury or illness that arises while a seaman is in service to a vessel. That is completely unlike seamen's claims for compensatory damages where a condition of unseaworthiness or negligence must be proven before liability exists. Those claims for compensatory damages are very different animals with entirely distinct histories as discussed above.

Maintenance and cure differs from unseaworthiness in another critical way. Congress granted seamen a Jones Act negligence claim – a statutory counterpart to a general maritime unseaworthiness claim to compensate for the same injury. There exists no such statutory counterpart to a seaman's right to maintenance and cure, however.[3]

E. *Miles*, not *Townsend*, controls the unseaworthiness damages question presented in this case.

Townsend was not constrained by *Miles* because it only addressed willful and wanton failure to pay maintenance and cure, a right which stands separate and apart from a seaman's cause of action for compensatory damages on theories of unseaworthiness and Jones Act negligence. Congress never enacted any statutory analog for maintenance and cure. Thus, Congress did not speak to maintenance or cure at all, let alone limit the remedy for willful or wanton failure to pay maintenance and cure.[4]

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[3] The culpable conduct for which punitive damages were allowed in *Townsend* underscores another important distinction. Under *Townsend*, a vessel owner is exposed to punitive damages for willful or wanton refusal to pay maintenance and cure, a second level claims handling transgression that happens after an injury occurs. In contrast, here respondent seeks punitive damages for unseaworthiness itself – a species of liability without fault. Allowing punitive damages for willful or wanton claims handling misconduct is a world away from allowing them on a claim for liability without fault.

[4] Historical maritime cases cited in *Townsend* to support the conclusion that punitive damages were already an established remedy under general maritime law involved plunder, callous refusals to provide medical treatment to seamen in need, or other

The question presented here only involves unseaworthiness, however. That brings this case within the ambit of *Miles* because the Jones Act provides a claim for compensatory damages for personal injury or death just as unseaworthiness does under general maritime law. Schoenbaum, § 5:10, at 337-38.

F. *Miles* bars recovery of punitive damages on an unseaworthiness claim.

Townsend plainly stated that "the reasoning of *Miles* remains sound." *Townsend*, 557 U.S. at 420. Although *Miles* did not control the maintenance and cure claim presented in *Townsend*, it certainly applies to unseaworthiness claims.

Miles decreed that recoverable damages on a claim for unseaworthiness cannot exceed those available under a claim for Jones Act negligence. Because punitive damages cannot be recovered on a Jones Act claim, they likewise cannot be recovered on an unseaworthiness claim. Schoenbaum, § 5:10, at 336-39.

First, punitive damages are not measureable by any standard. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-500 (2008) (observing that punitive damages are neither predictable nor consistent).[5] Thus, just like loss of society damages that were disallowed in *Miles*, they fail to meet the definition for pecuniary damages prescribed in *Vreeland*.

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egregious tortious acts. None appear to have awarded punitive damages for mere breach of a warranty of unseaworthiness.

[5] That *Baker* said when punitive damages can be recovered under general maritime law they should not exceed compensatory damages does not make them subject to any standard computation. It simply means there is an upper limit. Schoenbaum, § 5:10, at 336 n.36.

Second, punitive damages would not *compensate* for any actual loss – the standard for recoverable damages laid out by *Didricksen* and *McGinnis* as to FELA and *Peterson* as to the Jones Act. Instead, they punish and deter willful and wanton misconduct.[6]

G. It would be manifestly improper to allow more expansive remedies on a judicially created species of liability without fault than Congress allows in cases of harm caused by negligence.

Decisions of this Court have "undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care" such that unseaworthiness liability is completely divorced from fault concepts. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549-50 (1960) (reviewing cases).

That liability for unseaworthiness attaches irrespective of fault is the very point that led *Miles* to declare that "[i]t would be inconsistent with our place in

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[6] Routine demands for punitive damages are exploitive and confound adjudication meant to compensate for actual loss. *Lust v. Sealy,* 383 F.3d 580, 591 (7th Cir. 2004) (punitive damages claims are "potentially catastrophic for the defendants subjected to them and, in prospect, a means of coercing settlement"). *See also, R. Seamon, An Erie Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37, 89-90 (2006) ("the mere pleading of a large punitive damage request can force a defendant to settle the case quickly in unfavorable terms. This dynamic can rise regardless of the merits of the claim. It is a particularly strong dynamic when the defendant's insurance company refuses to defend against punitive damages claims."). Allowing punitive damages on an unseaworthiness claim sets up that precise dynamic "regardless of the merits of the claim." *Id.*

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." *Miles*, 498 U.S. at 32-33. That precept applies forcefully to the question presented in this case considering that punitive damages aim to punish and deter reprehensible conduct while notions of fault do not even factor into a seaman's modern claim for unseaworthiness.

Instead, the hair trigger for unseaworthiness liability is the condition of the vessel, regardless of whether any conduct of the owner is to blame. Permitting a seaman to recover punitive damages meant to punish and deter egregious conduct on a theory of liability without fault while the Jones Act limits the same seaman to compensatory and pecuniary damages upon proof of fault would impermissibly elevate this Court's place in the constitutional scheme, the hierarchy of which this brief addresses next.

II. CONGRESS HAS SUPERIOR AUTHORITY TO SHAPE AND LIMIT MARITIME LAW, AND THE COURTS MUST ABIDE BY STATUTORY LIMITS ON DAMAGES.

More than a century ago, this Court considered it "settled doctrine that . . . Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917).

Many decades later, *Miles* confirmed that Congress still holds superior authority when it comes to formulating maritime law. It further allowed that supplementing statutory remedies was permissible to

the extent that would achieve uniformity with statutory policy, but that

> 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.

Miles, 498 U.S. at 27. From there, *Miles* followed the footsteps of earlier decisions applying the same precepts.

First was *Moragne*. It overruled *The Harrisburg*, 119 U.S. 199 (1886), which held general maritime law afforded no remedy for a wrongful death in the absence of an applicable state or federal statute. *Moragne*, 398 U.S. at 409. Taking its cue from Congress' creation in 1920 of wrongful death actions for most maritime deaths through the Jones Act and Death on the High Seas Act or DOHSA, *Moragne* filled a gap by providing a like claim for non-seamen deaths within state territorial waters. *Miles*, 498 U.S. at 23-28. Thus, *Moragne* supplemented to achieve uniformity between maritime statutes and general maritime law, but it exceeded no limits imposed by the Jones Act and DOHSA.

Then came *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), which held loss of society damages could not be recovered on a general maritime law wrongful death claim because they could not be recovered under DOHSA.

> Congress made the decision for us. DOHSA, by its terms, limits recoverable damages in wrongful death suits to "*pecuniary* loss

> sustained by the persons for whose benefit the suit is brought." 46 U.S.C. App. § 762 (emphasis added). This explicit limitation forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action.

Miles, 498 U.S. at 31.

Miles further noted that *Higginbotham* rejected the argument that general maritime law should supplement the remedies afforded by maritime statutes. "[I]n 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.'" *Id.*, quoting *Higginbotham*, 436 U.S. at 625.

The key principles and logic of *Higginbotham* controlled this Court's decision in *Miles*. Congress has addressed what damages are recoverable in the area of maritime personal injury and death, and "'when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.'" *Miles*, 498 U.S. at 31, quoting *Higginbotham*, 436 U.S. at 625.

Since *Miles*, this Court has twice reaffirmed that maritime personal injury and death claims under maritime statutes and general maritime law should be coextensive. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), ruled that non-pecuniary loss of society damages could not be recovered for wrongful death of a commercial airline passenger under general maritime law where Congress limited damages to pecuniary losses under DOHSA. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001), found "no rational basis . . . for distinguishing

negligence from seaworthiness" and recognized a general maritime law negligence claim for death of a vessel repairman, just as maritime law recognizes seamen's personal injury and death claims for unseaworthiness and both the Jones Act and DOHSA allow claims for negligence causing death.

Moragne, *Higginbotham*, *Miles*, *Zicherman*, and *Garris* together teach several lessons. One is that a hierarchy exists in the constitutional scheme that places superior authority with Congress to set maritime law policy. A second is that general maritime law remedies should be coextensive with their statutory counterparts. And a third is that courts must abide by whatever limits are included in the statutes that Congress enacts. "An admiralty court is not free to go beyond those limits" that are included in the Jones Act and DOHSA. *Miles*, 498 U.S. at 24.[7]

Here Congress spoke directly through the Jones Act to the very cause of action that respondent pursues on a theory of unseaworthiness. Because he seeks a more expansive remedy under general maritime law than what the Jones Act would allow on the same cause of

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[7] The allowance of punitive damages for willful refusal to pay maintenance and cure in *Townsend* did not abridge or violate Congressional policy because no statute spoke to the maintenance and cure issue presented there. The Jones Act and DOHSA address liability for maritime injury and death, not the separate and independent obligation of a vessel owner to pay maintenance and cure to a seaman after injury occurs. *Townsend*, 557 U.S. at 420-21; *Peterson*, 278 U.S. at 136-37 ("the right under 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 arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship").

action, *Miles* applies and disallows recovery of punitive damages.

III. UNIFORMITY LIKEWISE COMMANDS A DECISION THAT SEAMEN CANNOT RECOVER PUNITIVE DAMAGES FOR UNSEAWORTHINESS.

Uniformity between statutory pronouncements and general maritime law has been a consistent force driving decisions of this Court. The holding of *Miles* itself strongly illustrates this point.

> Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the *uniform plan of maritime tort law Congress created in DOHSA and the Jones Act*. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society.

Miles, 498 U.S. at 37 (emphasis added).

Uniformity likewise bolstered the decision in *Moragne* to overrule *The Harrisburg* and create a general maritime wrongful death cause of action.

> This result was not only consistent with the general policy of both 1920 Acts favoring wrongful death recovery, but also effectuated "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' *Moragne*, *supra*, 398 U.S. at 402, quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)."

Miles, 498 U.S. at 27.

This Court has clearly identified the Jones Act as the leading maritime tort statute to which general maritime law should conform. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field. Foremost among those enactments in the field of maritime torts is the Jones Act . . .." *American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994).

Just as this Court announced uniform rules as to seamen's unseaworthiness claims in *Moragne*[8] and *Miles* to conform to maritime tort statutes, here it should likewise announce a uniform rule that seamen cannot recover punitive damages for unseaworthiness just as they cannot recover them for Jones Act negligence.

IV. LEADING MARITIME SCHOLAR PROFESSOR SCHOENBAUM CONCLUDED IN HIS TREATISE THAT SEAMEN CANNOT RECOVER PUNITIVE DAMAGES FOR UNSEAWORTHINESS.

Professor Thomas J. Schoenbaum has spent much of his professional life in the practice, teaching, and research of admiralty and maritime law. He has taught law since 1968 and has written many books and articles on admiralty and maritime law. His major work *Admiralty and Maritime Law* is a leading authority – the treatise so often cited by state and

[8] The deceased longshoreman in *Moragne* was a "Sieracki seaman" as to whom unseaworthiness could be claimed at that time. In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act to eliminate longshoremen claims for unseaworthiness.

federal courts, including by this Court. *E.g.*, *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837-38 (1996).

He objectively analyzed the very question presented by this case in the sixth edition of his treatise published in 2018. His detailed analysis led him to conclude that "Jones Act seamen may not recover punitive damages in suits for unseaworthiness against their employers or against vessel owners or operators." Schoenbaum, § 5:10, at 335 and 336-39.

Professor Schoenbaum framed the general question as "what is the proper reach of *Miles* after *Baker* and *Townsend*?" He recognized that *Baker* and *Townsend* express a general rule that punitive damages are available in appropriate general maritime law cases. But he further observed that *Townsend* did not overturn or disturb the holding and reasoning of *Miles*. He noted that *Townsend* not only said "[t]he reasoning of *Miles* remains sound," but also "expressly agreed, stating: it would be 'illegitimate to create common law remedies that [exceed] those remedies statutorily available under the Jones Act and DOHSA.'" *Id.* at 335, quoting *Townsend*, 557 U.S. at 420.

As to punitive damages for Jones Act seamen, Professor Schoenbaum first determined that *Miles* had effectively decreed that in cases of both seamen personal injury and death, damages for general maritime law unseaworthiness are the same as those for Jones Act negligence. *Id*. at 336. From there, he turned to the pecuniary damages limitation expressed in *Miles* to analyze whether punitive damages are pecuniary. He said the clear answer to this question was "no" because punitive damages are not capable of any standardized measurement – just as *Baker*, lower court decisions, and learned commentary agreed. *Id*. Consequently, Professor Schoenbaum said "it appears

that *Miles* applies to exclude the recovery of punitive damages by Jones Act seamen in suits against their employers or a vessel for unseaworthiness." *Id*. at 336-37.

But Professor Schoenbaum did not end his analysis there. He next addressed whether his conclusion squared with *Townsend*. He said "the answer to this question is yes, on several grounds." *Id*. at 337.

First, he noted that tort damages did not apply to maintenance and cure (the right at issue in *Townsend*) and judicial authority instructed that tort damages for Jones Act negligence and unseaworthiness claims were identical. Second, Professor Schoenbaum determined that when Congress enacted the Jones Act as a supplemental tort remedy in 1920, it was well aware of a seaman's pre-existing right to maintenance and cure but it "could not have foreseen" the subsequent radical development of unseaworthiness and "the complications this caused." Third, he contrasted maintenance and cure's ancient origins in general maritime law against the relatively recent development in the 1940's of the modern unseaworthiness claim. Fourth, he explained that the Jones Act was passed to enhance, not replace seamen's preexisting right to maintenance and cure, while unseaworthiness was developed to provide seamen an alternative ground to prove liability, "but not to provide new remedies." *Id*. at 337-38.[9]

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[9] Professor Schoenbaum explained in his treatise that complete uniformity between all classes of claims does not exist because some claims fall within the ambit of the Jones Act and DOHSA while others do not. Thus, recoverable damages in the case of a cruise passenger are not limited by the Jones Act while those in the case of a seaman plainly are. Such disparate treatment is the product of how Congress exercised its constitutional power

Professor Schoenbaum closed his analysis by explaining how the Ninth Circuit below and the Washington Supreme Court in *Tabingo v. American Triumph LLC*, 391 P.3d 434 (2017), *cert. denied*, 138 S. Ct. 648 (2018), both incorrectly analyzed the question. He said those courts mistakenly applied *Townsend* and improperly distinguished *Miles*, failing to adequately analyze *Miles* and its rulings excluding non-pecuniary damages and mandating uniform maritime tort remedies. *Id*. at 338-39.

CONCLUSION

The Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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to sculpt maritime claims and policy. It would be the place of Congress to eliminate such disparities, not the courts. Schoenbaum, § 5:10, at 338.

ADDENDUM

ADDENDUM

ALASKAN LEADER FISHERIES LLC

Alaskan Leader Fisheries LLC is one of the most progressive, innovative, and vertically integrated "hook and line" fishing companies in Alaska. It knows that its most valuable resources are the more than 100 incredible crewmembers who work hard and live on their vessels. Alaskan Leader Fisheries is known for its commitment to providing comfortable accommodations, a safe work environment, and a network of support for those crewmembers.

It operates four super long liners year round in the Bering Sea, using the latest technology for harvesting and processing Alaska seafood. Built in the United States and operated in compliance with Coast Guard requirements, they are the newest, safest, and cleanest vessels in the long line fleet. They proudly fly the Maltese Falcon Cross – the symbol of inspection excellence from the American Bureau of Shipping.

COASTAL MARINE FUND

Coastal Marine Fund is an unincorporated association licensed to do business in the State of Washington. Its members include about 350 owners of "traditional" fishing vessels – typically under 100 feet long and operated by long-time fishing families. These vessels fish along and off the coasts of Alaska, Washington, Oregon, California, and, to a lesser extent, the East Coast. The men and women who serve aboard Coastal Marine Fund member vessels are classic commercial fishermen.

Coastal Marine Fund uses group buying power to procure marine insurance for members at favorable premium rates. It limits membership to vessel owners

with better than average loss records to maintain strong buying power and keep insurance premiums as low as possible.

FISHERMEN'S FINEST, INC.

Based in Kirkland, Washington, Fishermen's Finest, Inc., provides safe, good paying careers for more than 240 employees in Alaska and Washington State. It strongly advocates progressive safety standards in US offshore fishing operations.

Fishermen's Finest owns and operates three US factory catcher processor ships. They harvest and process approximately 120 million pounds of fish per year in US EEZ waters of the Bering Sea and North Pacific Ocean, outside state territorial waters. Each ship is either load lined or classed, and operates with up to 43 crewmembers for 10 to 11 months each year.

GLOBAL SEAS LLC

Global Seas LLC is a private management company with headquarters in Seattle, Washington. Since forming in 2001, it has grown and evolved into an internationally diverse entity. Known for combining experience and knowhow from the past and with technology of the future, Global Seas has a variety of marine businesses lines that include fish harvesting, fish processing, and marine research.

Global Seas views it as a mission to provide its crews "with the most advanced, dynamic and quality vessels" that are safe, efficient, and well maintained. And that it does.

Global Seas operates a variety of fishing trawlers on both the East and West Coasts. Two recent additions to the Alaska fishing fleet are equipped with the latest technology, safety equipment, and exceptional living

spaces for the crew. Two other trawlers are regularly updated to exceed the industry standards.

It also owns and manages several research vessels. Global Seas has equipped them with state-of-the-art full ocean mapping capability. Surveys and research conducted by these vessels provide critical data that the maritime industry can use to make operations at sea safer and more predictable.

GOLDEN ALASKA SEAFOODS, LLC

Golden Alaska Seafoods is a Washington limited liability company that operates a 305 foot long fish processing vessel M/V GOLDEN ALASKA in waters off the coasts of Alaska, Washington, and Oregon. The vessel does not catch fish but takes deliveries from a number of catcher vessels whose crews, in turn, depend on the GOLDEN ALASKA for their living. As such, the vessel is commonly referred to as a "mothership."

The GOLDEN ALASKA carries around 150 hard-working crewmembers of various nationalities, religions, and backgrounds who compose a true cultural melting pot. They live on the vessel at sea for months at a time, with brief stops in ports every 10 days or so to unload product and replenish supplies. Golden Alaska works cooperatively with the crew to make their floating work place and home a safe environment.

NORTH STAR FISHING COMPANY LLC

North Star Fishing Company, founded in 1987, is based in Seattle, Washington. Operating a fleet of four trawl catcher processors in Alaska, it fishes for a variety of species. It is known for its commitment to

providing sustainable catch, harvesting natural, wild fish to feed a hungry world.

North Star Fishing strives every day to maintain an environmental balance that promotes healthy and productive oceans. For example, the company prides itself on working with scientists and using modified fishing gear to reduce adverse effects on the seafloor habitat.

It takes a team effort to safely achieve sustainable catch in the rough and unforgiving environment of Alaskan waters – something North Star Fisheries has successfully achieved for many years. Crewmembers of North Star Fishing vessels proudly participate in the company's conservation efforts. In turn, the company proudly employs its crewmembers, and it makes their safety a priority.

NORTH STAR INSURANCE SERVICES, LLC

North Star Insurance Services offers a broad range of insurance coverage options to bring peace of mind to fishing vessel operators, from small mom-and-pop operations to large factory trawlers. With locations both in Seattle, Washington, and Fairhaven, Massachusetts, the company is familiar with the unique needs of the fishing industry on both coasts.

North Star Insurance knows that safety is a top priority for its clients wherever they fish. Its clients promote safe practices and continuously work to improve safety to minimize injuries. That, in turn, helps keep insurance premiums as low as possible.

When mishaps do occur, the insurance services that North Star Insurance offers help vessel owners handle resulting claims, consider steps to try to prevent such events, and ultimately keep insurance premiums low.

North Star Insurance supports its clients' desire for uniform maritime law that fairly compensates injured crewmembers for their actual losses when liability exists.

OCEAN PEACE, INC.

Ocean Peace is located in in Seattle, Washington, and operates a fleet of four large factory trawlers 215 to 230 feet long and one catcher vessel. The company employs hundreds of hardworking crewmembers who catch, process and freeze fish on the vessels, which operate seven days each week for 24 hours per day from January to November each year.

Unquestionably, the extreme conditions of the Bering Sea and Aleutian Islands present a unique environment for working and living at sea. Success for all involved requires dedication and hard work, with an emphasis on safety.

Ocean Peace considers crew safety the highest priority on all of its vessels. It regularly updates its safety practices and work spaces on board the vessels and openly communicates with crewmembers regarding any safety concerns they may have. In addition to conducting training and drills as required by the Coast Guard, Ocean Peace requires all crewmembers to attend safety courses and crew safety meetings prior to each trip.

O'HARA CORPORATION

For over 110 years, O'Hara Corporation has withstood the test of time operating fishing vessels in both the Atlantic and Pacific Oceans. Francis J. O'Hara began building his sailing fleet in 1903 starting in Boston, Massachusetts.

After four generations, the business has grown. From setting a seine net off the coast of Maine for herring, to participating in the scallop fishery out of New Bedford, Massachusetts, to operating factory processing vessels in the North Pacific, O'Hara has diversified into a multinational family business. While its roots are still planted in Maine where O'Hara maintains significant marine and land-based operations, its catcher processor vessels that fish in waters of the Bering Sea, the Aleutian Islands, and the Gulf of Alaska are the heart of the company. O'Hara continuously invests in safety training for employees and crewmembers working ashore and at sea.

TRIDENT SEAFOODS CORPORATION

Trident Seafoods is one of the largest seafood companies in North America. The company was founded in 1973 by fisherman Chuck Bundrant when he built and skippered the first modern crab catcher/processor vessel to operate in the Bering Sea.

The company now owns trawl catcher/processor vessels, trawl catcher vessels, floating processing vessels, crab catcher vessels, freighters, and fish tenders that operate throughout waters off Alaska. It also owns shore-based seafood processing facilities in some of Alaska's most remote coastal areas.

Trident Seafoods employs thousands of hard working individuals at sea and on land. In addition, it partners with thousands of independent and dedicated Alaskan fishermen who run family-owned boats. Led by executives who began their careers fishing and understand firsthand what it means to work at sea, Trident Seafoods strives to provide a safe and secure work environment for crewmembers on all of its vessels.

UNITED CATCHER BOATS ASSOCIATION

United Catcher Boats or UCB is a non-profit trade association established in 1993 that serves two main purposes. It provides critical information to its member vessel owners, such as updated fishery regulations and rule making information at the regional and national levels. UCB also represents vessel owners, giving them a unified voice to air their concerns and positions regarding fisheries management and policy when addressing various government agencies and organizations.

UCB members own 68 vessels that trawl for ground fish in Bering Sea, Gulf of Alaska, and West Coast commercial fisheries. They deliver catch to motherships or shore-based facilities for processing. Safety has always been important to UCB members. UCB informs members of changes to safety rules and regulations that apply to their vessels as soon as possible so members can be the first ones to implement those changes as needed.

UNITED STATES SEAFOODS, LLC

"To work at sea is a thing of pride." These words, spoken by Matt Doherty, the president of the company, say it all. Starting as a fisherman in Boston, Massachusetts, Mr. Doherty's origins are humble. Over the years, he and his partners developed a fishing company in the Pacific Northwest that currently operates nine vessels and employs over 700 people. The United States Seafoods fleet ranges from the 98 foot catcher vessel ALASKA BEAUTY that employs five crewmembers to the 295 foot factory trawler SEAFREEZE ALASKA that employs 85.

In this era of consolidation and highly capitalized fisheries, Mr. Doherty is a one of the few remaining

fishermen founders – he built the company boat by boat. It comes as no surprise that when the vessels are in port, Mr. Doherty goes on board every day, doing tasks and chores alongside his crew.

In this company, crewmembers are not merely employees. They are family and are treated as such. Mr. Doherty takes pride in the company and his family of crewmembers. He knows and understands that working at sea, months at a time, in an unforgiving environment is a hard and prideful experience not meant for all. But for those proud individuals who choose to do it, United States Seafoods provides the safest environment onboard its vessels. After all, safety of the family is one of the most important goals.