No. 18-266

In The Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INJURED CREWMEMBERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are crewmembers injured in the service of their ships who have pending claims under the Jones Act, 46 U.S.C. § 30104, and the general maritime law's unseaworthiness doctrine. Each *amicus* claims punitive damages based on his employer's egregious misconduct. *Amicus* Tevrin Narcisse's action is pending in Washington Superior Court for the County of King as *Narcisse v. Crowley Liner Services, Inc.* *Amicus* James Stelpstra's action is pending in California Superior Court for the County of Alameda as *Stelpstra v. Matson Navigation Co.* Their ability to pursue their punitive-damages claims may well depend on, and *amici* accordingly have a strong interest in, the outcome of the present case.

SUMMARY OF ARGUMENT

Petitioner's argument depends entirely on its erroneous assertion that punitive damages are categorically unavailable under the Jones Act, 46 U.S.C. § 30104. This Court need not address that assertion; it can affirm the decision below on the ground that punitive damages are available in an unseaworthiness action regardless of whether they are available under the Jones Act. But if this Court chooses to reach the issue,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* confirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of *amicus* briefs.

it should affirm the decision below because punitive damages are available under the Jones Act.

1. When Congress incorporated the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, by reference in the Jones Act, it gave injured crewmembers the rights that injured railroad workers have under FELA. Applying the analytic framework that this Court explained in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), punitive damages are available under FELA. That approach is also consistent with this Court's direction in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), to construe FELA by reference to common-law principles when deciding issues that the statute does not explicitly address.

The relevant cause of action—negligence—was well-established at common law. In the years immediately before FELA, this Court upheld several negligence claims by injured railroad employees against their employers.

The remedy at issue—punitive damages—was also well-established before the enactment of FELA, both at common law and under the general maritime law, including in negligence actions. Punitive damages were available in actions against railroads, and punitive damages were awarded against railroads, including in actions for injuries suffered by their employees. In any event, this Court has put the burden on the party seeking to deny a traditional common-law remedy to show that a generally available remedy was unavailable in a particular context. *See Townsend*, 557

U.S. at 414-415, 418. Petitioner cannot carry that burden.

Nothing in FELA deprives injured railroad workers of the right to pursue punitive damages in appropriate cases. On the contrary, Congress's intention was to expand the remedies available to injured railroad workers without depriving them of any remedies that they previously possessed.

This Court has never held that punitive damages are categorically unavailable under FELA. The decisions cited to restrict the right to pursue punitive damages did not involve the issue. Those decisions addressed only compensatory damages in the wrongful-death context, which has a unique history that does not apply in non-fatal personal-injury cases. Lower-court decisions to the contrary are inconsistent with this Court's decisions.

2. Even if punitive damages were unavailable under FELA, they would still be available under the Jones Act. FELA limitations do not limit Jones Act claims when crewmembers have traditionally enjoyed greater rights under the general maritime law. FELA establishes a floor for crewmembers' rights, not a ceiling. This Court has several times recognized situations in which injured crewmembers have greater rights than injured railroad workers. The general maritime law recognized punitive damages before the nation even had railroads.

ARGUMENT

Petitioner Dutra Group advocates a *per se* rule that an injured crewmember can never recover punitive damages under the general maritime law doctrine of unseaworthiness, no matter how egregious a defendant shipowner's fault may be. That extreme rule would apply even if a shipowner made a deliberate, callous decision to send a doomed—but over-insured—rust-bucket to sea because the anticipated insurance proceeds would exceed the compensatory damages payable to any injured sailors who survive the inevitable sinking. Petitioner's argument for such a harsh rule rests entirely on its assertion that punitive damages are categorically unavailable under the Jones Act. But that assertion is incorrect. Properly understood, the Jones Act permits the traditional remedy of punitive damages in an extreme case when the defendant employer has been guilty of sufficiently egregious misconduct. As a result, petitioner's entire analysis collapses.

Neither the Jones Act nor the Federal Employers' Liability Act (FELA), which the Jones Act incorporates by reference, addresses punitive damages. And this Court has never held that punitive damages are unavailable under either statute. Indeed, this Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 n.12 (2009), explicitly recognized that the availability of punitive damages under the Jones Act remains an open question.

Some lower courts—including the court below—have mistakenly held that punitive damages are unrecoverable under the Jones Act and FELA. *See*, *e.g.*, *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1454-59 (6th Cir. 1993) (Jones Act); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984) (same); *Wildman v. Burlington Northern Railroad Co.*, 825 F.2d 1392, 1393-95 (9th Cir. 1987) (FELA); *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971) (same). This Court need not decide that issue. It may affirm the decision below on the ground that punitive damages would be available in an action for unseaworthiness even if they were not allowed under the Jones Act. That is what the court below held. *See* Pet. App. 3a & n.7. It is essentially how the *Townsend* Court upheld the availability of punitive damages for the willful failure to pay maintenance and cure. *See* 557 U.S. at 424 n.12. But this Court could also resolve the question presented by recognizing that the Jones Act permits the recovery of punitive damages when the defendant employer has been guilty of sufficiently egregious misconduct.

I. Punitive Damages Are Available in Actions Under the Jones Act Because They Are Available Under FELA.

The Jones Act gave crewmembers the right to "maintain an action for damages at law" and provided that "in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." Merchant Marine Act, ch. 250, § 33, 41

Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104). In *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 391-392 (1924), this Court recognized that Congress had by reference incorporated FELA and its amendments. A proper analysis of the availability of punitive damages under the Jones Act therefore begins with FELA. And because FELA permits an injured railroad worker to recover punitive damages in an appropriate case, that remedy is also available under the Jones Act.

Under the analytical framework that this Court established in *Townsend*, 557 U.S. at 414-415, 420, 424, the test for determining whether an injured railroad worker can seek punitive damages for an employer's egregious fault turns on whether the cause of action (negligence) and the remedy (punitive damages) preexisted FELA, and whether FELA precluded the action or the remedy. *See also*, *e.g.*, *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) (construing FELA by reference to common-law principles with respect to issues not explicitly addressed by the statute). All three of the *Townsend* factors point in favor of the continued availability of punitive damages under FELA.

A. Injured railroad employees had both a negligence cause of action and a punitive-damages remedy prior to FELA.

Pre-FELA caselaw demonstrates that the first two requirements—the pre-FELA existence of the cause of action and the remedy—are easily satisfied.

1. Injured railroad workers could bring an action for negligence against their employers prior to FELA.

In the years immediately prior to FELA, this Court regularly recognized that injured railroad workers could bring common-law negligence actions against their employers. In *Santa Fe Pacific Railroad Co. v. Holmes*, 202 U.S. 438 (1906), for example, an engineer injured in a head-on collision recovered for his employer's negligence in sending approaching trains on the same track. In *Texas & Pacific Railway Co. v. Swearingen*, 196 U.S. 51 (1904), an injured switchman recovered for his employer's negligence in placing a scale box too close to the track. And in *Choctaw, Oklahoma & Gulf Railroad Co. v. Holloway*, 191 U.S. 334 (1903), an injured fireman recovered for his employer's failure to equip an engine with brakes.

Prior to FELA, railroads often escaped negligence liability under three harsh common-law rules denying recovery in many typical situations—the fellow-servant rule, the contributory-negligence rule, and the assumption-of-the-risk rule.[2] In *Northern Pacific Railway Co. v. Dixon*, 194 U.S. 338 (1904), for example, a fireman was killed in a head-on collision between two

[2] In *Holmes*, the railroad asserted the fellow-servant doctrine; in *Swearingen* and *Holloway*, the railroads asserted the assumption-of-the-risk rule; and in all three cases the railroads asserted the contributory-negligence rule. *See Holmes*, 202 U.S. at 438-439; *Swearingen*, 196 U.S. at 53; *Holloway*, 191 U.S. at 337. But the defenses failed on the facts and the injured employees succeeded in their negligence actions.

trains that occurred because a local telegraph operator had negligently informed the dispatcher that one of the trains had not yet passed his station when in fact it had passed the station while the operator was asleep. This Court ruled that "it is obvious that the local operator was a fellow servant with the fireman," *id*. at 343, and thus the railroad was not liable for the fireman's death. *See also*, *e.g.*, *New England Railroad Co. v. Conroy*, 175 U.S. 323, 327-347 (1899) (fellow-servant rule); *Southern Pacific Co. v. Seley*, 152 U.S. 145, 154-156 (1894) (assumption-of-the-risk rule); *id*. at 156 (contributory-negligence rule) (alternate holding).

2. Punitive damages were generally available prior to FELA.

Although the plaintiffs in *Holmes*, *Swearingen*, and *Holloway* did not seek punitive damages, other pre-FELA cases establish that punitive damages were then available at common law, available under the general maritime law, available in common-law negligence actions, available against railroads, and in fact awarded against railroads (including in actions for injuries to railroad employees).

a. Punitive damages were available at common law prior to FELA.

This Court in *Townsend* documented that "[p]unitive damages have long been an available remedy at common law." 557 U.S. at 409 (citing U.S. and English cases dating back to colonial times). Indeed, before the enactment of FELA, this Court itself recognized the general availability of punitive damages. In *Day v.*

Woodworth, 54 U.S. (13 How.) 363 (1852), for example, this Court explained:

> It is a well-established principle of the common law, that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

Id. at 371; *see also*, *e.g.*, *Barry v. Edmunds*, 116 U.S. 550, 562 (1886) ("[A]ccording to the settled law of this court, [a plaintiff] might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions.").

This Court similarly recognized punitive damages as an available remedy under the general maritime law (itself a form of common law) even earlier. Justice Story, writing for the Court in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), described "exemplary damages" as "the proper punishment which belongs to [gross and wonton] lawless misconduct." *Id*. at 558; *see also*, *e.g.*, *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 108 (1893) (recognizing that "courts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages").

b. Punitive damages were available in negligence actions prior to FELA.

The availability of punitive damages was not limited to cases of intentional misconduct, as in *Day v. Woodworth* and *The Amiable Nancy*. This Court's pre-FELA cases also recognized that punitive damages were available in appropriate cases in which the plaintiff had brought a negligence action. In *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1876), for example, this Court explicitly noted that the punitive-damages rule it had recognized in *Day v. Woodworth* "is equally applicable to suits for personal injuries received through the negligence of others" if the defendant's misconduct was serious enough. 91 U.S. at 493.

c. Punitive damages were available against railroads prior to FELA.

Railroads were regularly subject to the general rule recognizing the availability of punitive damages. In *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101 (1893), a passenger sued a railroad for unlawful arrest, and the jury awarded punitive damages. This Court explained that the availability of punitive damages was "well settled":

> In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice

> as implies a spirit of mischief or criminal indifference to civil obligations.

Id. at 107. Not only did *Prentice* itself involve an action against a railroad, but the Court cited eight of its prior decisions in support of the quoted proposition—and five of them were actions against a railroad. *See*, *e.g.*, *Arms*, 91 U.S. at 492 ("well settled . . . that exemplary damages may in certain cases be assessed"); *Philadelphia, Wilmington & Baltimore Railroad Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) ("Whenever the injury complained of has been inflicted maliciously or wantonly . . . the jury are not limited to the ascertainment of a simple compensation for the wrong. . . .").

d. Punitive damages were in fact awarded prior to FELA in actions against railroads.

The railroads' exposure to punitive damages in the pre-FELA era was not an abstract principle. The courts in fact ordered railroads to pay punitive damages in appropriate cases. In *Fell v. Northern Pacific Railway Co.*, 44 F. 248, 252-253 (C.C.D.N.D. 1890), for example, the court upheld a jury verdict awarding punitive damages to a passenger who had been forced to jump from a moving train. In *Brown v. Memphis & Charleston Railroad Co.*, 7 F. 51, 63-64 (C.C. W.D. Tenn. 1881), the court upheld a jury verdict awarding punitive damages to a passenger who had wrongfully been excluded from the "ladies' car." And in *Denver & Rio Grande Railway Co. v. Harris*, 122 U.S. 597, 609-610 (1887), this Court affirmed an award that included "punitive or exemplary damages." *Cf. Missouri Pacific Railway Co. v.*

Humes, 115 U.S. 512, 522-523 (1885) (affirming an award of statutory double damages as analogous to punitive damages).

e. Punitive damages were in fact awarded prior to FELA in actions against railroads for injuries suffered by railroad employees.

Prior to the enactment of statutory regimes obligating employers to pay compensation to injured employees, there was no conceptual distinction between employees' tort actions against the railroads that employed them and actions by other plaintiffs against those railroads. With the enactment of FELA, of course, employees had a unique statutory remedy against their employers, unhampered by the harsh defenses that had so often denied recovery under the common law. *See supra* at 7-8 & n.2.[3] But until FELA entered into force, an employee's action against a railroad was subject to the same principles as applied in *Fell*, *Brown*, and *Harris* (discussed in the previous paragraph).

Despite the harsh common-law defenses that made it particularly difficult for injured railroad employees to recover even compensatory damages prior to

[3] In other contexts, employees were eventually covered by workers' compensation regimes that limited their ability to bring tort actions against their employers. *See*, *e.g.*, Longshore and Harbor Workers' Compensation Act § 5(a), 33 U.S.C. § 905(a) (providing that an employer's liability under the statute "shall be exclusive and in place of all other liability of such employer to the employee") (originally enacted in 1927).

FELA,[4] some plaintiffs succeeded in obtaining a punitive-damages award against a railroad for injuries suffered by an employee. In *Turner v. Norfolk & Western Railroad Co.*, 40 W. Va. 675, 22 S.E. 83 (1895), for example, a 16-year-old railroad employee was killed when an engine collided with the hand car on which he was riding. On appeal, West Virginia's highest court upheld the award, explaining "that the measure of damages in the case of a man's death is not limited to the pecuniary value of his life to his estate; but may be exemplary, punitive, and given as a solatium." 22 S.E. at 87. *See also*, *e.g.*, *Brickman v. Southern Railway*, 74 S.C. 306, 54 S.E. 553, 557 (1906) (affirming a jury verdict that included punitive damages for the death of a railroad employee in a train wreck); *cf. Ennis v. Yazoo & Mississippi Valley Railroad Co.*, 118 Miss. 509, 79 So. 73, 74-75 (1918) (upholding a jury verdict that apparently included punitive damages for the death of a railroad employee—and explicitly approving the jury instruction authorizing an award of punitive damages—in a case that was not subject to FELA and was accordingly governed by pre-FELA law).

[4] *See supra* at 7-8 & n.2 (discussing the common-law defenses). Although the contributory-negligence rule could apply in virtually any context, the assumption-of-the-risk rule was more likely to apply in the workplace context and the fellow-servant rule by its nature was a workplace doctrine.

f. In any event, the burden is on petitioner to show that an otherwise generally available remedy such as punitive damages was not available in this context.

Even if the availability of punitive damages against railroads had not been so well-established prior to FELA, this Court in *Townsend* put the burden on the party seeking to deny a traditional common-law remedy to show that the remedy was unavailable in a particular context. *See* 557 U.S. at 414-415, 418. It is accordingly petitioner's burden to prove that railroad workers' cases were an exception to the general rule permitting punitive damages. The cases discussed and cited above make it impossible for petitioner to carry that burden.

B. Congress enacted FELA to expand the rights and remedies available to injured railroad workers without limiting the rights and remedies previously available to them.

The third *Townsend* element—whether FELA precluded the cause of action or the remedy—requires attention to FELA itself. The statute's primary purpose was to expand the negligence action by eliminating the harsh defenses that so often denied recovery, *see supra* at 7-8 & n.2, and by creating a federal wrongful-death cause of action for railroad workers. Three sections of the Act accomplish those goals. Section 1, 45 U.S.C. § 51, expanded the common law in two ways. It eliminated the fellow-servant rule, which had allowed

employers to escape liability "for injuries sustained by one employee through the negligence of a coemployee," S. Rep. No. 60-460, at 1 (1908). And it provided that railroads engaged in interstate commerce "shall be liable in damages . . . , in case of the death of [an injured] employee, to his or her personal representative." Section 3, 45 U.S.C. § 53, modified the contributory-negligence rule, under which a plaintiff's negligence had been a complete bar to recovery, and instead provided that "damages shall be diminished . . . in proportion to the amount of negligence attributable to [the] employee." *See*, *e.g.*, S. Rep. No. 60-460, at 2 ("It is the purpose of this measure to modify the law of contributory negligence."). Finally, section 4, 45 U.S.C. § 54, eliminated the assumption-of-the-risk rule, which had allowed employers to avoid liability if the employee had accepted the job with knowledge of the unsafe work conditions.[5]

When enacting FELA to give *greater* rights and remedies to injured railroad workers who sued their employers for negligence, Congress did not intend to deprive injured workers of any of the rights and remedies that they had already enjoyed under the common law prior to FELA. The Senate Judiciary Committee

[5] FELA originally eliminated the assumption-of-the-risk defense only when "the violation . . . of any statute enacted for the safety of employees contributed to the injury or death of such employee." Act of Apr. 22, 1908, ch. 149, § 4, 35 Stat. 65, 66. Then, in 1939, Congress completely eliminated the defense. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404.

explained that point emphatically in the course of describing the proposed 1910 amendments to FELA:

> In considering the advisability of amending [the original FELA of 1908], it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by [the common] law to [railroad] employees. . . . *No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act.*

S. Rep. No. 61-432 (1910), *reprinted in* 45 Cong. Rec. 4040, 4044 (1910) (emphasis added).

Congress intended not only to provide more compensation to railroad workers but also to "greatly lessen personal injuries. . . ." H.R. Rep. No. 60-1386, at 2 (1908). During the late nineteenth century, railroad work was extraordinarily dangerous.[6] "In 1888 the

[6] Although conditions have improved, railroad work remains dangerous. *See*, *e.g.*, Dino Drudi, *Railroad-Related Work Injury Fatalities*, MONTHLY LAB. REV., July/Aug. 2007, at 17 (*available*

odds against a railroad brakeman's dying a natural death were almost four to one," and "the average life expectancy of a switchman in 1893 was seven years." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964). President Benjamin Harrison called it "a reproach to our civilization" that rail workers were "subjected to a peril of life and limb as great as that of a soldier in time of war." *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 19 (1904). Congress accordingly sought to induce railroads "to exercise the highest degree of care . . . for the safety of [all employees] in the performance of their duties." H.R. Rep. No. 60-1386, at 2. Congress would have recognized that the threat of punitive damages for egregious misconduct contributed to those goals, for it was understood then (as now) that one of the purposes of punitive damages is to "teach the tort feasor the necessity of reform." *McGuire v. The Golden Gate*, 16 F. Cas. 141, 143 (No. 8,815) (C.C.N.D. Cal. 1856). The threat of both punitive and compensatory damages provides a greater incentive for railroads to operate safely than would the threat of compensatory damages alone.

It is implausible that Congress, in its effort to provide incentives for railroads to improve safety standards, would eliminate *sub silentio* a well-established common-law remedy that created a powerful incentive to improve safety standards. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-489 (2008), this Court

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at http://www.bls.gov/opub/mlr/2007/07/art2full.pdf) (noting that railroad industry has "fatal injury rate more than twice the all-industry rate").

addressed essentially the same situation. When Exxon—relying on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc)—argued that the penalties for water pollution under section 311 of the Clean Water Act, 33 U.S.C. § 1321, displaced its liability to pay punitive damages following the *Valdez* spill, this Court summarily (and unanimously) rejected the argument:

> [W]e find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

554 U.S. at 488-489. It is, if anything, even harder to conclude that FELA, a statute expressly geared to protecting railroad workers and improving their remedies, was intended to eliminate *sub silentio* the railroads' corresponding liability to pay punitive damages for the breach of their common-law duties to refrain from injuring their employees.

C. This Court has never held that punitive damages are categorically unavailable under FELA.

This Court has never addressed the availability of punitive damages under FELA. Lower courts that have denied their availability in FELA cases have directly or indirectly relied primarily on three decisions: *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59

(1913); *American Railroad Co. v. Didricksen*, 227 U.S. 145 (1913); and *Gulf, Colorado & Santa Fe Railway Co. v. McGinnis*, 228 U.S. 173 (1913).[7] None of those cases involved punitive damages (or even used the words "punitive" or "exemplary"). Indeed none of them was even a personal-injury case; all three were wrongful-death cases in which the analysis turned on the unique history of wrongful-death statutes.

The *Vreeland* Court distinguished between survival and wrongful-death actions, *see* 227 U.S. at 65-70, and held that—in a wrongful-death action—the widow of a railroad worker killed in the railroad's service could not recover loss-of-society damages because wrongful-death statutes historically did not permit such damages, *id*. at 70-71.

In *Didricksen*, decided a week after *Vreeland*, the Court again distinguished between survival and wrongful-death actions, *see* 227 U.S. at 149, and held (following *Vreeland*) that the surviving parents of a railroad worker fatally injured in the service of the railroad could not recover loss-of-society damages in their wrongful-death action, *id*. at 149-150.

McGinnis (following *Vreeland* and *Didricksen* later in the same Term) held that the non-dependent child of an engineer killed in a derailment could not recover compensatory damages in a wrongful-death action. *See* 228 U.S. at 174-176. The rationale again turned on the unique history of wrongful-death

[7] *See*, *e.g.*, *Wildman*, 825 F.2d at 1394; *Kozar*, 449 F.2d at 1241-42.

statutes—a history that has no relevance to whether injured plaintiffs suing for their own damages may claim a well-established remedy such as punitive damages.

The key paragraph in the *Vreeland* opinion explained the reasoning on which the subsequent decisions all depended:

> The word "pecuniary" did not appear in Lord Campbell's Act, nor does it appear in our act of 1908 [FELA]. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

227 U.S. at 71. "Lord Campbell's Act" is the Fatal Accidents Act 1846, 9 & 10 Vict. c. 93 (U.K.), the original wrongful-death statute in the Anglo-American legal world that responded to the common law's failure to provide a wrongful-death remedy.

Two conclusions follow from the quoted reasoning, one self-evident and one less obvious. The self-evident conclusion is that the *Vreeland* Court based its analysis entirely on the special history of wrongful-death statutes. It concluded that FELA's wrongful-death provision disallowed non-pecuniary damages based solely on the premise that Lord Campbell's Act "and all those which follow it" had disallowed non-pecuniary damages. The Court said nothing about the remedies available for non-fatal personal injuries, a field in which a long history of common-law remedies leads to a very different analysis.

The less obvious conclusion is that the *Vreeland* Court must have been addressing only compensatory damages, and had nothing to say about punitive damages (even in the wrongful-death context). Because the underlying premise of the reasoning was that certain types of damages were unavailable under all of the state wrongful-death statutes, the *Vreeland* Court could only have been referring to those types of damages that were universally unavailable under state wrongful-death statutes at the time of the decision. That category does not include punitive damages, which were then available in wrongful-death actions in a number of states.[8] For example, this Court, less

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[8] In addition to South Carolina, which is discussed in the text, some of the other states that permitted the recovery of punitive damages under their wrongful-death statutes were Alabama, *see Savannah & Memphis Railroad Co. v. Shearer*, 58 Ala. 672, 680 (1877) (affirming a punitive-damages award under the wrongful-death statute); Arkansas, *see St. Louis, Iron Mountain & Southern Railway Co. v. Roberson*, 103 Ark. 361, 146 S.W. 482, 485 (1912) (affirming a punitive-damages award for the death of a passenger); Kentucky, *see Louisville & Nashville Railroad Co. v. Kelly's Administratrix*, 100 Ky. 421, 38 S.W. 852, 854 (1897) (holding that the law "extend[ed] the common-law right of action to recover both compensatory and exemplary damages for [non-fatal] injuries . . . to cases in which death ensued"); Missouri, *see Parsons v. Missouri Pacific Railway Co.*, 94 Mo. 286, 6 S.W. 464, 468 (1888) ("[T]wo elements of damage are to be considered by the jury,—compensation . . . , and punishment to the wrong-doer when the circumstances attending the wrongful act, neglect, or default are such as to warrant it."); Montana, *see Olsen v. Montana Ore Purchasing Co.*, 35 Mont. 400, 89 P. 731, 734 (1907) (holding that a general statute authorizing punitive damages applies in an action under the wrongful-death statute); Nevada, *see Benner v. Truckee River General Electric Co.*, 193 F. 740, 741 (C.C.D. Nev. 1911) (quoting the Nevada wrongful-death statute

than three years after its decision in *Vreeland*, described S.C. Civil Code § 3956 (1912) as "a statute in South Carolina similar to Lord Campbell's Act." *Seaboard Air Line Railway v. Koennecke*, 239 U.S. 352, 353 (1915). That statute explicitly authorized "the jury [to] give such damages, including exemplary damages where [the defendant's] wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportioned to the injury." *See also*, *e.g.*, *Brickman*, 54 S.E. at 556, 557 (affirming a jury verdict that included punitive damages under S.C. Civil Code § 2852 (1902), "the statute commonly known as 'Lord Campbell's Act,'" which was substantially the same as § 3956 in the 1912 Code, for the death of a railroad employee in a train wreck).

The strongest support that petitioner and its supporting *amici* could find to bolster their assertion that this Court has disapproved of punitive damages under FELA is *Koennecke*, 239 U.S. at 354.[9] *See* Pet. Br. 18;

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authorizing an award of "exemplary" damages); South Dakota, *see Moberg v. Scott*, 42 S.D. 372, 175 N.W. 559, 561 (1919) (affirming a punitive-damages award under the wrongful-death statute); Tennessee, *see Union Railway Co. v. Carter*, 129 Tenn. 459, 166 S.W. 592, 593 (1914) (holding that "exemplary damages . . . are recoverable in suits founded on [the wrongful-death] statute"); and West Virginia, *see Turner v. Norfolk & Western Railroad Co.*, 40 W. Va. 675, 22 S.E. 83, 87 (1895) (affirming a punitive-damages award for the death of a railroad employee).

[9] Petitioner also argues that respondent "recognizes that [punitive damages] are not available" under the Jones Act because he "did not even request punitive damages for the Jones Act negligence claim in his complaint." Pet. Br. 17 n.3. (Petitioner actually says that "petitioner" did not request punitive damages, but

Inland River Harbor and Fleeting Coalition Br. 6; Waterways Council Br. 10. The issue in the purportedly relevant portion of that opinion is whether a state court violated a defendant's due-process rights when it permitted a plaintiff to amend her ambiguous complaint in the middle of trial to specify that she was suing under FELA rather than the state's wrongful-death statute. *See* 239 U.S. at 354. FELA § 1 limits wrongful-death benefits in some situations to family members of the deceased railroad employee who were "dependent upon such employee," while the state statute imposed no dependency requirement. On the other hand, S.C. Civil Code § 3956 (1912), quoted above, explicitly authorized "exemplary damages," while FELA is silent on the availability of punitive or exemplary damages. The Court explained the ambiguity of the complaint by reference to those provisions:

> If [the complaint] were read as manifestly demanding exemplary damages, that would point to the state law, but the allegation of dependence was relevant only under the act of Congress.

239 U.S. at 354. Whatever that sentence means, it cannot be a holding that punitive damages are unavailable under FELA. It is unclear whether the

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that is an obvious typographical error. Petitioner clearly intended to say "respondent.") It is far more likely that respondent recognized only that *Kopczynski*, 742 F.2d at 560-561, a binding Ninth Circuit decision, had held that punitive damages are unavailable under the Jones Act, and made a strategic decision not to seek a remedy that neither the district court nor a three-judge panel of the court of appeals had the power to grant.

Koennecke plaintiff even requested punitive or exemplary damages; in any event, the availability of punitive damages was not before this Court. The Court may have meant simply that if the plaintiff had requested "exemplary damages" it could have suggested reliance on the state statute that explicitly authorizes "exemplary damages" (while saying nothing about whether they might also be available under FELA). That would be consistent with the reference to "the allegation of dependence." The Court believed that the dependency reference suggested reliance on FELA because FELA explicitly requires dependency in some circumstances, but that does not mean that dependents were barred from recovery under the state statute.[10] And even if the quoted sentence could be read to offer a subtle clue about the availability of punitive damages under FELA, it is important to recall that *Koennecke* was a wrongful-death case. Any clues that it might provide in that context would have little relevance in the context of workers suing to recover for their own injuries.

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[10] The South Carolina Supreme Court, in the decision that this Court was reviewing, made that point explicitly:

> The allegation of the complaint that deceased left a widow and four children, who were dependent upon him, is appropriate to an action under the federal statute; and, while the allegation of dependency is not strictly necessary, it is not wholly inappropriate to an action under the state statute. . . .

Koennecke v. Seaboard Air Line Railway, 101 S.C. 86, 85 S.E. 374, 375, *aff'd*, 239 U.S. 352 (1915).

D. Lower courts have erred in holding that punitive damages are categorically unavailable under FELA.

Because *Townsend*'s three requirements are satisfied, injured railroad workers are entitled to seek punitive damages under FELA. Lower courts' decisions to the contrary are simply wrong.

The mistaken interpretation began in the Sixth Circuit, which vacated a $70,000 punitive-damages award to the widow of a railroad employee who was killed when a 40-ton railroad car was negligently dropped on him. *See Kozar*, 449 F.2d at 1239. *Kozar* was decided before *Townsend* and *Gottshall*, so the Sixth Circuit did not have the benefit of this Court's teachings in either of those subsequent cases, and thus it did not conduct the analysis that would have led it to the opposite conclusion. *Cf. supra* at 6-18 (applying the *Townsend* analysis to demonstrate why punitive damages are available under FELA). But even at the time *Kozar* was decided, its reasoning was flawed.

The *Kozar* court's first reason for rejecting the punitive-damages award starkly illustrates its inconsistency with *Townsend*. Although it correctly recognized that FELA's "provisions were not to limit or take away any 'remedy' available at common law to an injured employee," 449 F.2d at 1240; *cf. supra* at 14-18, it nevertheless vacated the district court's punitive damages judgment because it believed that "the right to recover punitive damages at common law" was not "a 'common law remedy,'" *id*. That belief is flatly

inconsistent with *Townsend*, in which this Court explicitly described punitive damages as "an available remedy at common law," 557 U.S. at 409; "an available maritime remedy," *id*. at 411, 412 n.2; a "remedy . . . well established before the passage of the Jones Act," *id*. at 420; a "general maritime remedy," *id*. at 422; and "an accepted remedy under general maritime law," *id*. at 424. Simply put, *Townsend* precludes the argument that punitive damages are not a "remedy."

The *Kozar* court also relied heavily on a misreading of *Vreeland*, *Didricksen*, and *McGinnis*. *See supra* at 18-22. As noted, the *Vreeland* Court was discussing compensatory damages, not punitive damages. *See supra* at 21-22. And even if *Vreeland* had limited the availability of punitive damages under FELA's wrongful-death provisions—an issue that this Court never addressed—the case would still have no relevance to FELA's provisions governing non-fatal personal injuries, *see supra* at 20, and thus no relevance to this case.

Subsequent decisions denying punitive damages under FELA rely, either directly or indirectly, on *Kozar* and the cases that the Sixth Circuit cited in *Kozar*. The Ninth Circuit in *Wildman*, for example, relied primarily on *Kopczynski*, 742 F.2d at 560-561, which held that punitive damages are categorically unavailable under the Jones Act, and on *Kozar*. *See Wildman*, 825 F.2d at 1394-95. *Kopczynski*, in turn, relied primarily on *Vreeland*, *McGinnis*, and *Kozar*. *See* 742 F.2d at 560-561.

Two examples from *Wildman* illustrate the most blatant inconsistencies with *Townsend*. First, *Wildman* applied the "least common denominator" approach that *Townsend* rejects, 557 U.S. at 424, reasoning that by failing to authorize punitive damages FELA had silently prohibited them. *See Wildman*, 825 F.2d at 1394-95. In that regard, *Wildman* also ignored the established rule that "'to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law.'" *Exxon Shipping*, 554 U.S. at 489 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); *cf. Miles*, 498 U.S. at 31 (recognizing Congress's power when "Congress has spoken directly to the question"). Second, the *Wildman* plaintiff (anticipating *Townsend*) argued "that punitive damages were available at common law prior to the enactment of the FELA, and that it was Congress's expressed intent in enacting the law not to limit any existing remedies," which meant that punitive damages were still available. 825 F.2d at 1394. The *Wildman* court, repeating one of *Kozar*'s mistakes, rejected that argument because "'the right to recover punitive damages at common law'" was not "'a "common law remedy,"'" *id*. (quoting *Kozar*, 449 F.2d at 1240). *See supra* at 25-26.

The only other lower-court case that petitioner cites for the proposition that punitive damages are unavailable under FELA, *see* Pet. Br. 17-19 & n.6, is *Miller*, 989 F.2d at 1457, a Sixth Circuit wrongful-death case holding that punitive damages are unavailable under the Jones Act on the ground that they are

unavailable under FELA. The *Miller* court, however, merely cites *Kozar* with no independent analysis of the issue. The opinion instead focuses on whether punitive damages are available under the Jones Act, basing its reasoning on the (incorrect) assumption that they are unavailable under FELA. *See* 989 F.2d at 1457-60.

None of the cited cases are sufficient to justify the categorical prohibition of punitive damages that petitioner advocates.

II. Even If Punitive Damages Were Unavailable Under FELA, They Are Still Available Under the Jones Act.

Jones Act crewmembers have at least the same rights that railroad workers have under FELA. But the FELA-Jones Act linkage is not universally true. This Court has recognized that FELA's limitations do not always constrain crewmembers; in some situations, they and their families have greater rights. *Townsend*, which upheld the right to seek punitive damages for the "willful and wanton disregard of the maintenance and cure obligation," 557 U.S. at 424, offers a particularly relevant example. Injured railroad workers may not seek punitive damages in that context because they are not entitled to maintenance and cure in the first place. Similarly, in *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-375 (1932), this Court held that crewmembers can sue under the Jones Act for the negligent withholding of maintenance and cure—even though FELA does not give that right to railroad workers.

The *Townsend/Cortes* example is not unique. Until 1939, FELA eliminated the assumption-of-the-risk defense only when the violation of a safety statute contributed to the injury or death. *See supra* at 15 & n.5. In *The Arizona v. Anelich*, 298 U.S. 110, 120-123 (1936), however, this Court recognized that crewmembers have greater rights under the unseaworthiness doctrine, and thus were not subject to the assumption-of-the-risk defense when an unseaworthy condition contributed to the seaman's death.[11] The Court explained:

> The [Jones Act] was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions . . . are to be liberally construed to attain that end, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part.

Id. at 123 (citations omitted). Because maritime law prior to the Jones Act did not recognize the assumption-of-the-risk defense in unseaworthiness actions and "[n]o provision of the Jones Act is inconsistent with the admiralty rule," this Court would not assume "that Congress intended, by [the Jones Act's] adoption, to modify that rule by implication." *Id.* In other words, FELA establishes a floor for crewmembers, not a

[11] *Anelich*'s status as a fatal-injury case is particularly telling. The Court explicitly recognized that the plaintiff, as the administratrix of the deceased crewmember's estate, would have had no cause of action prior to the Jones Act. *See* 298 U.S. at 118. But *Anelich* still held that her rights were not limited by FELA. *See id.* at 123-124.

ceiling. They are guaranteed at least the rights that FELA grants to railroad workers, but in some contexts they have greater rights under maritime law. Asserting rights under the general maritime law's warranty of seaworthiness is one example of such a context.

This Court confirmed the principle that FELA establishes a floor, not a ceiling, in *Cox v. Roth*, 348 U.S. 207 (1955), which held that the death of an individual employer does not defeat a Jones Act claim even though FELA does not provide for the survival of actions against deceased tortfeasors. The *Cox* Court explained:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

Id. at 209. This Court accordingly rejected the approach that a plurality opinion of the Fifth Circuit later adopted in *McBride v. Estis Well Service*, 768 F.3d 382 (5th Cir. 2014) (en banc), which lifted the word "pecuniary" from *Vreeland*'s "gloss on FELA" in the wrongful-death context and applied it mechanically to the Jones Act personal-injury context. *See also Baptiste v. Superior Court*, 106 Cal. App. 3d 87, 102, 164 Cal. Rptr. 789, 797 (1980) ("FELA precedents do not

constitute a bar to punitive damages in Jones Act cases" because "the kinship of railway workers and seamen, as perceived by Congress, should not lead to overly literal or rigid transplanting of principles from land to sea.").

Because nothing in FELA suggests that Congress intended to deny injured railroad workers the right to seek punitive damages from a railroad, *see supra* at 6-28, this case presents a typical situation in which an injured plaintiff's rights are the same under FELA and the Jones Act. But even if FELA did prohibit punitive damages, they would still be available under the Jones Act. Punitive damages are even more firmly established in maritime law. Indeed, the general maritime law recognized the availability of punitive damages before the nation even had railroads. *See The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818).

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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