

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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THE DUTRA GROUP, )  
Petitioner, )  
v. ) No. 18-266  
CHRISTOPHER BATTERTON, )  
Respondent. )  
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Pages: 1 through 56  
Place: Washington, D.C.  
Date: March 25, 2019

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3       THE DUTRA GROUP,                                     )  
4                                     Petitioner,                     )  
5                                     v.                                     ) No. 18-266  
6       CHRISTOPHER BATTERTON,                                     )  
7                                     Respondent.                     )  
8       - - - - -

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10                                     Washington, D.C.  
11                                     Monday, March 25, 2019

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13                     The above-entitled matter came on for oral  
14       argument before the Supreme Court of the United  
15       States at 11:09 a.m.

16  
17       APPEARANCES:

18  
19       SETH P. WAXMAN, ESQ., Washington, D.C.;  
20                     on behalf of the Petitioner.  
21       DAVID C. FREDERICK, ESQ., Washington, D.C.;  
22                     on behalf of the Respondent.  
23  
24  
25

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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-266, the Dutra Group versus Batterton.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

In Miles, this Court emphasized that when Congress enacted the Jones Act, it took principal responsibility for fashioning remedies for injured seamen. And again and again, this Court has followed Congress's lead --

JUSTICE SOTOMAYOR: I'm sorry. That -- that's a little bit backwards. I thought the Jones Act directly says that it's there to supplement whatever the remedies were, not to take remedies away. It was there to give more protection to seamen, not less.

MR. WAXMAN: So the Jones Act doesn't say anything about remedies --

JUSTICE SOTOMAYOR: But our case law

1 has said it repeatedly.

2 MR. WAXMAN: You -- what this Court  
3 said just a few years after the Jones Act was  
4 enacted was that the Jones Act provides,  
5 vis-a-vis unseaworthiness, alternative grounds  
6 for recovery of a single cause of action. And  
7 the Court also said, in Mitchell versus Trawler  
8 Racer several years later, that with the  
9 passage of the Jones Act, Congress obliterated  
10 all distinctions between the kinds of  
11 negligence for which shipowners are liable.

12 And it's important --

13 JUSTICE SOTOMAYOR: But that doesn't  
14 tell me that their intent was to take away  
15 common law remedies. And I thought that's what  
16 Townsend said, which is if -- unless there is  
17 some proof, contrary evidence, those common law  
18 remedies still remain.

19 And so my question is that's a  
20 different statement than what you started with.

21 MR. WAXMAN: Well, I --

22 JUSTICE SOTOMAYOR: That it's the  
23 exclusive remedy.

24 MR. WAXMAN: No, I think my -- I'm not  
25 sure that it is a different statement. The

1 question is -- and this Court has made clear,  
2 not only in this area of the law, vis-a-vis the  
3 Jones Act, and in cases like Moragne and  
4 Mahnich and Miles itself, that when Congress  
5 exercised -- but also in cases like -- and I  
6 point the Court to the -- the Court's decision  
7 in Milwaukee versus Illinois, in which the  
8 Court stated the general -- broader rule that  
9 when federal -- when this Court sits as a  
10 federal common law court and announces and  
11 expounds the scope of federal common law  
12 remedies, it has the authority to do that  
13 interstitial law-making function, but when  
14 Congress then comes in and legislates in that  
15 particular area and sets out particular  
16 remedies, the previous scope of the common law  
17 remedies subside.

18 That's exactly what this -- Chief  
19 Justice Rehnquist explained for the Court in  
20 Milwaukee, and it's what happened in this case  
21 and is what ought to happen in this case.

22 Now, as to Townsend, Townsend is very  
23 much not to the contrary because it is -- it  
24 involved maintenance and cure, rather than  
25 unseaworthiness, and that makes a tremendous

1 difference in several dimensions.

2 First of all and most fundamentally,  
3 unseaworthiness is a substitute for Jones Act  
4 negligence, while maintenance and cure, as this  
5 Court in Townsend --

6 JUSTICE SOTOMAYOR: Not a complete  
7 substitute. There are different elements to  
8 unseaworthiness than there are to ordinary  
9 negligence. It -- there's different standards.

10 MR. WAXMAN: But I -- our -- our --

11 JUSTICE SOTOMAYOR: It's a different  
12 cause of action. The remedies may overlap, but  
13 not the cause of action.

14 MR. WAXMAN: The cause -- at the time  
15 that the Jones Act was enacted, the contours of  
16 the particular cause of action differed  
17 significantly. The Jones Act was much --  
18 reached much broader.

19 But this Court nonetheless said in the  
20 1920s, in Phillips and in Townsend, in  
21 Baltimore Steamship, that -- and Peterson,  
22 rather, that this -- what Congress did was to  
23 legislate an alternative grounds for the  
24 recovery of a single cause of action. And this  
25 Court explained right away if --

1                   JUSTICE GINSBURG: But I thought --  
2 Mr. Waxman, if I can interrupt you there. I  
3 thought the main reason for the Jones Act was  
4 that there wasn't under the unseaworthiness  
5 doctrine a simple case of negligence. A fellow  
6 crew member acts negligently and injures you;  
7 there was no unseaworthiness remedy for that.

8                   And so Jones came in to create a  
9 negligence remedy that didn't exist before,  
10 that had nothing to do with the fitness of the  
11 ship.

12                   MR. WAXMAN: I -- I agree with that  
13 articulation that this Court rendered in the  
14 Osceola in 1905 and as to which the Jones Act  
15 was addressed. There are several points.

16                   Number one, following the enactment of  
17 the Jones Act, this Court in a succession of  
18 cases, at least five times beginning in 1944 in  
19 the Mahnich case, expanded and revised the  
20 contours of the unseaworthiness remedy so that  
21 it now is -- and -- and, Justice Sotomayor, I  
22 will get to you on the incremental differences  
23 between the two -- so that it now is recognized  
24 as a virtual substitute, as Gilmore and Black  
25 said several decades ago, it is a --



1                   JUSTICE KAGAN:  It's even a little bit  
2 better sometimes, right, given it's a strict  
3 liability offense, isn't it?

4                   MR. WAXMAN:  So it's -- it's not -- it  
5 is frequently said that it is a strict  
6 liability defense, whereas the Jones Act is a  
7 negligence standard.  Both of those terms are  
8 somewhat misleading in application.

9                   Every court that has considered the  
10 question and the treatise writers say that  
11 negligence under the Jones Act is what's called  
12 featherweight negligence.  It barely meets any  
13 standard of negligence, whereas, in *Mahnich*, in  
14 which this Court -- to which this Court has  
15 said imported a strict liability standard under  
16 seaworthiness, what *Mahnich* said was we are not  
17 going to recognize the fellow servant rule  
18 because it's not recognized in the Jones Act.

19                   JUSTICE KAGAN:  I mean, maybe -- I  
20 guess one of the points in your brief that  
21 confused me, and maybe you're kind of providing  
22 an answer to it, but I'll just -- you say  
23 several times in your brief that the  
24 unseaworthiness action really has evolved,  
25 changed, quite a bit since the Jones Act.

1           And I would think that if you're right  
2 as to your basic theory, which is that the  
3 Jones Act is a signal to courts to stop doing  
4 stuff --

5           MR. WAXMAN: Uh-huh.

6           JUSTICE KAGAN: -- because the Jones  
7 Act is now taking over the field, essentially,  
8 if you're right as to your basic theory, how is  
9 it possible that this action of unseaworthiness  
10 could have changed as much as you admit that it  
11 did?

12           MR. WAXMAN: Well, the -- there are  
13 some differences, as Justice Sotomayor -- there  
14 were reasons why the court, when it enacted the  
15 Jones Act, didn't preempt other federal --  
16 existing federal common law remedies.

17           And the situation of preemption and  
18 the effect of a statutory scheme of remedies  
19 vis-a-vis preexisting common law is markedly  
20 different when the common law is federal rather  
21 than state. But, for example, even to this  
22 day, the defendant in a Jones Act case and the  
23 defendant in an unseaworthiness case may be  
24 different.

25           The former is the employer. The

1       latter is the shipowner.  And sometimes they're  
2       not the same.  In Jones Act cases, you have an  
3       absolute right to a jury trial.  In unseaman-  
4       -- unseaworthiness cases, you sometimes do and  
5       sometimes don't, depending on whether there's  
6       diversity of citizenship.

7                 JUSTICE KAGAN:  So I guess my -- if  
8       I --

9                 MR. WAXMAN:  But if I -- if I can just  
10       --

11                JUSTICE KAGAN:  I guess my question  
12       is --

13                MR. WAXMAN:  I realize I'm talking --

14                JUSTICE KAGAN:  -- Mister -- Mr.  
15       Waxman, is when does the Jones Act say stop,  
16       don't do stuff to -- to courts, and when does  
17       it allow courts to keep thinking about  
18       revising, developing these common law actions?

19                MR. WAXMAN:  Well, I think this Court  
20       came pretty close to attempting to articulate  
21       that line in Miles itself where it says, and  
22       I'm quoting from page 27, "In this era, an  
23       admiralty court should look primarily to these  
24       legislative enactments for policy guidance.  We  
25       may supplement these statutory remedies where

1 doing so would achieve the uniform vindication  
2 of such policies, consistent with our  
3 constitutional mandate, but we must also keep  
4 strictly within the limits imposed by  
5 Congress."

6 JUSTICE KAGAN: And I guess what I'm  
7 asking is, how is that kind of flashing yellow  
8 light, which I agree with you, that sounds like  
9 a flashing yellow light to me, how is it  
10 consistent with all the changes that have  
11 occurred in the unseaworthiness action?

12 MR. WAXMAN: And what you see is that  
13 the effectuation of those sentences I just read  
14 in Miles itself, in light of the scope of the  
15 Jones Act, Congress not only eliminated in  
16 Mahnich the -- for -- for unseaworthiness the  
17 defense of fellow servant, and then eliminated  
18 in light of the Jones Act the defense of  
19 contributory negligence under unseaworthiness,  
20 but in Miles, following Moragne, the Court  
21 said, well, the Jones Act recognizes a wrongful  
22 death remedy for claims under the Jones Act.

23 And because the Jones Act and  
24 unseaworthiness are just twin causes of action  
25 for the same injury, we will recognize the -- a

1 -- we will recognize recoveries in wrongful  
2 death, in cases brought of an unseaworthiness.

3 Now, importantly, what happened was,  
4 after this Court decided *Moragne* and said,  
5 well, the Jones Act allows a recovery for  
6 wrongful death and unseaworthiness, so we're  
7 going to, too, the question then came before  
8 the Court in *Sea-Land Services versus Gaudet*,  
9 well, what does that involve? Like, what are  
10 the remedies that you get for wrongful death?

11 And what this Court held was that the  
12 remedies you get for wrongful death include the  
13 loss of society.

14 The next case that comes along is  
15 *Mobil Oil versus Higginbotham*, raises wrongful  
16 death for unseaworthiness but for a wrongful  
17 death that occurred on the high seas.

18 And this time what this Court says is,  
19 well, the Death on the High Seas Act doesn't --  
20 only allows for recovery of pecuniary damages.  
21 Loss of society is not pecuniary damages. So  
22 we need to constrict the federal common law  
23 remedies that we recognized in *Gaudet* in cases  
24 that occur on the high seas.

25 And then, finally, in *Miles*, the Court

1 gets the same question. Loss of society for,  
2 you know, for somebody who is a Jones Act  
3 seaman. And what the Court says is, under the  
4 Jones Act, which is the twin cognate cause of  
5 action for loss resulting from  
6 wrongfully-caused injury, we don't allow loss  
7 of society damages.

8 And, therefore, again, notwithstanding  
9 the broader ruling in *Gaudet*, which took place  
10 in an environment in which there was no  
11 congressional limitation, once again, we're  
12 recognizing the limitation.

13 Now I do want to get --

14 JUSTICE GINSBURG: I thought all those  
15 cases in the *Miles* line had to do with wrongful  
16 death actions and the whole history that there  
17 was no -- before *Death on the High Seas Act*,  
18 there was no such remedy?

19 MR. WAXMAN: Well, the three cases  
20 that I identified just now, Justice Ginsburg,  
21 were wrongful death cases, although *Miles*  
22 itself also included a claim for a right of  
23 survivorship, which is a form of injury.

24 And, once again, the Court said the  
25 Jones Act sets the limits for common law

1 recoveries for injury or death to Jones Act  
2 seamen and held on the injury side of it that  
3 the representative of the deceased, pursuing a  
4 personal injury action on behalf of the  
5 deceased, could not recover future lost wages  
6 because the Jones Act doesn't allow it.

7           Now, in Mahnich, it was not a wrongful  
8 death case. And the -- the other cases which  
9 are cited in, I believe it's Footnote 5 of your  
10 opinion in Usner, which relate all the respects  
11 in which, in light of the Jones Act, this Court  
12 changed, modified both the contours of what  
13 unseaworthiness constitutes and the remedies  
14 available.

15           Now I do want to get to, I think it  
16 was Justice -- I can't remember whose question  
17 it was about -- about Townsend and the other  
18 distinction of Townsend because, even if Miles  
19 didn't exist, and even if Miles didn't import  
20 into this case the constitutional commands of  
21 separation of power and uniformity in maritime  
22 law, in Townsend, what this Court said was,  
23 look, maintenance as a cure is an ancient  
24 remedy that goes back at least until the 13th  
25 Century, if not before.

1           It is a -- it reflects a fundamental  
2 humanitarian imperative to provide sustenance  
3 and care for seamen who fall ill during the  
4 voyage.

5           JUSTICE BREYER: Is it --

6           MR. WAXMAN: And -- and this Court  
7 said, at common law, in particularly egregious  
8 cases, punitive damages were available. In  
9 certain maritime actions which the Court  
10 identified, punitive damages, if not awarded,  
11 there is at least language suggesting that they  
12 could be awarded against the malfeasant.

13           And we -- if we look at maintenance  
14 and cure, we don't see any reason to create an  
15 exception because, as the Court explained in --  
16 in Section 2 -- 2(c) of its opinion, over  
17 pages, let's go back and look.

18           There were treatise writers, I believe  
19 three different treatises that recognized that  
20 punitive damages were available for egregious  
21 refusals to provide maintenance and cure.  
22 There were decided cases, *The Troop* and the  
23 *Carlisle*.

24           At the same time, there is nothing, no  
25 evidence whatsoever that punitive damages were



1 ever even sought, much less awarded, and we  
2 know why.

3 JUSTICE SOTOMAYOR: Any -- any counter  
4 evidence?

5 MR. WAXMAN: Excuse me?

6 JUSTICE SOTOMAYOR: Any counter  
7 evidence?

8 MR. WAXMAN: Well, here's -- here's  
9 the counter evidence, and it's -- it's -- it's  
10 revealing. It's reflected in -- in one of the  
11 principal cases that my friend is relying on as  
12 an example of punitive damages in  
13 unseaworthiness cases.

14 It's a case called the Noddleburn.  
15 It's also, I believe -- yeah.

16 The Noddleburn was a case in which it  
17 was brought for unseaworthiness and for  
18 maintenance and cure. The court held with  
19 respect to unseaworthiness that "there was  
20 actual knowledge of the unsound and unseaworthy  
21 condition of the vessel, coupled not only with  
22 willful negligence but wanton indifference."

23 And yet, in the Noddleburn, the court  
24 considered and discussed the possibility of  
25 awarding punitive damages for the failure to

1 provide maintenance and cure but not for  
2 unseaworthiness.

3 Now I can't cite you a case either  
4 before the Jones Act was passed or after, for  
5 decades and decades after, in which a court  
6 said we've been asked to apply punitive damages  
7 because the -- the conduct that constituted  
8 unseaworthiness was egregious.

9 JUSTICE BREYER: I'd like --

10 MR. WAXMAN: I can't find a case in  
11 which punitive damages were even requested.  
12 And if you look at -- and this -- this Court  
13 certainly has a rich body of unseaworthiness  
14 decisions between the 1880s and the -- and the  
15 present time, there are -- there is case after  
16 case of what is reported as shocking, egregious  
17 conduct in which there is no reflection in the  
18 briefs or in any of the opinions that punitive  
19 damages was even sought.

20 And a reason may be -- and this is the  
21 other Townsend-related reason I want to address  
22 -- prior to -- we have a -- somewhat of a  
23 disagreement between us as to the exact date at  
24 the very end of the 19th Century in which any  
25 court first recognized that compensatory

1 damages could be paid to an injured seaman for  
2 failure of seaworthiness, but at least until  
3 the middle 1880s, at a time when the treatises  
4 and the cases were saying you can get punitive  
5 damages for a willful refusal to provide  
6 medical care to an ill seaman, you couldn't  
7 even get under -- unseaworthiness compensatory  
8 damages.

9           The remedy for unseaworthiness to a  
10 seaman was the privilege to refuse to embark on  
11 a vessel that was unseaworthy and yet to claim  
12 your wages.

13           And that's the reason. That's the  
14 major distinction, if we're talking just on  
15 Townsend terms, that unseaworthiness is so  
16 different than maintenance and cure.

17           On the one hand, you've got treatises  
18 that say you can get punitive damages. It's a  
19 given. You've got cases that are either  
20 awarding or considering punitive damages for  
21 the failure to provide maintenance and cure,  
22 like the Noddleburn.

23           And at the other hand, from the other  
24 side, for all these centuries, at least up  
25 until a couple of cases decided at the end of

1 the 19th Century, for unseaworthiness, no  
2 matter how egregious, there was no right of  
3 personal compensation for --

4 JUSTICE KAGAN: And were there cases  
5 where it was quite egregious? Because I was  
6 thinking about this and thinking maybe it just  
7 wouldn't come up because an unseaworthiness  
8 action is basically you've taken deliberate  
9 action to ensure that your own ship sinks.

10 So most people don't want the ship  
11 that they own to sink, right? So, you know, it  
12 might just be that when people bring this kind  
13 of action, they're not bringing it on the basis  
14 of the kind of behavior that would justify a  
15 punitive damages award.

16 MR. WAXMAN: Justice Kagan, I have  
17 read you the Court's opinion in the Noddleburn,  
18 which finds that the shipowners not only knew  
19 of the unseaworthy condition, but they were --

20 JUSTICE KAGAN: Well, I do think that  
21 my --

22 MR. WAXMAN: And --

23 JUSTICE KAGAN: -- my question is not  
24 answerable by pointing to a single case.

25 MR. WAXMAN: Okay. So I -- can I --

1 can I give you just a couple of other examples  
2 in support of my assertion that there are many,  
3 many cases that the federal courts and this  
4 Court have looked at in which the allegation --  
5 which the findings of seaworthiness indicated  
6 egregious conduct.

7           The first one is the -- the now, I  
8 guess, for purposes of this case, The Rolph,  
9 about which much ink is spilled in the briefs  
10 about whether it did or didn't involve punitive  
11 damages for the -- as -- as explained in the  
12 documents that we've sought permission to  
13 lodge, there is no question that the damages  
14 awarded in that case and sought were  
15 compensatory. But the -- the -- the opinion of  
16 both the court of appeals and the district  
17 court in that case demonstrate an -- and found  
18 an extreme case of unseaworthiness on the part  
19 of the shipowner in --

20           JUSTICE ALITO: But the owner -- the  
21 owner of the ship is not mostly -- generally  
22 isn't going to be on the ship.

23           MR. WAXMAN: Right.

24           JUSTICE ALITO: So, if it sinks, the  
25 owner is probably not going to be one of the

1 ones that drowns.

2           So, if the owner does a cost/benefit  
3 analysis of the -- the cost of getting a better  
4 ship or repairing the ship versus the amount of  
5 money that could be obtained from -- from going  
6 ahead with a voyage using that ship, is that  
7 always going to come out in favor of safety?  
8 Is it generally going to -- did it -- did it  
9 always -- did it generally come out in favor of  
10 safety in the -- in the 19th century?

11           MR. WAXMAN: So I would suggest -- I  
12 mean, I didn't live in the 19th Century and  
13 although I feel like at this point I've read  
14 most of the cases decided in the 19th Century,  
15 I haven't seen policy discussions on this  
16 point.

17           But I will say that when Congress  
18 enacted the Jones Act, and for that matter,  
19 when Congress enacted FELA -- I mean, the  
20 owners, the corporations that own railroads  
21 weren't riding on the railroads themselves --  
22 Congress made a -- an obvious policy judgment  
23 to create -- to not go all the way to a  
24 workmen's compensation statute where if you're  
25 injured, you just file a claim in front of a

1 state administrative agency and you get the  
2 following kinds of recovery but not many  
3 others, but that is the spirit of what FELA and  
4 the Jones Act did, which is to provide a much  
5 broader, much more certain remedy, sweeping  
6 away the defenses of assumption of risk and  
7 contributory negligence and the fellow servant  
8 rule, in exchange for a -- a judgment that in  
9 dealing with the policies and the thinking of  
10 what went on in people who ran railroads and  
11 ran steamship companies and people who worked  
12 there, Congress's choice was to say very easy  
13 streamlined recovery for compensatory damages,  
14 no recovery for punitive damages. And --

15 JUSTICE GINSBURG: Is pain and  
16 suffering compensatory damages?

17 MR. WAXMAN: Yes, pain and suffering  
18 is compensatory. And, you know --

19 JUSTICE GINSBURG: It's not pecuniary?

20 MR. WAXMAN: Excuse me?

21 JUSTICE GINSBURG: It's not -- then  
22 it's not pecuniary?

23 MR. WAXMAN: It's not pecuniary. And  
24 so, for example, in cases like Miles, in a suit  
25 brought for -- in a -- in a claim of wrongful

1 death for unseaworthiness, there's no pain and  
2 suffering recovery. But, in a claim for injury  
3 that is maintained by -- in a survivorship  
4 action, pain and suffering is recoverable.

5 And, you know, one of the many  
6 anomalies that would occur if this Court were  
7 to affirm the court below and find that,  
8 although punitive damages are not available  
9 under the Jones Act, they are available for  
10 unseaworthiness --

11 JUSTICE GINSBURG: But may I just stop  
12 you there. This Court has never held that, has  
13 it?

14 MR. WAXMAN: That's right. For 111  
15 years, the treatise writers and courts have all  
16 been unanimous that punitive damages are not  
17 available under FELA or -- and, therefore,  
18 under the Jones Act.

19 JUSTICE SOTOMAYOR: We've reserved  
20 that question.

21 MR. WAXMAN: Excuse me?

22 JUSTICE SOTOMAYOR: We reserved that  
23 question.

24 MR. WAXMAN: You did reserve that  
25 question.



1 JUSTICE SOTOMAYOR: So that's still an  
2 open question.

3 MR. WAXMAN: Well, I mean, it is an  
4 open question in this Court. At the time that  
5 the Jones Act was enacted, there were multiple  
6 treatise writers who said under FELA punitive  
7 damages aren't available.

8 This Court, although not deciding it,  
9 had said on several occasions that for injury,  
10 for a railroad worker, the remedy was  
11 compensation. And, indeed, in the St. Louis  
12 and Iron Mountain Railway Company, which was  
13 not a wrongful death case, it was a  
14 survivorship case, this Court said that the  
15 remedies under FELA were "confined to  
16 compensatory loss."

17 JUSTICE SOTOMAYOR: So why did you in  
18 your --

19 MR. WAXMAN: I agree that this Court  
20 has not so cited.

21 JUSTICE SOTOMAYOR: -- brief say that  
22 FELA and the Jones Act bar on compensatory  
23 damages could include non-pecuniary losses?

24 MR. WAXMAN: Well, there's a dis -- so  
25 --

1 JUSTICE SOTOMAYOR: And that --

2 MR. WAXMAN: -- the non-pecuniary  
3 recovery for -- I don't have -- we don't have a  
4 position on whether pecuniary damages are non  
5 -- whether pecuniary damages are available  
6 under the Jones Act or not.

7 What the -- the way that came about is  
8 pecuniary damages are not available under the  
9 Death on the High Seas Act. That led to a  
10 determination by this and other courts that  
11 under the Jones Act, non-pecuniary damages are  
12 not available in wrongful death cases and,  
13 therefore, are not available --

14 JUSTICE SOTOMAYOR: But that may  
15 not --

16 MR. WAXMAN: -- in unseaworthiness  
17 cases. And -- and the extreme anomaly that  
18 would -- that -- that is being invited in this  
19 case is to -- is what the other side asks for  
20 is, okay, look, we know that if an injured  
21 seaman dies, he can't recover under the Jones  
22 Act and, therefore, under unseaworthiness for  
23 -- and can get -- punitive damages won't be  
24 awarded, but because they say there's no  
25 pecuniary damage limitation in injury actions,

1 if he doesn't die, then punitive damages can be  
2 awarded.

3 And I -- I -- I would -- would  
4 respectfully submit there is no policy --

5 JUSTICE KAVANAUGH: There -- there  
6 seem to be --

7 MR. WAXMAN: -- imperative to -- to  
8 create that anomaly.

9 JUSTICE KAVANAUGH: -- two ways we can  
10 look at this. One is the Miles precedent,  
11 Jones Act, twin causes of action. The other is  
12 Townsend says punitives have historically been  
13 available and awarded in general maritime  
14 actions. The question's which of those  
15 principles to follow here.

16 Where does the special solicitude for  
17 the welfare of sailors principle factor into  
18 how we should think about that, or does it  
19 factor at all?

20 MR. WAXMAN: I think it -- I think it  
21 factors in exactly -- I mean, this Court has  
22 said over and over again that the special  
23 solicitude to the wards of the admiralty does  
24 not dictate a result that the -- the seaman  
25 always wins. Otherwise, you wouldn't have had

1 a situation at the time that that -- that  
2 phrase was coined in which seamen could get no  
3 compensation at all for any injuries and -- or  
4 if they died or anything like that.

5 The -- the way to find your way  
6 through this is the way that Miles explained  
7 it, which is, yes, the Jones Act, and this  
8 Court following the lead of the Jones Act, has  
9 greatly broadened the amount of compensation  
10 that injured seamen can recover. That is a  
11 reflection of Congress's solicitude and this  
12 Court's admiralty law solicitude. It doesn't  
13 mean that you add punitive damages onto that.

14 May I reserve the balance of my time?

15 CHIEF JUSTICE ROBERTS: Certainly,  
16 counsel.

17 Mr. Frederick.

18 ORAL ARGUMENT OF DAVID C. FREDERICK

19 ON BEHALF OF THE RESPONDENT

20 MR. FREDERICK: Thank you, Mr. Chief  
21 Justice, and may it please the Court:

22 Our position is that punitive damages  
23 are available under the general maritime law  
24 for claims that a vessel is unseaworthy. Our  
25 argument rests on two points.

1           First, punitive damages have long been  
2 available under general maritime law and  
3 there's no evidence of cases precluding  
4 punitives in unseaworthy claims prior to the  
5 1920 enactment --

6           JUSTICE SOTOMAYOR: Except --

7           MR. FREDERICK: -- of the Jones Act.

8           JUSTICE SOTOMAYOR: -- except that  
9 it's not like Townsend, where there were at  
10 least two cases where punitive damages were  
11 awarded. I really don't see a case where it  
12 was clear that it was awarded for  
13 unseaworthiness as opposed to maintenance and  
14 cure, number one.

15           And there aren't any treatises that  
16 affirmatively say that punitive damages were  
17 awarded for unseaworthiness. That's a somewhat  
18 different historical picture.

19           MR. FREDERICK: It's slightly  
20 different, Justice Sotomayor, but I would say  
21 that what the Court decided in Townsend, which  
22 controls here, is does the general rule of  
23 allowing punitive damages apply, unless there's  
24 some express case holding that says otherwise  
25 or Congress expressly said otherwise.

1           And, certainly, the discussion that my  
2 friend offers of the Noddleburn indicates that  
3 the Court was considering whether to give  
4 exemplary or punitive damages in that case. It  
5 was a case where there was a fraying rope, the  
6 -- the sailor fell to significant injuries.  
7 The court said it's a close question whether to  
8 give exemplary damages. On this record, I'm  
9 deciding not to do that.

10           Now, if you want to say that there's a  
11 difference between a discussion which this  
12 Court in Townsend gave several examples of  
13 discussions of exemplary damages, certainly,  
14 Justice Story in *The Amiable Nancy* offered that  
15 giving exemplary damages was important.

16           And the reason why it was important  
17 was for the reason that Justice Alito averted  
18 to, which is that the vessel owner needs to be  
19 held to a higher standard so that when the  
20 vessel owner chooses to over-insure, a rust  
21 bucket is not sent to sea.

22           And that policy point is quite  
23 important in these particular cases because,  
24 even though these situations are extremely  
25 rare, the cases have always talked about the

1 availability of exemplary damages.

2 And there's an 1850s case called the  
3 Golden Gate where a -- what would be deemed now  
4 to be an unseaworthy condition injured  
5 passengers. And the passengers, instead of  
6 bringing a suit for unseaworthiness, brought it  
7 for breach of contract.

8 And the judge there said essentially:  
9 Had this been brought as an unseaworthiness  
10 case, I would have awarded exemplary damages,  
11 but I can't do that because contract claims  
12 have never allowed for exemplary damages.

13 JUSTICE SOTOMAYOR: Is your adversary  
14 right -- adversary -- I mean --

15 MR. FREDERICK: He's my friend.

16 JUSTICE SOTOMAYOR: I know.

17 (Laughter.)

18 JUSTICE SOTOMAYOR: Mr. Waxman right  
19 that the remedy for unseaworthiness was for a  
20 period of time only the ability to collect  
21 wages?

22 MR. FREDERICK: The -- yes.

23 JUSTICE SOTOMAYOR: And when did that  
24 change?

25 MR. FREDERICK: It started to change

1 in the 1800s. And this was an importation of a  
2 rule that was adopted in Great Britain where,  
3 although the concept of unseaworthiness existed  
4 from the founding of our republic, and there  
5 are cases from 1789 that we cite that say an  
6 unseaworthy condition would be an excuse for  
7 the crew member to decide not to go with the  
8 ship on the voyage.

9 That principle expanded during the  
10 1800s through decisions in Great Britain to  
11 allow for compensation for the injury to the  
12 sea worker as a result of the unseaworthiness  
13 condition.

14 Those cases were then adopted by  
15 courts in this country. And in the Noddleburn,  
16 Judge Deady, a district court judge in Oregon,  
17 explains where all of this came from, and he  
18 explains that this idea of unseaworthiness  
19 leading to a compensatory-type principle was  
20 one that was designed to protect the crew  
21 members as wards of the admiralty.

22 And so, by the time of the Osceola in  
23 1903, this Court said it is well settled by the  
24 decisions of the lower courts that a -- an  
25 injured worker from an unseaworthiness



1 condition can obtain compensation both for the  
2 unseaworthiness of the vessel, as well as for a  
3 failure to provide maintenance and cure.

4 Those principles, I think, were very  
5 well established, well before the Jones Act was  
6 enacted. And nothing in the Jones Act itself  
7 points where Congress would have said that  
8 punitive damages, the general rule of the  
9 common law or the general maritime law, are not  
10 available.

11 Now, importantly, my friend starts to  
12 talk about some of the differences between the  
13 unseaworthiness claim and a Jones Act claim,  
14 but he only got so far. It is true and an  
15 important difference that the defendant is a  
16 different person or entity in an  
17 unseaworthiness claim versus a Jones Act claim.

18 In a Jones Act claim, the defendant is  
19 the employer. In an unseaworthiness claim, the  
20 defendant is the owner. But it is also  
21 important that the plaintiff could be different  
22 as between those two claims.

23 And here is a very significant  
24 difference between Townsend that works in our  
25 favor. Whereas, in Townsend, a maintenance and

1 cure claim would overlap entirely with a Jones  
2 Act claim, that is not true for an  
3 unseaworthiness.

4 A passenger could bring a claim for  
5 damages in an unseaworthiness action if the  
6 unseaworthiness was a substantial cause of the  
7 passenger's injury. The Jones Act only speaks  
8 to the relationship between employees and  
9 employers.

10 JUSTICE KAVANAUGH: You're not  
11 disputing -- you're not disputing that they're  
12 often referred to as twin causes of action?

13 MR. FREDERICK: No, they're not. They  
14 are often -- and this -- this discussion  
15 started in the Cortes in 1930-ish and followed  
16 in Mitchell. And the reason why they are  
17 considered that way is because, as my friend  
18 points out in the Peterson case, this Court  
19 announced the rule that you can't get double  
20 recovery.

21 We're not asking for double recovery.  
22 Just as in any common law claim where there's a  
23 statutory claim, you have one injury, you can  
24 only get one recovery for that.

25 JUSTICE ALITO: But you're -- you're

1 basically asking us to put on our common law  
2 hat and decide that punitive damages are a good  
3 thing because there -- there isn't any case  
4 pre-Jones Act saying that you could get -- that  
5 you could get punitive damages for  
6 unseaworthiness, and no court of appeals that  
7 I'm aware of has ever held that you can get it  
8 -- get them under either FELA or the Jones Act?

9 MR. FREDERICK: Your Honor --

10 JUSTICE ALITO: Is all that right?

11 MR. FREDERICK: -- let me step back  
12 and say first that what this Court decided in  
13 Townsend, we think, controls and that if you  
14 were to substitute "maintenance and cure" for  
15 the words "unseaworthiness" in almost every  
16 paragraph of the first three parts of the  
17 Court's decision in Townsend, you would come to  
18 exactly the same result, the exceptions being a  
19 couple of the cases where we would offer to  
20 substitute in a few unseaworthiness cases  
21 versus a couple of cases that were cited.

22 JUSTICE ALITO: But if there were just  
23 -- if there were an established general rule in  
24 maritime cases that you get punitive damages,  
25 how do you account for the fact that there

1 weren't cases awarding punitive damages for  
2 unseaworthiness?

3 MR. FREDERICK: The -- I think --

4 JUSTICE ALITO: How did this general  
5 rule escape everybody's attention?

6 MR. FREDERICK: It didn't escape  
7 everybody's attention. For the cases that we  
8 cite in our case where the Court considered  
9 whether to award them but decided on the basis  
10 of the special facts there not to do so, I  
11 would submit that having punitive damages  
12 available has been a very powerful deterrent to  
13 vessel owners not providing sea-worthy vessels.  
14 And that's a good thing.

15 JUSTICE ALITO: But, i mean, I think  
16 -- I wasn't around in the 19th Century either,  
17 but I think then and earlier, there were an  
18 awful lot of very unseaworthy vessels that were  
19 sent out to sea by owners. And they just took  
20 the risk. And it wasn't their life that was at  
21 stake.

22 And so what would be -- it seems  
23 strange that there wouldn't be punitive damages  
24 claims in those cases, in any unseaworthiness  
25 case.

1           MR. FREDERICK: Well, I -- I -- there  
2 were claims, certainly. And the Noddleburn is  
3 an example of that. The Golden Gate is an  
4 example of that. The Rolph is an example of  
5 that. And --

6           JUSTICE ALITO: Well, there weren't  
7 holdings. There weren't courts that awarded  
8 punitive damages.

9           MR. FREDERICK: That is true. But the  
10 fact that they are awarded rarely does not mean  
11 that the court said as a matter of law, I don't  
12 have the discretion or the power to award it.  
13 And that was the very important point I think  
14 that this Court drew out of Townsend, that the  
15 fact that there's a general background rule  
16 that doesn't come into play very often is not a  
17 situation where one needs to be concerned.

18           And the fact that you -- you have a  
19 deterrent out there serves as a very powerful  
20 situation, particularly in an environment now  
21 where you have overlapping employers having  
22 operations on various vessels, cruise ships are  
23 a very good example of that where you might  
24 have multiple employers who would have -- give  
25 rise to Jones Act remedies in various

1 circumstances for not providing a safe place.

2 CHIEF JUSTICE ROBERTS: But there --  
3 there -- but there's -- I mean, you're talking  
4 about, you know, sending rust buckets out to  
5 sea and all these things. I mean, most of the  
6 unseaworthiness cases are the hatch that isn't  
7 -- doesn't close right or something like that,  
8 and injures it.

9 But maintenance and cure is something  
10 very different. Maintenance and cure is you're  
11 talking about somebody who can't do anything  
12 for himself, who's seriously injured or isn't  
13 taken care of. And you can understand maybe  
14 allowing punitive damages in that situation but  
15 not necessarily in the other.

16 MR. FREDERICK: Well, Your Honor, I  
17 think that they're both egregious situations.  
18 And I would not want to fight the premise of  
19 your question that the willful withholding of  
20 maintenance and cure is -- is egregious,  
21 because it certainly is.

22 But, in Townsend, what the Court held  
23 was that just because there's overlap between  
24 the willful withholding of maintenance and cure  
25 does not mean that -- with the Jones Act

1 remedy, does not mean that the Jones Act remedy  
2 forecloses the ability of obtaining punitive  
3 damages for that.

4 Certainly in situations where a -- a  
5 vessel is not reasonably fit for its intended  
6 purpose because of its --

7 CHIEF JUSTICE ROBERTS: But that --  
8 that includes a situation I discussed, right?  
9 If you had a hatch that didn't fully close, and  
10 as a result there was an injury, I mean,  
11 that's, you say, not fully fit for its  
12 purposes. I mean, that would cover that. That  
13 would be called unseaworthy.

14 But maintenance and cure is met only  
15 in far more egregious circumstances, isn't it?

16 MR. FREDERICK: Your Honor, I think  
17 that the key question, if I could take you to  
18 this place in the colloquy, is whether or not  
19 the owner acted in a wanton or willful way with  
20 conscious disregard of the safety.

21 So really what we're talking about are  
22 those situations in maintenance and cure where  
23 the captain or the master of the vessel is  
24 acting in a wanton way that causes the danger  
25 to the crew member to exacerbate.

1           The same kind of wantonness is what  
2 we're talking about in the unseaworthiness  
3 situation where, as in this case, air pressure  
4 was not vented and instructions for the safe  
5 use of this vessel were not even given to the  
6 master of the vessel and --

7           JUSTICE BREYER: Can I --

8           MR. FREDERICK: -- and that's the kind  
9 of wantonness that we're talking about here  
10 that should be deterred and prevented.

11           JUSTICE GINSBURG: Mr. Frederick, one  
12 thing that I think is undisputable is the  
13 evidence is very slim that there were punitive  
14 damages, in fact, awarded for unseaworthiness  
15 claims. I mean, you can't dispute that, the  
16 evidence is slim.

17           MR. FREDERICK: I -- I would agree  
18 with that, Justice Ginsburg.

19           JUSTICE GINSBURG: And you would also  
20 agree on the Jones and FELA that the courts of  
21 appeals have been uniform in saying no.

22           MR. FREDERICK: That I don't agree  
23 with. What I am informed, there have been a  
24 couple of court of appeals decisions that have  
25 talked about the FELA and the Jones Act. But,



1 remember, about 70 percent of these kinds of  
2 cases arise in state court.

3           And most state court judgments are not  
4 with reported decisions. And what I'm informed  
5 by lawyers who filed amicus briefs on our side  
6 of the case is that they have obtained on  
7 occasion punitive damages awards in state court  
8 proceedings that have not led to reported  
9 judgments and not been appealed and that have  
10 been paid.

11           Now, these are not runaway courts --

12           JUSTICE SOTOMAYOR: You also have four  
13 court of appeals who have given punitive  
14 damages for unseaworthiness.

15           MR. FREDERICK: You -- you --

16           JUSTICE SOTOMAYOR: They're listed in  
17 Petitioner's brief.

18           MR. FREDERICK: That's correct. And  
19 we -- and -- but my point is that the existence  
20 of punitive damages on unseaworthiness cases in  
21 those circuits that have been there for  
22 decades, the fact that nearly ten years has now  
23 elapsed since Townsend, we don't have runaway  
24 juries for maintenance and cure claims, this  
25 Court in Exxon versus Baker noted the

1 literature and said it's, in fact, not the case  
2 that in those rare circumstances when punitive  
3 damages are awarded, that there has been some  
4 disproportionate problem of runaway.

5 And I would offer you that in Exxon,  
6 this Court considered a question closely  
7 analogous to the one here, which is whether or  
8 not the penalties under the Clean Water Act for  
9 pollution displaced the general maritime law  
10 general rule of punitive damages, and every  
11 justice said no.

12 JUSTICE BREYER: Can I -- I just want  
13 to make my list. I'm making a list of  
14 differences between Jones Act and  
15 seaworthiness.

16 MR. FREDERICK: Yes.

17 JUSTICE BREYER: And -- and it seems  
18 to me everybody has agreed that the standard of  
19 liability doesn't really make much difference.

20 MR. FREDERICK: That's not correct.

21 JUSTICE BREYER: All right. Well, let  
22 me list the three I have --

23 MR. FREDERICK: Okay.

24 JUSTICE BREYER: -- and then go back  
25 and tell me what I'm missing.

1 MR. FREDERICK: Sure.

2 JUSTICE BREYER: All right. The three  
3 I have is one, the jury.

4 MR. FREDERICK: Yes.

5 JUSTICE BREYER: Number 2, the ship  
6 owner versus the employer.

7 MR. FREDERICK: Yes.

8 JUSTICE BREYER: And Number 3 is you  
9 say passengers can sue. I don't know if there  
10 are a lot of passenger suits or not. Okay.  
11 That's what I have.

12 What else should I have?

13 MR. FREDERICK: The liability standard  
14 is different. It's negligence versus the --

15 JUSTICE BREYER: Yeah --

16 MR. FREDERICK: -- whether the vessel  
17 equipment is staffing for an unfit purpose.

18 The causation standard is different.  
19 For an unseaworthiness claim, the  
20 unseaworthiness has to be a substantial or  
21 proximate cause of the injury. Under this  
22 Court's decision in CSX versus McBride, it is a  
23 more relaxed causation standard.

24 So, whereas in the unseaworthiness  
25 claim you have essentially a strict liability

1 standard for the unseaworthiness condition but  
2 a higher causation standard, in the Jones Act  
3 you have a more rigid negligence standard for  
4 liability but a more relaxed causation  
5 standard.

6           And so there are circumstances, and  
7 let me give you an example of one, where the  
8 vessel owner might provide -- get a brand-new  
9 piece of equipment, put it on the vessel, it  
10 goes out to sea but it doesn't work. There's  
11 no negligence in that circumstance because the  
12 vessel acted with due care. There is an  
13 unseaworthiness condition because the equipment  
14 did not perform as it was intended to for its  
15 suited purpose.

16           And so you can see in an example where  
17 if the equipment was what caused the injury,  
18 you would have a seaworthiness claim on one  
19 hand, but you would not have a Jones Act claim  
20 on the other.

21           The last difference that I would point  
22 to is that, for an unseaworthiness claim, you  
23 can get a maritime lien and attach the vessel.  
24 And that is an ancient remedy that is designed  
25 to ensure protection of award of the admiralty.

1 You cannot attach the vessel in a Jones Act  
2 claim.

3 And so if you are looking at these  
4 just strictly from a bottom-line perspective,  
5 what the Court recognized in Patterson and in  
6 Cortes and in Mitchell is that the worker very  
7 often brings all three claims, maintenance and  
8 cure, unseaworthiness, and Jones Act. But that  
9 can only lead to one remedy, and then the court  
10 will decide after the conclusion of the  
11 proceedings, you know, what that is, but the --  
12 but the owner is not going to have to  
13 double-recover.

14 But for those reasons, it's very  
15 important for the Court not to take the view  
16 that simply because there is substantial  
17 overlap, it's not a uniform --

18 JUSTICE BREYER: But -- can we go  
19 back? Passengers, are there a lot of passenger  
20 suits?

21 MR. FREDERICK: I -- I don't know  
22 that, Your Honor. What -- what -- what I would  
23 also --

24 JUSTICE BREYER: Which I assume there  
25 are not because you would -- you would probably

1 know.

2 MR. FREDERICK: No, that is -- that's  
3 correct.

4 JUSTICE BREYER: The --

5 MR. FREDERICK: But -- but also there  
6 are situations where other employees of other  
7 entities would have an unseaworthiness claim,  
8 and let me give a prosaic example, if I might  
9 indulge the Court.

10 Say you've got a cruise ship that's  
11 owned by a particular cruise line but they  
12 subcontract out to a Broadway company to have a  
13 traveling music show on the cruise ship. Now,  
14 under the Jones Act, it's the Broadway company  
15 that is the employer of the musician, but if  
16 the unseaworthiness condition causes an injury  
17 to that worker, that worker has a suit against  
18 the owner of the vessel for the unseaworthiness  
19 causing the condition, but not a Jones Act  
20 remedy against his or her employer for that  
21 particular injury.

22 And so you can see that there's  
23 overlap, but it's not a perfect overlap.

24 JUSTICE KAGAN: So how do you think,  
25 Mr. Frederick, we should think about the

1 question of the relationship between the Jones  
2 Act, on the one hand, and the common law  
3 maritime function, on the other?

4 Because there is this language in  
5 Miles when seems to say broadly that, given the  
6 Jones Act, given that the Jones Act exists,  
7 courts should be wary of -- of doing things  
8 with their common law hat on.

9 So how should we think about that?

10 MR. FREDERICK: Let me --

11 JUSTICE KAGAN: What's the line?

12 MR. FREDERICK: Here's the line.

13 First start with the statute. What the statute  
14 says is that the injured worker can elect  
15 remedies. And what the Court in Townsend  
16 explained is that that statutory language was  
17 meant to preserve the preexisting common law  
18 remedies.

19 Where wrongful death comes in is kind  
20 of in an historical anachronism and it resulted  
21 from, frankly, a mistake of this Court in the  
22 Harrisburg which wasn't recognized for some 90  
23 years until Moragne was decided. And that  
24 mistake in the Harrisburg, which held that  
25 wrongful death claims are not permissible under

1 the general maritime law, ended up spawning a  
2 number of statutory fixes that were -- arose in  
3 state legislatures, as well as Congress through  
4 the Death on the High Seas Act, the special  
5 wrongful death provision of the Jones Act, and  
6 then ultimately this Court's reassessment of  
7 the correctness or incorrectness, as it were,  
8 of the Harrisburg in overruling it in Moragne.

9 And so by that time, what the Court  
10 decided was that in the area of wrongful death,  
11 which is where Congress --

12 JUSTICE KAGAN: So that makes Miles --

13 MR. FREDERICK: -- was legislating --

14 JUSTICE KAGAN: -- sound like a  
15 one-off. But Miles, in -- in -- in some parts  
16 at least, does not read like a one-off. It  
17 reads like a general statement about the  
18 relationship between the Jones Act and the  
19 common law maritime law.

20 MR. FREDERICK: Well, in Townsend, the  
21 Court did explain not that Miles is a one-off,  
22 but that it is proper and should be viewed  
23 within the context in which it arises.

24 And it was that special context that  
25 Townsend was able to rule that because of the



1 special progeny of the way wrongful death  
2 occurred -- because, remember, wrongful death  
3 claims were not cognizable at the common law.  
4 Personal injury claims were.

5           And so if you want to draw a line  
6 right there, you have a very distinctive  
7 history between wrongful death and  
8 survivorship. My friend points out that the  
9 survivorship part of the Miles holding, that  
10 also was not a claim recognizable at common  
11 law.

12           And the reason was this very strict  
13 view that the law was there to protect living  
14 persons, and it was not there to compensate  
15 people who had died.

16           JUSTICE KAVANAUGH: Isn't that an  
17 anomaly, as Mr. Waxman says, though, if we were  
18 to agree with your position here?

19           MR. FREDERICK: No, I think that the  
20 anomaly actually works in the other direction  
21 because the fact that many state courts, and  
22 there are footnotes in our amicus briefs that  
23 point out there were, you know, dozens of state  
24 courts that recognized punitive damages for  
25 wrongful death claims, even where they had

1 allowed for only a more circumscribed  
2 compensatory damages in the wrongful death  
3 space, suggests that state legislators did not  
4 view an inconsistency between punitive damages,  
5 which were done to deter, and compensatory  
6 damages, which needed to look at the economic  
7 realities of what the deceased worker was  
8 providing as livelihood to his or her family.

9           And so for that reason, the wrongful  
10 death area has a very long and different  
11 lineage and, therefore, also gives rise to  
12 different views about how the interplay between  
13 this Court acting under its powers of the  
14 general maritime law should interface, where  
15 Congress has spoken in the area of wrongful  
16 death --

17           JUSTICE KAVANAUGH: I have --

18           MR. FREDERICK: -- and so --

19           JUSTICE KAVANAUGH: -- one other  
20 question, which was you've talked about the  
21 deterrent value of the punitive damages. We  
22 have an impressive array of amicus briefs on  
23 the other side from you that use severe  
24 language saying this would harm the maritime  
25 industry in the national economy.

1           So I just wanted to give you an  
2 opportunity to respond to those amicus briefs.

3           MR. FREDERICK: Thank you, Justice  
4 Kavanaugh, I'm happy to do that because,  
5 notwithstanding all the rhetoric, there is no  
6 citation of any situation where a particular  
7 holding created the kind of economic harm that  
8 they expostulate.

9           And this is an important thing as was  
10 pointed out that for decades, punitive damages  
11 had been allowed in unseaworthiness claims in  
12 the Ninth Circuit, in the Eleventh Circuit,  
13 both two of the major maritime circuits, and if  
14 that harm were to come to pass, you would have  
15 expected to see some evidence of that.

16           But, in fact, there is no evidence of  
17 that. And I accept that many of the employers  
18 on the other side would rather not face the  
19 specter of having their own willful and wanton  
20 misconduct punished.

21           But I would submit that part of the  
22 objective of the law is to deter people from  
23 acting in a way where the cost/benefit analysis  
24 is such that you want to make the cost too high  
25 in order to deter that willful harm is going to

1 result or at least be put at substantial risk.

2 So for these reasons, notwithstanding  
3 the array of the amici on the other side, I  
4 would ask you to look at what the actual  
5 evidence that they cite, and it's very, very  
6 scant.

7 And, in fact, what this Court in the  
8 Exxon versus Baker case did was to look at the  
9 evidence of the effect of punitive damages.

10 Of course there, there was an  
11 extraordinarily high compensatory award. And  
12 this Court concluded that, notwithstanding the  
13 very high, over half a billion dollar  
14 compensatory award, that punitive damages was  
15 also available.

16 For the interests of the sea worker,  
17 the crew member, who is often working at very,  
18 very low wages, the idea that you would cut off  
19 the one incentive that the employer has to  
20 ensure that there is a safe workplace for a  
21 functioning vessel would be extremely  
22 hazardous, I would submit.

23 And I would note --

24 JUSTICE SOTOMAYOR: I'm sorry. I -- I  
25 thought you told me the operators were

1 different than the ship owners in many cases.

2 So would unseaworthiness still be  
3 available to the -- to the -- to the sea worker  
4 against the operator?

5 MR. FREDERICK: Your Honor, the answer  
6 to your question depends on what kind of  
7 charter is arranged between the owner of the  
8 vessel and the operator of the vessel.

9 For a bare boat charter, which was an  
10 operation in our case, the operator stands in  
11 the shoes by virtue of some very late 19th  
12 Century law about the effect of bare boat  
13 charters in creating a -- an owner pro hac vice  
14 for this purpose.

15 In many other instances the employer  
16 is not acting as the owner pro hac vice and it  
17 depends on the particular chartering  
18 arrangement that is established between the  
19 owner and the employer.

20 JUSTICE BREYER: Can I ask a trivial  
21 question?

22 MR. FREDERICK: Yes, Your Honor.

23 JUSTICE BREYER: All right. I notice  
24 that in the Heaton, it came from the District  
25 of Massachusetts, which was the original

1 admiralty court and they still have to put an  
2 oar over the judge's head.

3 And at the end of that it says that  
4 the A. Heaton is a case of injuries arising  
5 from unseaworthiness or negligence was sued,  
6 although the learned judge does not draw a  
7 distinction.

8 MR. FREDERICK: With that, Your Honor,  
9 we'll rest. I have no further words.

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Three minutes, Mr. Waxman.

14 REBUTTAL ARGUMENT OF SETH P. WAXMAN

15 ON BEHALF OF THE PETITIONER

16 MR. WAXMAN: Thank you. I just have a  
17 few points.

18 Justice Breyer, with respect to the  
19 laundry list of little things that are  
20 different, it's not our contention -- there is  
21 no question that even in 1920, in the 1920s,  
22 this Court repeatedly said that these are --  
23 that the Jones Act is an alternative remedy for  
24 loss resulting from wrongfully-caused injury.

25 And now -- nowadays I cannot think of

1 a case, and no one has cited one, in which you  
2 could get a recovery under the Jones Act but  
3 not for unseaworthiness.

4           These specific differences between the  
5 two were well-known to the court in Miles.  
6 They were well-known to the Court in Peterson  
7 and all the other cases that have said that the  
8 two are substitutes for each other.

9           On the other hand, vis-à-vis  
10 maintenance and cure, the notion that, well,  
11 because there could be cases where there is  
12 injury suffered after and as a result of a  
13 failure to undertake the humane duty of  
14 maintenance and cure and that could be brought  
15 under the Jones Act, well, they both overlap.

16           Consider this: In its very first  
17 decision after the Jones Act was enacted in the  
18 Baltimore Steamship case and then again in  
19 Peterson, this Court explained that res  
20 judicata applies as between a Jones Act cause  
21 of action and an unseaworthiness cause of  
22 action that is not true with respect to  
23 maintenance and cure.

24           For that reason, a Jones Act claim and  
25 a unseaworthiness claim must be brought at the

1 same time, emphatically not true for  
2 maintenance and cure.

3 The Court has held that the three-year  
4 statute of limitations for causes of action  
5 under general maritime law applies to  
6 maintenance and cure.

7 But, following enactment of the Jones  
8 Act, can no longer be applied to  
9 unseaworthiness because they are cognate causes  
10 of action for the same injury and, therefore,  
11 the shorter statute of limitations under the  
12 Jones Act governs.

13 The evidence with respect, Justice  
14 Ginsburg, the evidence of punitive damages in  
15 unseaworthiness cases, with all due respect, is  
16 not slim. It is utterly nonexistent.

17 And it's utterly nonexistent because  
18 at the time that this Court and English courts  
19 were recognizing that punitive damages,  
20 exemplary damages, could be applied in  
21 maintenance and cure and the treatise writers  
22 all obligingly verified that, even compensatory  
23 damages were not available for a violation of  
24 the general maritime law of unseaworthiness.

25 Thank you.



1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.

3 (Whereupon, at 12:07 p.m., the case  
4 was submitted.)

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