No. 18-

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT CERTIORARI

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B. Street Suite 1790
San Diego, CA 92101
(619) 225-6450
bponticello@eps-law.com

SETH P. WAXMAN
Counsel of Record
PAUL R. Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTIONS PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

CORPORATE DISCLOSURE STATEMENT

The Dutra Group is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock.

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The Dutra Group respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 880 F.3d 1089. The order of the district court denying petitioner's motion to strike or dismiss respondent's claim for punitive damages (App. 17a-21a) is available at 2014 WL 12538172.

JURISDICTION

The court of appeals entered judgment on January 23, 2018. App. 1a. A petition for rehearing was denied

on May 2, 2018. App. 23a. On June 7, 2018, Justice Kennedy extended the time for filing a petition for certiorari to August 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

As the court of appeals observed, this case presents an issue "of considerable importance in maritime law" that has "divided" the lower courts: whether punitive damages may be awarded to a seaman in a personal injury suit based on an alleged breach of the general maritime duty to provide a seaworthy vessel. App. 2a. In the decision below, the Ninth Circuit ruled that punitive damages are available on such a claim. That ruling, the court recognized, is in direct conflict with a recent decision of the en banc Fifth Circuit, which held that punitive damages are not available in unseaworthiness cases. *McBride* v. *Estis Well Serv., LLC*, 768 F.3d 382, 388-391 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015).

The disagreement between the Fifth and Ninth Circuits turns largely on how to reconcile this Court's decisions in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), and *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009). In *Miles*, the Court unanimously held that damages for loss of society and lost future income may not be awarded in an unseaworthiness action under general maritime law. 498 U.S. at 32-33, 36. The Court stressed that Congress did not authorize either form of damages in negligence actions under the Jones Act, 46 U.S.C. § 30104, which provides remedies for seamen injured or killed in the course of their employment as a result of the employer's negligence. 498 U.S. at 32. The Court explained that respect for Congress's preeminent role in maritime law required that the

scope of recovery under the judge-made action for unseaworthiness—which emerged in its current form as a strict liability claim in the mid-twentieth century—be no more expansive than under the remedies Congress had authorized for negligence in the Jones Act. *See id.* at 32-33.

But in *Townsend*, a closely divided Court held that punitive damages may be awarded in claims based on the separate general maritime doctrine of maintenance and cure.[1] The *Townsend* Court stressed that "[t]he reasoning of *Miles* remains sound." 557 U.S. at 420. Nonetheless, the Court concluded that *Miles* did not control the scope of remedies for maintenance and cure, which (unlike unseaworthiness) was "well established" as a claim before the Jones Act was enacted, and which has "different origins" from and is "independent" of unseaworthiness. *Id.* at 420, 423. The Court also emphasized that there was a "common-law tradition of punitive damages" in the maritime context before the Jones Act was enacted, and it found "no evidence that claims for maintenance and cure were excluded from this general admiralty rule." *Id.* at 414-415, 418.

In the decision below, the Ninth Circuit concluded that *Townsend* rather than *Miles* governs punitive damages in unseaworthiness claims. App. 11a-12a. *Miles*, according to the court, precludes only *nonpecuniary* damages in unseaworthiness actions. But, the court reasoned, punitive damages are neither pecuniary

[1] Maintenance and cure is a general maritime legal duty requiring a vessel owner to provide wages, food, lodging, and medical treatment to a seaman while he is wounded or ill in the service of the vessel as long as the voyage continues, whether or not the vessel owner caused the injury or illness. *See Townsend*, 557 U.S. at 407-408, 413.

nor nonpecuniary, and so *Miles* does not speak to the availability of punitive damages. App. 12a-13a. By contrast, the Fifth Circuit concluded that punitive damages in unseaworthiness claims are precluded by the reasoning of *Miles*, which limited damages in unseaworthiness claims to those available for negligence under the Jones Act (which does not authorize punitive damages), and that *Townsend*, which concerns the distinct claim for maintenance and cure, is irrelevant to unseaworthiness actions. *See McBride*, 768 F.3d at 388-391.

The courts of appeals—including two that hear the most admiralty cases—are thus irreconcilably divided on whether punitive damages are available in unseaworthiness actions and on how to read this Court's two leading recent decisions on remedies in maritime actions. Only this Court can resolve that conflict. Moreover, the decision below is incorrect and has the potential to harm the economy, the environment, and national security. And the division among the lower courts on this issue undermines the fundamental principle that maritime law should be uniform across the nation. This Court's review is therefore warranted.

STATEMENT

Respondent Batterton alleges that he suffered an injury while he was employed by petitioner as a Jones Act seaman. He sued in the United States District Court for the Central District of California, asserting three claims (as is typical in lawsuits of this nature): breach of the duty to provide a seaworthy vessel under general maritime law, negligence under the Jones Act, and breach of the duty to provide maintenance and cure. App. 2a-3a, 18a. He sought punitive damages on his unseaworthiness claim. App. 18a.

Petitioner moved to strike or dismiss respondent's punitive damages claim on the ground that punitive damages are not available in unseaworthiness actions. The district court denied that motion but certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). App. 21a, 32a.

Recognizing the issue's "considerable importance in maritime law," the Ninth Circuit accepted the interlocutory appeal. App. 2a. The court then affirmed, and held that punitive damages are "awardable to seamen for their own injuries in general maritime unseaworthiness actions." App. 15a. The panel first determined that the Ninth Circuit had previously answered the question in *Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987), a pre-*Miles* decision holding that punitive damages are available on unseaworthiness claims. App. 3a. The panel then concluded that this Court's subsequent decisions in *Miles* and *Townsend* did not change the result, and that it still "would reach the same conclusion *Evich* did." App. 15a.

The court of appeals believed that this case was controlled not by *Miles*, which—like this case—involved an unseaworthiness claim, but by *Townsend*, which involved a claim for maintenance and cure, a cause of action that is not at issue in this petition. Pointing to this Court's language in *Townsend* that there was a "common-law tradition of punitive damages" in the maritime context before the Jones Act was enacted, 557 U.S. at 414, the court of appeals found "no persuasive reason to distinguish maintenance and cure actions from unseaworthiness actions with respect to the damages awardable." App. 4a-5a, 14a.

In contrast, the court of appeals deemed *Miles* irrelevant. *Miles*, it noted, "did not address punitive

damages," and the court found it "not apparent why barring damages for loss of society should also bar punitive damages." App. 10a, 13a. Despite the extensive discussion in *Miles* about the need to conform remedies under the judge-made unseaworthiness action to those available under the Jones Act, *see* 498 U.S. at 32-33, the court read *Miles* to concern only the narrow question whether compensatory damages for unseaworthiness extend to nonpecuniary loss or are limited to pecuniary loss. App. 12a-15a. Because punitive damages "are not compensation for loss at all," the court concluded that *Miles* was inapposite. App. 14a-15a.

The court of appeals expressly rejected the contrary conclusion of the en banc Fifth Circuit in *McBride*, which relied on the reasoning of *Miles* to conclude that punitive damages may not be awarded for unseaworthiness claims. 768 F.3d at 388-391. The court acknowledged that the majority and concurring opinions in *McBride* were "scholarly and carefully reasoned," but nonetheless found the dissenting opinions "more persuasive." App. 14a. In particular, the court believed that the historical rationales for limiting remedies for wrongful death—which, it believed, had been at issue in *Miles*—were inapplicable in personal injury suits like this one. App. 10a-11a. Moreover, according to the court, "[t]he purposes of punitive damages, punishment and deterrence, apply equally" to both unseaworthiness and maintenance and cure. App. 14a (footnote omitted). Thus, the court concluded, "unless Congress legislates on the matter," the availability of punitive damages in unseaworthiness actions is "clearly established." App. 14a-15a.

REASONS FOR GRANTING THE PETITION

The decision below—holding that punitive damages may be awarded in a personal injury case brought under the general maritime doctrine of unseaworthiness—conflicts with decisions of several other appellate courts, most notably that of the en banc Fifth Circuit. The decision also cannot be reconciled with this Court's decision in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), which held that the damages available in unseaworthiness cases may not exceed the damages Congress allowed when it comprehensively addressed remedies for seamen in the Jones Act. And the decision is deeply troubling as a matter of maritime policy; it threatens to deter productive economic activity, jeopardize national security, and render maritime law incoherent, in an area where uniformity is of fundamental importance. This Court should therefore grant review.

A. The Decision Below Conflicts With Numerous Federal And State Appellate Decisions

1. In *Miles*, this Court held that a seaman asserting an unseaworthiness claim cannot recover damages for loss of society and that a seaman's estate cannot recover his lost future income. 498 U.S. at 30, 32-33, 36. Essential to the Court's decision was its recognition that it "sail[s] in occupied waters." *Id.* at 36. Whereas seamen and their loved ones once had to "look primarily to the courts as a source of substantive legal protection from injury and death," "[m]aritime tort law is now dominated by federal statute." *Id.* at 27, 36. Thus, the Court stated, "an admiralty court should look primarily to these legislative enactments for policy guidance," and "must … keep strictly within the limits imposed by Congress." *Id.* at 27.

Given those limits on the courts' institutional role in fashioning maritime tort remedies, the Court concluded that any "limit" on damages that Congress has judged appropriate for negligence claims under the Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability"—*i.e.*, unseaworthiness. *Miles*, 498 U.S. at 31, 36. Indeed, the Court observed, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—again referring to unseaworthiness—than Congress has allowed in cases resulting from negligence under the Jones Act. *Id.* at 32-33. Because the Jones Act permits recovery only for pecuniary loss in negligence actions, the Court held that the Act "precludes" a seaman from recovering for non-pecuniary loss—such as loss of society and lost future income—in claims for unseaworthiness as well. *Id.* at 32 ("The Jones Act … precludes recovery for loss of society in this case."); *id.* at 36 ("Because [the seaman's] estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.").

2. The court of appeals' ruling that punitive damages are available in unseaworthiness actions deepens and solidifies a split between appellate courts.

Until recently, federal and state appellate courts had consistently recognized that this Court's reasoning in *Miles* precludes punitive damages in unseaworthiness actions. *See McBride*, 768 F.3d at 388-389; *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller* v. *American President Lines, Ltd.*, 989 F.2d 1450, 1455, 1457-1459 (6th Cir. 1993); *Wahlstrom* v. *Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp.* v. *Williams*, 868 S.W.2d

294, 296-297 (Tex. 1993); *Sky Cruises, Ltd.* v. *Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).[2]

That consensus was undone last year when the Washington Supreme Court ruled that "a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law." *Tabingo* v. *American Triumph LLC*, 391 P.3d 434 (Wash. 2017), *cert. denied*, 138 S. Ct. 648 (2018). The Ninth Circuit has now joined the Washington Supreme Court in rejecting the contrary, and previously uniform, view of appellate courts on that issue.

In *McBride*, the Fifth Circuit comprehensively reviewed the availability of damages in maritime cases and concluded that punitive damages are not available in unseaworthiness actions. *McBride*, 768 F.3d at 389-390; *see also id.* at 391-401 (Clement, J., concurring); *id.* at 401-404 (Haynes, J., concurring).[3] As the Fifth Cir-

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[2] *But cf. Gaither* v. *Hunter Marine Transp., Inc.*, 990 F.2d 442, 442 (8th Cir. 1993) (per curiam) (without analyzing the question, affirming jury verdict apparently awarding "punitive damages" for claim based on unseaworthiness). A few decisions predating *Miles*, such as the Ninth Circuit's earlier decision in *Evich* and the Eleventh Circuit's decision in *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (1987), held that punitive damages were available in unseaworthiness actions, but those decisions cannot survive *Miles* and would conflict with the Fifth Circuit's decision in *McBride* and other appellate decisions. *See* p.16 n.10, *infra*.

[3] Judge Davis's opinion expressed the view of nine of the fifteen judges on the en banc court that punitive damages may not be awarded in unseaworthiness actions. *See McBride*, 768 F.3d at 384-391 (Davis, J.); *see also id.* at 391 (Clement, J., joined by Jolly, Jones, Smith, and Owen, JJ., concurring); *id.* at 401 (Haynes, J., joined by Elrod, J., concurring). Although two of the concurring judges perceived a possible distinction between wrongful death cases and personal injury cases, they concurred in the en banc

cuit explained, *Miles* rather than *Townsend* provides the most direct guidance on that question. *Miles* instructs that courts considering a remedy in unseaworthiness cases should look to whether Congress has authorized that remedy in the Jones Act. *See id.* at 387-390. *Townsend* did not disturb that understanding; indeed, "[t]he Court [in *Townsend*] could not have been clearer in signaling its approval of *Miles* when it added: 'The reasoning of *Miles* remains sound.'" *Id.* at 390 (quoting *Townsend*, 557 U.S. at 420). *Townsend* expressly distinguished claims for maintenance and cure, which were at issue there, from claims for unseaworthiness, which were at issue in *Miles* (and are at issue in this case): Whereas "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" "the [Jones Act] negligence/unseaworthiness actions are alternative, overlapping actions derived from the same accident and look toward the same recovery." *Id.* at 389 & n.36 (quoting *Townsend*, 557 U.S. at 423) (brackets omitted).

Thus, the Fifth Circuit concluded that the available remedies must be assessed by reference to the particu-

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court's affirmance of the dismissal of all of the punitive damages claims in that case, and they expressly rejected the dissenters' submission that punitive damages should be available in personal injury cases based on an unseaworthiness claim. *See id.* at 402, 404 (Haynes, J., concurring). They also observed that the arguable "tension … between (at least) two Supreme Court precedents" can be "definitive[ly] resol[ved]" only by this Court. *Id.* at 404. A subsequent panel in the same case confirmed that the en banc decision "foreclosed" the claims for punitive damages in personal injury unseaworthiness actions (and in negligence actions under the Jones Act). *McBride* v. *Estis Well Serv., LLC*, 853 F.3d 777, 780 n.1 (5th Cir. 2017), *cert. denied sub nom. Touchet* v. *Estis Well Serv.*, 138 S. Ct. 644 (2018).

lar cause of action at issue, and that *Miles* remains undisturbed as the controlling precedent for unseaworthiness actions. Contrary to that analysis, the Ninth Circuit here thought the assessment of available remedies is divorced from the cause of action and thus concluded that *Townsend*—which involved punitive damages but not unseaworthiness—provides the governing framework. That disagreement between the Fifth and Ninth Circuits is especially significant because of the Fifth Circuit's leading role in adjudicating admiralty law (by a wide margin).[4]

Given the division between the Ninth Circuit and the Washington Supreme Court on the one hand, and the Fifth Circuit and several other circuits and state appellate courts on the other hand, the availability of punitive damages in unseaworthiness cases will often turn on the happenstance of where suit is brought.[5]

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[4] *See, e.g., U.S. Court of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending June 30, 2017*, tbl. B-7 (2017), http://www.uscourts.gov/sites/default/files/data_tables/stfj_b7_630.2017.pdf (17 of 33 cases involving "marine injury" were appealed to the Fifth Circuit); *U.S. Court of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending June 30, 2015* (2015), tbl. B-7, http://www.uscourts.gov/sites/default/files/b07jun15_0.pdf (21 of 39 cases involving "marine injury" were appealed to the Fifth Circuit); Garwood & Engerrand, *Recent Developments in Admiralty Law in the United States Supreme Court, the Fifth Circuit, and the Eleventh Circuit*, 18 Hous. J. Int'l L. 709, 710 (1996) ("the Fifth Circuit continues to deal with the greatest number of admiralty cases").

[5] A seaman bringing an unseaworthiness claim under general maritime law can choose to file in federal court invoking federal admiralty jurisdiction under 28 U.S.C. § 1333, or in state court under the "saving to suitors" clause of Section 1333. In admiralty, venue is proper in any court that has personal jurisdiction over the

This Court should grant review to resolve the lower courts' disagreement on this important issue and avoid such an arbitrary and inconsistent regime.

B. The Decision Below is Erroneous

1. *Miles* And Other Precedents Make Clear Punitive Damages Are Not Available In Unseaworthiness Actions

The resolution of the question presented is straightforward: Punitive damages are not available in unseaworthiness actions by seamen. This Court's decisions in *Miles* and other cases lead inexorably to that conclusion.

In *Miles*, this Court held that any "limit" that Congress has placed on damages in a negligence action under the Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability," *i.e.*, unseaworthiness. 498 U.S. at 36. The Court stressed that, were it "to sanction more expansive remedies" in the "judicially created cause of action" for unseaworthiness than Congress has sanctioned for claims of negligence under the Jones Act, it would step outside its proper "place in the constitutional scheme." *Id.* at 32-33.[6] Thus, the Court ruled in *Miles* that, because Congress had not authorized damages for loss of socie-

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defendant. *See In re McDonnell-Douglas Corp.*, 647 F.2d 515, 516 (5th Cir. Unit A 1981); Dougherty et al., 23 Fed. Proc., L. Ed. § 53:52 (West 2018).

[6] *See also* 498 U.S. at 24 ("Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits."); *id.* at 27 ("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.").

ty and lost future earnings for negligence actions under the Jones Act, the courts also should not award such remedies under the judge-made claim for unseaworthiness. *See id.* at 32-33, 36.

The same is true of punitive damages. It is well settled that punitive damages are not available in negligence actions brought under the Jones Act. As the Fifth Circuit has explained, "no cases have awarded punitive damages" under the nearly century-old Jones Act. *McBride*, 768 F.2d at 388; *see Miller*, 989 F.2d at 1457; *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984). Under *Miles*, therefore, punitive damages also should not be awarded for unseaworthiness claims.

In *Miles*, the Court determined that the Jones Act precludes awards of loss of society and lost future earnings by looking to the remedies authorized under the Federal Employers Liability Act ("FELA"), which the Jones Act incorporates "unaltered." *Miles*, 498 U.S. at 32. As with loss of society and lost future earnings, punitive damages are not available under FELA. This Court held as much in *Seaboard Air Line Railway* v. *Koennecke*, 239 U.S. 352, 354 (1915), when the Court reviewed a wrongful death complaint brought by heirs of a railroad worker that was ambiguous as to the source of the cause of action, and observed that "[i]f [the complaint] were read as manifestly demanding exemplary damages" (*i.e.*, punitive damages), "that would point to the state law" rather than FELA as the basis for the claim.[7] Courts of appeals have consistently

[7] The terms "'exemplary, punitive, [and] vindictive'" damages are synonymous. *See Townsend*, 557 U.S. at 410 (quoting *Day v. Woodsworth*, 54 U.S. 363, 371 (1851)).

reached the same conclusion: Punitive damages are not available under FELA. *See Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987); *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240 (6th Cir. 1971).

In FELA and the Jones Act, Congress limited recovery to compensatory damages. *See, e.g.*, *Gulf, Colo., & Santa Fe Ry. Co.* v. *McGinnis*, 228 U.S. 173, 175 (1913) ("The recovery [under FELA] must … be limited to compensating those relatives … as are shown to have sustained some pecuniary loss."); *Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 69-71 (1913) (FELA provides "only for compensation for pecuniary loss"); *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 149 (1913) ("The damage [under FELA] is limited strictly to the financial loss thus sustained"). As this Court has recognized since before FELA was enacted, punitive damages are not compensatory damages. *See Lake Shore & Mich. S. Ry. Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others ….").[8] *Miles* instructs that the same limitation should apply to unseaworthiness

[8] *See also Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 490-493 (2008) (explaining that historically and today, "punitives are aimed not at compensation but principally at retribution and deterring harmful conduct," and are "separate and distinct from compensatory damages"); *Day*, 54 U.S. at 371 (describing "exemplary" damages as stemming from "'the enormity of [the] offense rather than the measure of compensation to the plaintiff'" (alteration in original)); *Restatement (Second) of Torts* § 908(1) (1979) ("Punitive damages are damages, *other than compensatory* or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." (emphasis added)).

claims, and so punitive damages are also not available on such claims.

The court of appeals recognized that punitive damages "are not compensation for loss at all," *see* App. 14a, but it misunderstood the significance of that fact to this case. In the court's view, *Miles* is irrelevant here because that decision addressed only the types of compensatory damages available in unseaworthiness actions—pecuniary, or also nonpecuniary—and did not consider punitive damages at all. *See* App. 12a-15a. But that crabbed reading of *Miles* improperly divorces the result in that case from its fundamental rationale. In *Miles*, this Court stressed over and over that due regard for Congress and for the Judiciary's proper constitutional role requires the courts to limit remedies for unseaworthiness claims to those authorized by Congress in the Jones Act. *See* 498 U.S. at 32-33, 36. Nothing in *Miles* limits that reasoning to distinguishing among the kinds of compensatory damages that are available, or suggests that courts may freely award punitive damages in unseaworthiness cases even though Congress has precluded punitive damages for Jones Act negligence claims, to which unseaworthiness claims are closely connected.

Indeed, decades before *Miles*, this Court observed that the remedies available for unseaworthiness claims are coextensive with those available for Jones Act negligence claims, and that the remedies for both types of claims are limited to compensatory damages. In *Pacific Steamship Co.* v. *Peterson*, 278 U.S. 130 (1928), the Court emphasized the close relation between unseaworthiness claims and Jones Act negligence claims when it explained that "[t]he right to recover *compensatory damages* under the new rule for injuries caused by negligence [*i.e.*, the Jones Act] is … an alternative of

the right to recover indemnity under the old rules [*i.e.*, general maritime law] on the ground that the injuries were occasioned by unseaworthiness." *Id.* at 138 (emphasis added). Therefore, the Court stressed, "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 [under the Jones Act], or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to *but one indemnity by way of compensatory damages*." *Id.* (emphasis added).[9] And in *Townsend*, the Court reaffirmed its prior recognition that unseaworthiness is "'an alternative of[] the right to recover compensatory damages under the Jones Act.'" 557 U.S. at 423 (quoting *Peterson*, 278 U.S. at 138).[10]

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[9] *See also McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958) (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action" (citing *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927))).

[10] A handful of pre-*Miles* appellate decisions indicated that punitive damages could be available for claims of unseaworthiness. The leading decisions to that effect were *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), and *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. Unit B July 1981). As Judge Clement explained in *McBride*, those cases failed to account for the Court's emphasis in cases such as *Peterson* on the close connection between Jones Act negligence and unseaworthiness, and relied on older cases that did not involve unseaworthiness. 768 F.3d at 395-401 (Clement, J., concurring). Further, *Merry Shipping* and similar decisions relied on cases indicating that loss of society damages were available in unseaworthiness claims—a premise specifically rejected by this Court in *Miles*. *See* 650 F.2d at 624-625. The Fifth Circuit has therefore properly determined that *Miles* "effectively overruled" *Merry Shipping*. *See Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995), *abrogated by Townsend on other grounds*, 557 U.S. 504. Other

The court of appeals thought it could not read *Miles* to foreclose punitive damages in unseaworthiness actions because this Court had stated in *Miles*, "The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." 498 U.S. at 29, *quoted in* App. 9a. But that passage in *Miles* did not concern the scope of remedies for unseaworthiness claims; it was addressed to the available causes of action. That remark was made in the Court's discussion of whether to recognize a cause of action for wrongful death based on unseaworthiness, not in its later analysis of whether to permit recovery for nonpecuniary loss in such actions. *See* 498 U.S. at 29. The Court did recognize the wrongful death action—but separately, it also refused to allow damages for nonpecuniary loss because such damages are not available for Jones Act negligence. *See id.* at 29-30. Nothing in *Miles* supports the decision below; to the contrary, *Miles* makes clear that the court of appeals erred.

2. *Townsend*'s Framework Does Not Apply To Unseaworthiness Actions

The court of appeals read *Townsend* to hold that punitive damages should be available for all maritime claims unless Congress has affirmatively withdrawn them as a remedy. App. 14a-15a. That decision reflects a profound misunderstanding of *Townsend*—including its express reaffirmance of *Miles* as "sound," 557 U.S. at 420. *Miles* and *Townsend* make clear that the remedies available for general maritime claims depend on

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cases following *Merry Shipping* are similarly flawed. *See Evich*, 819 F.2d at 258; *Self*, 832 F.2d at 1550.

the particular cause of action—and especially on the understanding that Congress has limited the remedies for cognate causes of action. *Compare Miles*, 498 U.S. at 32 (stressing that Congress had limited remedies for Jones Act negligence), *with Townsend*, 557 U.S. at 419 (noting that Congress had not addressed remedies for maintenance and cure).

The Court in *Townsend* addressed only punitive damages in maintenance and cure actions and expressly distinguished its ruling on unseaworthiness actions in *Miles*. 557 U.S. at 420. There are several reasons why the remedies available for the two causes of action might differ. First, unseaworthiness is a twin of Jones Act negligence, but maintenance and cure is not. As the Court in *Townsend* explained, unseaworthiness is "'an alternative of[] the right to recover compensatory damages under the Jones Act,'" such that "the seaman may have … one of the … two." *Townsend*, 557 U.S. at 423-424; *see Peterson*, 278 U.S. at 138 (Jones Act negligence is "an alternative of the right to recover indemnity … [for] unseaworthiness"); *McAllister*, 357 U.S. at 225 (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action"). Both unseaworthiness and Jones Act negligence claims may be brought to redress a seaman's personal injury or death occurring in the scope of his employment.

In contrast, "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" and thus "the seaman may have maintenance and cure *and*" a Jones Act negligence (or unseaworthiness) recovery. *Townsend*, 557 U.S. at 423-424 (quoting *Peterson*, 278 U.S. at 138) (emphasis added). Indeed, maintenance and cure is not even a tort but ra-

ther is a "contractual right." *Peterson*, 278 U.S. at 139; *see also Weeks Marine, Inc.* v. *Garza*, 371 S.W.3d 157, 163 (Tex. 2012).

Second, the judicial origins of the contemporary theory of unseaworthiness liability are quite different from the origins of maintenance and cure—a point stressed by this Court in *Miles*. More than two decades after the Jones Act was enacted, unseaworthiness underwent a "revolution" in which "this Court transformed the warranty of seaworthiness into a strict liability obligation." *Miles*, 498 U.S. at 25-26 (quotation marks omitted). "As a consequence of this radical change, unseaworthiness" went from "an obscure and relatively little used remedy" to "the principal vehicle for recovery by seamen for injury or death." *Id.* at 25-26 (quotation marks omitted). After that dramatic broadening of the doctrine of unseaworthiness, this Court deemed it "inconsistent with [its] place in the constitutional scheme" to extend unseaworthiness yet further, and "to sanction more expansive remedies" for unseaworthiness than Congress did for negligence under the Jones Act. *Id.* at 32-33; *see also McBride*, 768 F.3d at 399-401 (Clement, J., concurring).

Again in contrast, the doctrine of maintenance and cure has not undergone a "revolution." *Miles*, 498 U.S. at 25 (quotation marks omitted). Rather, "the legal obligation to provide maintenance and cure dates back centuries." *Townsend*, 557 U.S. at 413. A "seaman's right to maintenance and cure is 'ancient,'" *McBride*, 768 F.3d at 393 (Clement, J., concurring) (quoting *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527 (1938)), and "has remained unchanged in substance for centuries," *McBride*, 768 F.3d at 415 (Higginson, J., dissenting).

Those differences led this Court to conclude in *Townsend* that the congressional remedial judgments embodied in the Jones Act did not foreclose the courts from awarding punitive damages in claims for maintenance and cure. But unseaworthiness and Jones Act claims remain as closely connected as they were before, and the reasoning in *Miles* cannot be confined to any specific remedy. Thus, allowing punitive damages in unseaworthiness actions when Congress has foreclosed them in negligence actions—as with allowing nonpecuniary damages for lost society or lost income—would go "well beyond the limits of Congress's ordered system of recovery." *Miles*, 498 U.S. at 36.[11]

3. *Miles* Applies To Both Wrongful Death Actions And Personal Injury Actions

The court of appeals also suggested that the limits on remedies for unseaworthiness claims that this Court recognized in *Miles* apply only to wrongful death actions, and not personal injury suits like this case. The court believed that the "limitations" on recovery under the Jones Act are "based on the restrictive recoveries permitted for wrongful death," which "have no application to general maritime claims by living seamen for injuries." App. 14a. That reading of *Miles* is plainly wrong.

The central holding of *Miles* is that the courts may not expand the scope of recovery for the judge-made action of unseaworthiness beyond what Congress has allowed for negligence under the Jones Act. *See* 498

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[11] Even under the *Townsend* framework, however, punitive damages would not be available here; as Judge Clement explained in *McBride*, there is no tradition of recognizing punitive damages in unseaworthiness actions. 768 F.3d at 395-399.

U.S. at 22-23, 32-33. That holding is not limited to wrongful death cases. To the contrary, the Court noted in *Miles* that "[t]he Jones Act provides an action in negligence for the death or *injury* of a seaman." *Id.* at 29 (emphasis added).[12] The separation of powers concerns that animated the Court's analysis do not depend on whether the action is for death or injury. This Court said so in *Miles* itself: "We will not create, under our admiralty powers, a remedy … that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury* and death." *Id.* at 36 (emphasis added).[13]

The "constitutional mandate" to achieve "uniform" maritime law—which this Court heeded in *Miles*, both in recognizing wrongful death actions and in disallowing recovery for loss of society and survival rights in unseaworthiness actions, *see* 498 U.S. at 27, 29-30, 33, 35, 37—also precludes recognition of punitive damages for personal injury claims based on unseaworthiness. Reading *Miles* to reach only wrongful death claims would make a crazy quilt of remedies for seamen's injuries. As discussed, the Jones Act disallows punitive damages based on negligence in both personal injury and wrongful death actions. *See* pp. 12-14, *supra*. Al-

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[12] *See* 46 U.S.C. § 30104 ("A seaman injured in the course of employment or, if the seaman dies from the injury ….").

[13] FELA, which the Jones Act incorporates, also provides remedies for an employee's personal injury or death. *See* 45 U.S.C. § 51 ("Every common carrier by railroad while engaging in commerce … shall be liable in damages to any person *suffering injury* …." (emphasis added)); *The Arizona* v. *Anelich*, 298 U.S. 110, 118 (1936) ("the Federal Employers' Liability Act, thus incorporated in the Jones Act by reference, gives a right of recovery for the injury or death of an employee of a common carrier by rail" (emphasis added)).

lowing recovery of punitive damages for unseaworthiness (but not negligence) if a seaman was injured (but not killed) would create serious "anomalies" in maritime law. *Miles*, 498 U.S. at 26.

There is no justification for such anomalies. In the nineteenth century, personal injury claims and wrongful death actions may have followed different paths of development, but this Court long ago rejected those happenstances of legal history as a guide to the maritime remedies that should be available today. The ancient common law rule permitting suit based on personal injury but not death "had little justification except in primitive English legal history," and "it is difficult to discern an adequate reason for its extension to admiralty." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 379, 381 (1970). This Court therefore jettisoned the old rule and recognized wrongful death actions under general maritime law because "there is no present public policy" to treat death differently from injury in this context—a judgment Congress also reached in the Jones Act. *Id.* at 382-383, 388-390; *id.* at 405 (old "rule … produces different results for breaches of duty in situations that cannot be differentiated in policy"); *see Miles*, 498 U.S. at 27-30.

The Court has consistently recognized the importance of adopting "a uniform rule" of recovery for injuries under maritime law. *Miles*, 498 U.S. at 33. It would be strange for the more serious penalty (punitive damages) to be available only for the less serious result (injury). That would be stranger still given that sometimes a seaman's death may occur long after the accident, when the full effects of the injury are finally felt. A plaintiff's entitlement to punitive damages, and a vessel owner's liability for them, should not shift and

spring depending on the vagaries of whether a particular seaman eventually dies of his injuries.

C. The Importance Of The Question Presented Warrants This Court's Immediate Review

This case presents an important question of federal law warranting this Court's review. The court of appeals' decision will have serious and adverse consequences for the maritime industry and the nation as a whole.

The domestic maritime industry may often go unnoticed by the average American, but it has a substantial effect on the economy. The nation's commercial fleet comprises more than 40,000 fishing boats, tankers, container ships, tugboats, barges, ferryboats, cruise ships, water taxis, and other working vessels.[14] Operating along the country's seacoasts and throughout its internal waterways, those vessels transport about 100 million passengers for work and pleasure each year, as well as every conceivable type of raw material and consumer goods for export or distribution, including seafood, agricultural products, crude and finished petroleum products, and steel.[15] For example, in 2009, U.S. marine vessels transported $1 trillion worth of imports

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[14] American Maritime Partnership, *Frequently Asked Questions*, https://www.americanmaritimepartnership.com/faq/ (visited Aug. 22, 2018).

[15] Navy League of the United States, *America's Maritime Industry: The Foundation of American Seapower* 7-8, 14, https://navyleague.org/files/legislativeaffairs/americas-maritime-industry.pdf (visited Aug. 22, 2018); *Frequently Asked Questions*, *supra* n.14.

and exports.[16] All told, the maritime industry annually accounts for about $30 billion in wages, $11 billion in taxes, and $100 billion in economic output.[17]

In particular, the dredging work performed by companies such as petitioner is essential to maintaining the vitality of our economy and ensuring commerce is carried out safely and efficiently. That dredging, performed by companies on behalf of the U.S. Army Corps of Engineers and others, ensures that thousands of miles of internal waterways that span the nation remain navigable.[18] A financially healthy maritime transportation industry is essential to those operations.

Maritime transportation does all this in a relatively cost-effective and environmentally friendly way.[19] Maritime shipping costs have been declining, whereas the costs for other modes of freight transportation have

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[16] *The Foundation of American Seapower*, *supra* n.15, at 12-13.

[17] *Id.* at 14; American Maritime Partnership, *What We Do*, https://www.americanmaritimepartnership.com/about-amp/what-we-do/ (visited Aug. 22, 2018).

[18] U.S. Army Corps of Engineers, *Inland Waterway Navigation: Value to the Nation*, http://www.mvp.usace.army.mil/Portals/57/docs/Navigation/InlandWaterways-Value.pdf (visited Aug. 22, 2018).

[19] *The Foundation of American Seapower*, *supra* n.15, at 4, 7, 11, 15; *see also* Texas Transportation Institute, Center for Ports and Waterways, *A Modal Comparison of Domestic Freight Transportation Effects on the General Public* 34, 38 (2007), https://www.marad.dot.gov/wp-content/uploads/pdf/Phase_II_Report_Final_121907.pdf (comparing the energy efficiencies and emissions generated by highway, railroad, and maritime transport, and finding maritime transport to be consistently more energy efficient and to generate fewer emissions).

been increasing.[20] Maritime transportation thus keeps costs down to consumers—and also to the American taxpayer, since U.S. commercial vessels play a vital role in transporting our servicemembers and their supplies around the world, including 95% of the dry cargoes to U.S. and Coalition Forces in Iraq and Afghanistan since 2008.[21] Indeed, a robust domestic maritime industry is essential to American military readiness and strength.[22]

By exposing vessel owners and operators to punitive damages for claims of unseaworthiness, the decision below creates "devastating potential for harm" to the industry and the national economy, environment, and security. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). As Judge Clement explained in *McBride*, the increased cost to owners and operators resulting from potential liability for punitive damages are likely to "be eventually passed along to consumers," whether private or governmental. 768 F.3d at 401; *see also, e.g.*, *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1490 (D.C. Cir. 1991) ("The award of punitive damages … would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation."). And "[g]iven the sizeable percentages of the world's goods that travel on ships, … the decision in this case needs to have only the minutest impact on shipping prices to have a significant aggregate cost for consumers." *McBride*, 768 F.3d at 401 (Clement, J., concurring). Faced with higher prices, consumers may

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[20] *The Foundation of American Seapower*, *supra* n.15, at 15.

[21] *Id.* at 16-17.

[22] *Id.* at 16-18.

choose to buy less, and manufacturers, distributors, and exporters may shift to other modes of transportation, which may be less environmentally friendly and which cannot substitute for the maritime industry's role in supporting U.S. military and homeland security operations.

The decision below also contravenes "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27 (quotation marks omitted); *see also The Lottawanna*, 88 U.S. 558, 575 (1874). As explained above (pp. 8-9), the court of appeals' decision deepens a conflict among appellate courts about the availability of punitive damages, increasing uncertainty and costs. The decision also creates inconsistency between claims based on negligence and claims based on unseaworthiness, as well as between personal injury and wrongful death actions. *Supra* pp. 12-15, 19-20, 22.

In light of all of those detrimental effects of the court of appeals' decision, this Court's review is warranted now, even though there has not yet been a trial in this case. The Ninth Circuit has definitively ruled that punitive damages are available in unseaworthiness cases. Its decision is likely to have an *in terrorem* effect, pressuring maritime employers to settle even meritless unseaworthiness claims to avoid the prospect of an overwhelming award of punitive damages.[23] That

[23] *See* Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1156 (1984) (describing "the now universal practice of plaintiffs alleging and demanding punitive damages in an effort … to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award"); Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Deci-*

settlement pressure is particularly strong for strict liability claims like unseaworthiness, where no allegation of fault is necessary to survive a dispositive motion and any trial carries the possibility of a runaway jury verdict.

This Court granted review in *Townsend* when that case was in the same procedural posture. Like the district court here, the district court in *Townsend* denied a motion to dismiss the punitive damages claim but certified the question for interlocutory appeal. 557 U.S. at 408. Like the court of appeals here, the Eleventh Circuit agreed to hear the interlocutory appeal and affirmed the district court's ruling. *Id.* This Court granted certiorari, recognizing the importance of immediately resolving a conflict on the availability of punitive damages in maintenance and cure actions. The same is true here, and it is appropriate and imperative for the Court to grant immediate review of the court of appeals' decision in this case.

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sions Affect Class Actions, 60 Baylor L. Rev. 880, 916 (2008) (when a case "includes a claim for punitive damages claim, the combined settlement pressure increases exponentially"); Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 Wis. L. Rev. 211, 229-232 (1998) (noting that insurance companies have a good-faith obligation to settle compensatory damages claims to protect their insureds from a possible punitive damages verdict); *id.* at 212 ("it is possible that the 'shadow' cast by punitive damages awards in the settlement process is much larger than would be predicted by simple extrapolation from trial verdicts"); Berch & Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 Miss. L.J. 715, 727 n.49 (1999) (describing "the concomitant increase in the settlement value of a case once a claim for punitive damages is added").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B. Street Suite 1790
San Diego, CA 92101
(619) 225-6450
bponticello@eps-law.com

SETH P. WAXMAN
Counsel of Record
PAUL R. Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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