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 FOR *AMICUS CURIAE* WATERWAYS COUNCIL, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Waterways Council, Inc. (WCI), located in Washington, D.C., is the public policy organization advocating for a modern, efficient, and well-maintained national system of ports and waterways. WCI is made up of nearly 200 members, including most tug and barge companies operating on the inland river system, companies that ship or use goods transported on our inland waterways, ports, agricultural groups, Chambers of Commerce, environmental and conservation entities, lock and dam builders, and other waterways advocacy groups. As these members well know, the inland waterways are a key component of America's competitiveness in the global marketplace.

WCI's members thus have a keen and sustained interest in keeping the country's waterborne commerce competitive and efficient. The seamen assigned as members of the crew of vessels on these waterways benefit from a compensation system that is both fair and generous. Adding a layer of uncertain non-economic/non-pecuniary damages, not tied to actual losses, to the already-existing system created by Congress in 1920, as the Ninth Circuit proposes, poses an unreasonable economic risk. WCI sees this case as having vital and exceptional importance to the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties consented to the filing of this brief.

inland marine transportation segment of our economy, a segment relied upon by family farmers, manufacturers, energy producers, lock and dam constructors, and commodity shippers. WCI urges this Court to reverse the judgment of the Ninth Circuit and adopt the reasoning of the majority opinions in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (*en banc*).

SUMMARY OF THE ARGUMENT

The inland marine transportation industry carries goods on the waterways not only more inexpensively but also more fuel efficiently, less polluting, and more safely than transportation of similar quantities of goods on our nation's highways and railways. Already vessel crewmembers are protected by a compensation system with benefits and causes of action more generous than granted to truck companies' employees (workers' compensation) or rail crewmembers (FELA). Supplementing further the remedies already afforded to injured seamen and their families will increase the costs, and thereby decrease the competitiveness, of the marine transportation industry as compared to trucking and rail transportation. Adding costs to the industry via punitive exposure will not just harm the Jones Act seamen's employers but also the shippers, all those who rely on this critical sector, and ultimately damage the nation's economy and make it less competitive. Moreover, given the United States Coast Guard's comprehensive regulation of the seaworthiness of WCI members' vessels, no such incentivization is needed. Punitive damages would increase costs with no benefit to the country's economy and no gain in personal safety.

Not only is the current compensatory compensation system important to sustaining this industry's competitiveness, it makes little sense to graft a non-pecuniary damage award possibility onto the General Maritime Law unseaworthiness cause of action afforded a seaman. A punitive damages claim necessarily must assert egregiously-unreasonable

conduct by the Jones Act employer – yet the unseaworthiness doctrine is a strict liability cause of action not requiring lack of reasonable care. The strict liability cause of action will transform into a heightened negligence claim and thus push aside the Congressionally-mandated compensatory regime now available to seamen.

ARGUMENT

I. Allowance of Punitive Damages for Unseaworthiness Claims Would Cause Economic Harm and Comparative Disadvantage to the Inland Marine Transportation Industry.

A. The Inland Waterways Are of Vital Economic Importance to the United States.

The tugs and barges crewed by Jones Act seamen on the inland waterway system provide the most fuel efficient, environmentally sound, safe, and economical way to ship America's bulk commodities. In 2016, 557.8 million tons valued at $300 billion were transported on the nearly 12,000 miles of navigable inland rivers. These "inland marine highways" move commerce to and from 38 states throughout the heartland and Pacific Northwest. The inland waterways industry sustains more than 541,000 jobs. To emphasize just one aspect of this waterway system, American farmers depend on the inland rivers and ports to get their crops to global markets easily and inexpensively, compared to agricultural interests in other regions of the world where such an incredible inland transportation system simply does not exist.

And the crewmembers assigned to these vessels assist in creating an inland marine industry that outperforms the other carriers of such bulk goods – rail and truck. The Texas A&M Transportation Institute in January 2017 updated a study that demonstrates the following key statistics:

1. Emissions including greenhouse gases generated by inland towing constituted a fraction of that produced by trucks on a gram-per-ton-mile basis and considerably lower than rail.[2]

2. The inland towing segment, compared to rail and truck, is far more fuel efficient in ton-miles per gallon as this graphic shows.[3]

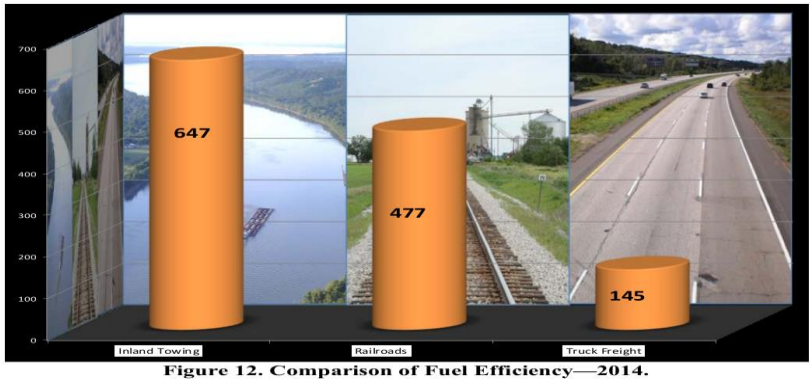

Figure 12. Comparison of Fuel Efficiency—2014.

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[2] *A Modal Comparison of Domestic Freight Transportation Effects on the General Public: 2001-2014*, Center for Ports and Waterways, Texas A&M Transportation Institute (January 2017), www.nationalwaterwaysfoundation.org/documents/Final%20TTI%20Report%202001-2014%20Approved.pdf (last visited January 28, 2019). The study analyzed the societal impacts of a diversion of waterborne cargo to truck or rail modes in the event of a major waterway closure.

[3] *Id.* at 47.

3. Critically, on the issue of safety of the inland marine industry, the below graphic shows the tremendous difference in the ratio of injuries per million-ton-miles among the three bulk commodity transportation modes.[4]

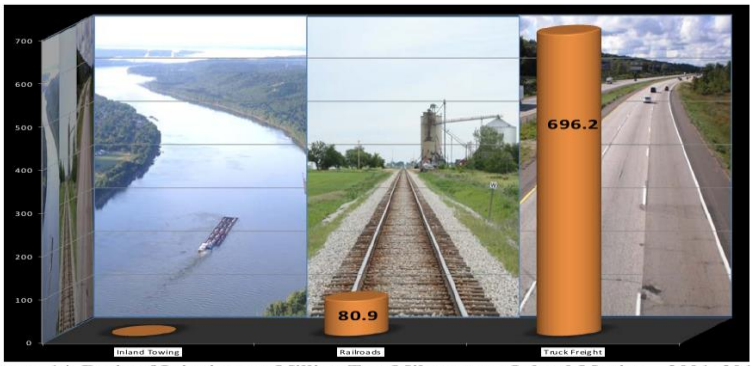

Figure 14. Ratio of Injuries per Million Ton-Miles versus Inland Marine—2001–2014.

As safe as the inland maritime industry has been, recently additional safeguards have been implemented via an important rulemaking by the United States Coast Guard. 46 C.F.R. Subchapter M, effective in June 2016, puts into place a comprehensive inspection program and minimum safety standards for towing vessels to ensure regulatory oversight of each towing vessel's seaworthiness. Subchapter M extensively prescribes equipment condition requirements, robust safety management systems, and third-party audits to address seaworthiness issues. In addition, many shippers themselves impose stringent regimes to ensure seaworthy vessels before they will use a carrier's equipment to transport their products. Adding punitive damage exposure is not needed to enhance safety. Instead, costs will rise, farmers in the

[4] *Id.* at 51.

nation's heartland (among other shippers) will become less competitive in the global marketplace, with no benefit to anyone except plaintiffs and their lawyers.

The inland marine transportation industry shines in all these key areas – particularly in safety – as compared to truck and rail. Imposition now of the overhanging risk of windfall recoveries for Jones Act seamen assigned to these vessels threatens this vital economic driver. Punitives will undermine the competitiveness of the inland maritime industry, hurt shippers, and damage the country's economy.

B. The Safer, More Fuel Efficient, and Environmentally-Sound Inland Maritime Industry Should Not Be Comparatively Disadvantaged With Punitive Damages.

Yet punitive damages, if added to the remedies afforded seamen, would undoubtedly increase costs to this segment and work a comparative disadvantage. Business will be driven from the maritime sector to truck and rail, to the disadvantage of the country. The compensation scheme for injured railroad workers, the Federal Employers' Liability Act (FELA), while allowing tort-based negligence actions, is limited to pecuniary-only damages. *See Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913). Truckers injured in the course of their work, of course, have no federal compensation system but rather have recourse to workers' compensation statutes of the many states. These employers are not at risk for punitive damages. A new-found recognition of punitive damages confined to marine transportation will diminish the economic and social benefits already gained through this mode of bulk goods transport.

C. The Seaman's Remedies Are Already Generous.

A seaman's lawyer knows that proving the client's status as a Jones Act member of the vessel's crew is "the brass ring" and worth pushing the limits or outer edges of seaman status – as this Court's Jones Act jurisprudence proves. *See, e.g.*, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) ("We think the time has come to jettison the aid in navigation language" to define seaman status); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) (nearly stationary dredge a "vessel" for Jones Act and Longshore Act purposes).

Moreover, seaman status – even in the absence of a shot at punitive damages – is considered highly favorable given the substantive and procedural advantages granted to seamen's litigation claims against employers:

1. The unseaworthiness warranty owed the seaman imposes an "absolute duty" on the shipowner to provide a "reasonably fit" vessel that is not dependent on the proof of negligence or fault. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). This duty is one of strict liability for a defective condition on the ship or with the ship's equipment. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6.26 (6th ed. 2018).

2. The seaman's proof of causation does not need to rise to the level of "proximately causing" the injury; instead, any negligence that played a role in the injury, no matter how slight, will suffice. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011).

3. The seaman possesses procedural advantages of choice of forum (state or federal court) and whether

to try the case to the bench or to a jury. *See* 28 U.S.C. § 1333 (2006); Fed. R. Civ. P. 9(h).

The seaman's already-ample legal armamentarium needs no further enhancement to ensure full compensation to the victim of an unfortunate marine accident. The seaman possesses remedies and procedural advantages not available to his or her colleagues in other transportation modes. And, as will be discussed more fully below and in the Petitioner's brief, accepting the Ninth Circuit's reasoning will thwart the express intent of Congress when it legislatively overruled this Court in *The Osceola* and thus permitted a seaman to recover for negligence. "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." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

II. Allowance of Punitive Damages for Unseaworthiness Claims Would Violate *Miles* and Render the Jones Act a Dead Letter.

This Court in *Atlantic Sounding Co. v. Townsend* could not have been clearer: "[t]he reasoning of *Miles* remains sound." 557 U.S. 404, 420 (2009). In *Miles*, the Court, inter alia, refused to bypass Congress' clear intent in passing the Jones Act by "sanction[ing] more expansive remedies in [an unseaworthiness action] than Congress had allowed in [a Jones Act action]." 498 U.S. at 32–33. *Miles* has been the subject of rigorous judicial and academic debate, but, if nothing else, it teaches that the Jones Act, as part of Congress'

"uniform plan [for] maritime tort law," should not play second fiddle to the General Maritime Law. *Id.* at 37.

If this Court accepts the Ninth Circuit's reasoning, however, the Jones Act would be relegated to just that. Unseaworthiness would be the star, and the Jones Act would be an after-thought, shoved into pleadings solely to retain the unique procedural advantages afforded by the Act. *See* 28 U.S.C. § 1333; Fed. R. Civ. P. 9(h). Congress surely did not intend that result—it intended that seamen use the Jones Act, not unseaworthiness, "to recover for negligence . . . ." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 328–29 (2d ed. 1975).

A. Punitive Damages Are Not Available Under the Jones Act.

As Petitioner notes, there has been universal consent among the courts, including this Court, regarding the availability of punitive damages under the FELA. *See* Pet'r's Br. 17–18. They are not available. *See Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352 (1915); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993); *Kozar v. Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987).

Because punitive damages are not, and never have been, available under the FELA, and because the Jones Act imported into maritime law the same remedies available to railroad workers under the FELA,[5] it necessarily follows that punitive damages are similarly unavailable under the Jones Act.

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

Unsurprisingly, the lower federal courts unanimously agree. *See Miller*, 989 F.2d at 1457; *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560–61 (9th Cir. 1984); *McBride*, 768 F.3d at 390–91; *see also Townsend*, 557 U.S. at 428 (Alito, J., dissenting).

B. Allowing Punitive Damages for Unseaworthiness Would Eclipse the Congressionally-Enacted Seaman's Compensation Remedies.

As a real-world litigation strategy, Jones Act negligence claims and general maritime law unseaworthiness claims travel together. *See* Gilmore & Black, *supra*, at 389–90 (explaining that the "current practice" in seaman tort suits is to plead both Jones Act negligence and General Maritime Law unseaworthiness). Where one goes, the other is not far behind—the reason being that "they derive from the same accident and look toward the same recovery."[6] *See id.* at 383; *see also McBride*, 768 F.3d at 400 (Clement, J., concurring) ("[U]nseaworthiness has been transformed into a strict liability action, and then systematically expanded in scope so that it would now award an unseaworthiness recovery to an injured seaman who would have traditionally only had a Jones Act negligence action"). A claim for withheld maintenance and cure may arise out of the same accident, but that claim is completely separate from

[6] As this Court explained in *Pacific S.S. Co. v. Peterson*, "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." 278 U.S. 130, 138 (1928).

any fault connected to the underlying accident. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73, 147–48 (1997) (explaining that while unseaworthiness and Jones Act negligence are "Siamese Twins," the "action for damages for withholding maintenance and cure is completely separate and independent from [those] claims").

Should punitive damages now be grafted onto the unseaworthiness cause of action but not Jones Act negligence, the Jones Act will shortly be pushed aside. Although unseaworthiness at present need no showing of the shipowner's negligence or that of the seaman's fellow crewmembers, the two causes of action arise from the same conduct. *See Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 729 (1967) (White, J., dissenting) (citations omitted) ("While it is true that unseaworthiness is legally independent of negligence, it cannot be denied that in many cases unseaworthiness and negligence overlap.").

Of course, to recover punitive damages, a party must show a level of mental culpability. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 9–10 (5th ed. 1984) (explaining that a grossly heightened sense of negligence may give rise to punitive damages). As Justice Thomas phrased it in *Townsend*, punitive or exemplary damages arise from "tortious acts of a particularly egregious nature." *Townsend*, 557 U.S. at 411. With accidents involving negligent conduct, the seaman's lawyer will be incentivized to focus exclusively on unseaworthiness.

Instead of pursuing the Jones Act claim, the savvy seaman's lawyer will transmogrify that negligent, tortious conduct into "unseaworthiness" to plausibly allege a claim for punitive damages. *See An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 Harv. L. Rev. 1900, 1909–10 (1992) (explaining that plaintiffs' lawyers have a natural tendency to exploit punitive damages). In such a world, there is no room left for the Jones Act.

Making a dead letter of the Jones Act negligence cause of action circumvents Congress' plan for seamen's tort recovery against their employers. It dislodges that conduct-based reasonable due care standard and shoehorns it into the unseaworthiness cause of action that heretofore existed to allow recovery for an unfit ship or equipment regardless of fault or negligence. The Ninth Circuit's approach contradicts the Jones Act and improperly alters the seaman's unseaworthiness claim.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted:

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