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

REPLY BRIEF FOR PETITIONER

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Respondent's argument that punitive damages are available for Jones Act seamen in unseaworthiness cases disregards several fundamental points:

First, unseaworthiness and Jones Act negligence are alternative means by which an injured seaman may recover compensation for his resulting loss. Consequently, due regard for the constitutional principles articulated in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990)—judicial deference to Congress's superior authority in maritime matters and the mandate to maintain legal uniformity—requires that the recovery available under the judicially created action for unseaworthiness not exceed the recovery Congress allowed for Jones Act negligence. By contrast, as the Court underscored in *Atlantic Sounding Co.* v. *Townsend*, 557 U.S.

404 (2008), maintenance and cure serves a different role—sustaining injured or ill seamen during their voyage—and so the Jones Act does not carry the same constitutional force with respect to maintenance and cure.

Second, modern unseaworthiness is a virtual substitute for Jones Act negligence in personal-injury actions no less than in wrongful-death actions. Although *Miles* was a wrongful-death case, its analysis cannot be limited to that context.

Third, it is too late to find that punitive damages are available under the Jones Act or FELA, which the Jones Act incorporates. Thousands of cases have been litigated under those century-old statutes, yet respondent and his amici make no credible showing that punitive damages might be allowed under either one.

Fourth, even if *Miles* were not controlling and the Court were free to decide *de novo* whether to allow punitive damages in unseaworthiness cases, the result should be the same. Unlike maintenance and cure, punitive damages were not historically available in unseaworthiness cases.

Finally, respondent's assurances that punitive damages will do no harm to the maritime industry overlook experience, economics, and common sense.

For all these reasons, the Court should hold that punitive damages may not be awarded to Jones Act seamen in unseaworthiness cases and reverse the judgment of the court of appeals.

ARGUMENT

I. THE SCOPE OF RECOVERY FOR UNSEAWORTHINESS FOLLOWS THAT FOR JONES ACT NEGLIGENCE

A. Unseaworthiness And Jones Act Negligence Are Twin Rights To Compensation For The Same Loss—Unlike Maintenance And Cure

Respondent brushes aside the constitutional concerns of separation of powers and uniformity that animated *Miles* because he fails to acknowledge the essential differences between unseaworthiness and maintenance and cure—in particular, how each relates to Jones Act negligence. Unseaworthiness and Jones Act negligence serve the same role: compensating the wrongfully injured seaman for his resulting loss. Indeed, this Court has often called them "alternative" causes of action. Maintenance and cure serves a different purpose: sustaining the seaman who is ill or injured (however caused) with medical care, food, and wages during the voyage. It is not a compensatory right and therefore, as this Court has also observed, not an alternative of unseaworthiness or Jones Act negligence. Because of this difference, the constitutional principles applied in *Miles* have much greater force when the claim is based on unseaworthiness than when based on maintenance and cure.

1. Under the ancient right of maintenance and cure, "[w]hen a seaman becomes ill or injured while in the service of his ship, … whether or not the shipowner was at fault or the ship unseaworthy," the shipowner must "pay[] a subsistence allowance, reimburs[e] medical expenses actually incurred, and tak[e] all reasonable steps to ensure that the seaman receives proper care and treatment." *Morales* v. *Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987); *accord, e.g.*, *Aggarao* v. *MOL*

Ship Mgmt. Co., 675 F.3d 355, 377 n.22 (4th Cir. 2012). But as this Court has recognized before and after the Jones Act, maintenance and cure "does not extend to compensation or allowance for the effects of the injury." *Pacific S.S. Co.* v. *Peterson*, 278 U.S. 130, 137 (1928); *see The Osceola*, 189 U.S. 158, 175 (1903). Rather, it "is a material ingredient in the compensation *for the labour and services* of the seamen" and thus is owed "at least so long as the voyage [i]s continued." *Peterson*, 278 U.S. at 137 (emphasis added) (quotation marks omitted).

The Court's decision in *The Osceola* is critical to understanding the force of the Jones Act. That decision, which barred maritime negligence actions, 189 U.S. at 175, left injured seamen with the right to subsistence through the voyage in the form of maintenance and cure, but without a practical means of recovering compensation for losses resulting from their injuries. As petitioner previously explained (at 6-7), unseaworthiness—all that remained after *The Osceola* foreclosed negligence—suffered from so many limitations that it hardly provided seamen any assurance of compensation.

Through the Jones Act, Congress gave injured seamen a more useful right to compensation for their loss: "'Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola* ….'" *Townsend*, 557 U.S. at 415-416 (quoting *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 354 (1995)). But the Jones Act expressed no congressional intent regarding maintenance and cure other than to leave it alone, *see id.* at 416; *Peterson*, 278 U.S. at 138-139—naturally, since the compensatory gap created by *The Osceola* had nothing to do with maintenance and cure. Unlike actions to compensate for loss, Congress perceived no flaw in maintenance and cure that needed fixing.

Consistent with this history, shortly after enactment of the Jones Act the Court explained in *Peterson* that "[t]he right to recover compensatory damages under the new rule for injuries caused by negligence" (the Jones Act) "is … an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness," but that the "right to maintenance, cure and wages [is] in no sense inconsistent with, or an alternative of, the right to recover compensatory damages." 278 U.S. at 138-139. The Court elaborated: "[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Id.*; *see McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222 (1958). That is why unseaworthiness actions and Jones Act negligence actions have res judicata effect against each other but maintenance and cure actions do not. *Peterson*, 278 U.S. at 137-139; *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319 (1927).

This fundamental difference between unseaworthiness and maintenance and cure explains why this Court's reasoning in *Miles* controls this case. In the decades following enactment of the Jones Act, the Court transformed unseaworthiness from an "obscure and relatively little used" alternative to Jones Act negligence into a powerful substitute. *See Miles*, 498 U.S. at 25. Thus, in *Miles*, the Court was sure not to "sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—unseaworthiness—"than Congress has allowed" for negligence actions under the Jones Act. *Id.* at 32-33.

Otherwise, seamen could circumvent the limitations on compensation for wrongfully caused loss that Congress judged appropriate. That is not the case for maintenance and cure.

2. *Townsend* is consistent with that understanding of unseaworthiness and maintenance and cure. *Townsend* recognized that whether punitive damages are available cannot be divorced from the underlying cause of action, and that the constitutional import of Congress's remedial judgments in the Jones Act is much greater for unseaworthiness than for maintenance and cure. The Court quoted *Peterson* and other authorities explaining that unseaworthiness is an alternative right of compensation to Jones Act negligence but maintenance and cure is not. *See* 557 U.S. at 423-424. Accordingly, *Townsend* rightly distinguished *Miles* on the ground that, "unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or *its* remedy." *Id.* at 420 (emphasis added); *see also id.* at 419 ("*Miles* does not address either maintenance and cure actions in general or the availability of punitive damages *for such actions*" (emphasis added)).

Respondent emphasizes repeatedly (at 9, 22) that *Miles* did not read the Jones Act to foreclose preexisting general maritime "causes of action," including unseaworthiness. But petitioner has not argued that the Jones Act eliminated unseaworthiness as a theory of liability. Rather, petitioner has pointed out that under *Miles* and *Townsend*, the remedies available for unseaworthiness should conform to those under the Jones Act, whereas that need not be true for maintenance and cure because that action is not an alternative right to recover compensation for wrongfully caused loss.

B. *Miles* Is Not Distinguishable On The Ground That The Court Created The Wrongful-Death Cause Of Action After The Jones Act

Respondent argues (at 5-8) that *Miles*'s holding is limited to wrongful-death actions, which the Court authorized only after the Jones Act. *Miles* did involve a deceased seaman, and in articulating the limits to recovery for wrongful death in unseaworthiness, the Court adhered to the Jones Act's limits for wrongful-death recovery. *See* 498 U.S. at 32-33, 34-35. But the Court's fundamental rationale—that in drawing the scope of recovery for a judicially created claim, the Court must respect the limits on recovery Congress placed on a statutory claim that serves the same remedial role—cannot be limited to wrongful-death cases.

Indeed, the Court in *Miles* saw no such distinction, for it stated that it would "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*." 498 U.S. at 36 (emphasis added); *see id.* at 29. And the Court applied its reasoning to resolve the scope of recovery not only for a wrongful-death action but also for a survivorship action, which is a form of personal-injury action. *See id.* at 36.[1]

Given that Congress precluded punitive damages for negligence claims under the Jones Act, whether for

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[1] Unlike a wrongful-death action, in which a decedent's heirs seek recovery for their own harms, in a survival action the representative seeks recovery for personal injuries the decedent suffered before death. 1 Stein, *Stein on Personal Injury Damages Treatise* § 3:53 (3d ed. 2018); 2 Lawrence, *Litigating Tort Cases* § 26:4 (2018); *see* 45 U.S.C. § 59 [FELA] ("Any right of action given by this chapter to a person *suffering injury* shall survive to his or her personal representative …." (emphasis added)).

wrongful death or personal injury (*see* Pet. Br. 17-21; and *infra*, pp. 10-16), the Court's rationale in *Miles* applies fully here. "When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, [the Court has] generally recognized, no cause for enlargement of the damages statutorily provided." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 215 (1996); *see Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624-625 (1978).

Respondent emphasizes (at 30-32) that the Court authorized maritime wrongful-death actions after Congress enacted the Jones Act, whereas unseaworthiness first emerged as a cause of action before 1920. In other words, according to respondent, the post-Jones Act general maritime action that *Miles* conformed to the Jones Act's limits was wrongful death, not unseaworthiness. That argument is flawed in several respects.

First, the modern doctrine of unseaworthiness is also a post-Jones Act creation. Despite respondent's suggestions to the contrary, this Court has recognized that the modern "doctrine of unseaworthiness as a predicate for a shipowner's liability for personal injuries or death" developed from a "humble origin as a dictum in an obscure case in 1922" and "experienced a most extraordinary expansion in a series of cases decided by this Court" starting in 1944. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 496-497 (1971); *see Miles*, 498 U.S. at 25 (noting the "'revolution in the law that began with [*Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96 (1944)],' in which this Court transformed the warranty of seaworthiness into a strict liability obligation"); Pet. Br. 4, 6-7. For all intents and purposes, unseaworthiness no less than wrongful death is a post-Jones Act creation of the courts, and so its

remedies should equally conform to those in the Jones Act.[2]

Attacking petitioner's argument from the other direction, respondent claims (at 24-25) that maintenance and cure, too, has "evolved" since the Jones Act's enactment. But the changes in maintenance and cure to which respondent points were marginal. *See Townsend*, 557 U.S. at 412-413. More importantly, whatever post-Jones Act changes occurred have not converted maintenance and cure into yet another alternative means by which to recover compensation for wrongfully caused loss; it remains as it was at the time of *The Osceola*, a humane mechanism to afford subsistence and assistance to injured and ill seamen during the voyage.

In any event, the *sequencing* of the Jones Act and the Court's construction of the maritime cause of action is by no means material to the deference courts owe to Congress's preeminent constitutional power in maritime matters. As the Court explained in *Miles*, "[w]e no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; … Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep

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[2] Respondent misreads (at 18-19) three old cases to argue otherwise. In *Dixon* v. *The Cyrus*, the court recognized that seamen refusing to board an unseaworthy ship have only a right to have the ship repaired or to receive lost wages. 7 F. Cas. 755 (D. Pa. 1789) (No. 3,930). In *Halverson* v. *Nisen*, the court, at most, mused about negligence and some understanding of unseaworthiness, but did not allow compensation for loss resulting from injury caused by either. 11 F. Cas. 310-311 (D. Cal. 1876) (No. 5,970). And in *The Edith Godden*, the court held that shipowners would be liable only for their negligence; it did not find liability based on unseaworthiness. 23 F. 43, 46 (S.D.N.Y. 1885).

the well-considered boundaries imposed by federal legislation." 498 U.S. at 27. Thus, whenever unseaworthiness emerged as a means to obtain compensation for loss, Congress's decision in the Jones Act to bar punitive damages in negligence actions arising from a seaman's injury or death—to say "this far and no more"—precludes the courts from going further now.

II. PUNITIVE DAMAGES ARE UNAVAILABLE IN JONES ACT NEGLIGENCE ACTIONS

Respondent invites the Court to overturn a century of settled precedent and become the first appellate court ever to hold that punitive damages are recoverable in a Jones Act negligence action. Because that disruptive outcome is foreclosed by statutory text and this Court's precedent, the Court should decline the invitation.

A. The law has long been settled that the Jones Act authorizes only compensatory damages. *See, e.g.*, *McBride* v. *Estis Well Serv., L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (en banc); *Miller* v. *American President Lines*, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 557 (9th Cir. 1984); *see also Peterson*, 278 U.S. at 136-138 (repeatedly characterizing the Jones Act as providing "the right to recover compensatory damages"). Throughout the statute's hundred-year history, "no cases have awarded punitive damages under the Jones Act," *McBride*, 768 F.3d at 388; respondent and his amici have not identified a single Jones Act case awarding punitive damages.[3] For the Court to reverse the

[3] Contrary to respondent's position (at 38-41), courts of appeals have held that punitive damages are unavailable without relying on the premise that the Jones Act limits recovery in per-

course of the law now would be an abrupt and surprising shift.

B. Such a shift would also be unjustified, because the rule limiting Jones Act recovery to compensatory damages is not just the settled view; it is correct.

1. The Jones Act adopts FELA's remedial scheme "unaltered," *Miles*, 498 U.S. at 32, and courts—including this Court—have consistently recognized that FELA does not allow punitive damages. This Court so recognized in *Seaboard Air Line Railway* v. *Koennecke*, 239 U.S. 352, 354 (1915), when it observed that, if a complaint brought for the death of a railway worker were read as claiming "exemplary damages," the complaint would necessarily arise under state law, not federal law. Respondent argues (at 37) that the Court was not suggesting that a claim for punitive damages was relevant only under the state statute, but that is the only reasonable reading of *Koennecke*. And *no* case since FELA's enactment in 1908 has suggested that punitive damages could be awarded.

Indeed, by the time Congress enacted the Jones Act, this Court had already emphasized the compensatory purpose of FELA recovery. Several of those decisions explicitly addressed actions for personal injury. *See Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913) (FELA gives nonfatally injured employee "such damages as would … compensate him for his expense, loss of time, suffering, and diminished earning power"); *St. Louis, Iron Mountain & S. Ry. Co.* v.

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sonal-injury cases to pecuniary loss. For example, the Ninth Circuit in *Kopczynski* noted that "[p]rior to the enactment of the Jones Act in 1920, it had been established that only compensatory damages were available in FELA actions," 742 F.2d at 560—an accurate observation, as explained below.

Craft, 237 U.S. 648, 656, 658 (1915) (FELA "invests the injured employee with a right to such damages as will compensate him for his personal loss and suffering" and "is *confined* to his personal loss and suffering before he died" (emphasis added)). Although those opinions did not specifically address punitive damages, a rule "confining" recovery to compensatory loss leaves no room for punitive damages, which are by definition "not compensatory." *Barnes* v. *Gorman*, 536 U.S. 181, 189 (2002).

Relying on these cases, one Jones Act-era treatise stated that "in *all* actions under [FELA], an award of exemplary damages is not permitted." Roberts, *Federal Liabilities of Carriers* § 621, at 1093 (1918) (emphasis added); *see also id.* § 417, at 708 (noting that FELA embodies "the principle of compensation as a substitute for penalties in the way of damages"—perhaps a reference to the text limiting recovery to "damages … for injury," as discussed below). Another declared without qualification that plaintiffs "cannot recover punitive damages" under FELA. Thornton, *A Treatise on The Federal Employers' Liability and Safety Appliance Acts* § 166, at 237 (3d ed. 1916). And respondent's own preferred treatise extensively catalogued the types of damages available in FELA personal-injury actions yet never mentioned punitive damages as a possibility. *See* 5 Sutherland, *A Treatise on the Law of Damages* § 1331, at 5088-5092 (4th ed. 1916).

When Congress enacted the Jones Act, it adopted this "gloss" on FELA. *See Miles*, 498 U.S. at 32. FELA's reenactment in 1939 without relevant change, *see* Pub. L. No. 76-382, 53 Stat. 1404 (1939), solidified that understanding. Where Congress reenacts a law that has been consistently interpreted by the courts (particularly this Court) without making any change, it

is assumed to have adopted that reading. *See Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

2. This consistent construction of FELA is firmly grounded in its text. Contrary to respondent's position (at 33), FELA's text does not give employees who "suffer[] injury" an unqualified right to damages. It entitles them only to "damages … *for such injury*." 45 U.S.C. § 51 (emphasis added). But "punitive damages 'are not compensation for injury.'" *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). They therefore fall outside the scope of the compensatory relief FELA provides.

"Damages for injury" refers most naturally to damages with a compensatory purpose. The word "for" is often "used as a function word to indicate purpose" or "the object … of a[n] … activity" (as in: "a grant for studying medicine"). *Merriam-Webster's Collegiate Dictionary* 488 (11th ed. 2003). In this sense, "damages for injury" means damages that are aimed or directed at injury, as compensatory damages are. Punitive damages, on the other hand, "are aimed not at compensation but principally at retribution and deterring harmful conduct," with a focus on the behavior and characteristics of the tortfeasor rather than the condition of the particular injured party. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 492-493 (2008). In other words, punitive damages are damages "for" punishing the defendant's conduct and deterring actors from engaging in similar conduct in the future; they are not damages "for" the victim's injury. *See Foust*, 442 U.S. at 48.

Other uses of "for" speak to the same distinction. The word can mean "in place of" (as in: "go to the store for me") or "equivalence in exchange" (as in: "$10 for a hat"). *Merriam-Webster's Collegiate Dictionary* 488. Compensatory damages stand in "place of" or "exchange for" injury; punitive damages do not. The word "for" can also mean "because of" (as in: "can't sleep for the heat"). *Id.* This Court has already confirmed that punitive damages are not damages "because of" injury. *See O'Gilvie* v. *United States*, 519 U.S. 79, 83 (1996) (punitive damages do not qualify as "damages received … on account of personal injuries" under 26 U.S.C. § 104(a)(2) in part because "on account of" means "because of"). Petitioner's view makes sense of FELA's "for injury" limitation, whereas respondent's would read it out of the statute. Indeed, respondent's textual argument omits the phrase entirely. *See* Resp. Br. 33.

Respondent invokes the maxim that "federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). But the wrong is "made good" when the injured person is *compensated*; "[p]unitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell*." *Barnes*, 536 U.S. at 189. Moreover, the *Bell* principle yields whenever Congress has provided "clear direction" on the subject, *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 65 (1992), and Congress has done so here, *cf. Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252, 261 & n.15 (1964) (no punitive damages under statute whose text provided only for recovery of "the damages … sustained"). Finally, although the Court has "accorded broad scope" to FELA's use of the term "injury," *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532,

550 (1994), the question here is not whether respondent suffered "injury." No matter how broadly "injury" is construed, punitive damages cannot be damages "for such injury" within FELA's meaning.

3. Because punitive damages are categorically unavailable under FELA, they are categorically unavailable under the Jones Act. *See* 46 U.S.C. § 30104; *Miles*, 498 U.S. at 32. Amici's contrary argument (Injured Crewmembers Br. 28-31) rests on three inapposite cases. In two of those cases, the Court departed from the statutory text because of inherent differences between sea work and railroad work. *See The Arizona* v. *Anelich*, 298 U.S. 110, 122-123 (1936) (unlike railroad workers, seamen are unable to leave or inspect their workplaces, a predicate to assumption-of-risk defense); *Cortes* v. *Baltimore Insular Lines*, 287 U.S. 367, 377 (1932) (injured seamen may recover under the Jones Act for negligent failure to provide medical care because they are totally dependent on the ship). In *Cox* v. *Roth*, 348 U.S. 207, 209 (1955), the Court broadly construed a FELA provision allowing suits against corporate receivers to permit Jones Act suits against deceased employers; that broad construction was justified by the differences between the industries. By contrast, no such differences make punitive damages more appropriate in one context than the other. *Cf. Martin* v. *Harris*, 560 F.3d 210, 220 (4th Cir. 2009) (Jones Act incorporates FELA's prohibition on prejudgment interest because "the availability of prejudgment interest, *vel non*, is not a principle analytically limited to railroads or to the sea"). The Court should therefore decline to take the unusual step of disregarding the clear statutory text incorporating FELA wholesale into the Jones Act.

C. Pre-FELA common law does not counsel otherwise. Respondent stresses (at 34-36) that the Court

has sometimes looked to the common law "when considering the right to recover." *Gottshall*, 512 U.S. at 557. But the Court "turn[s] first to the statute." *Id.* at 542. Common law principles "are not necessarily dispositive of questions arising under FELA," *id.* at 544, particularly when "they are expressly rejected in the text of the statute," *id.*, as extra-compensatory damages are. Here, the directly relevant evidence—FELA's text, the Court's early FELA decisions, and contemporaneous treatises—shows that Congress prohibited punitive damages in FELA and carried that prohibition into the Jones Act.

III. PUNITIVE DAMAGES ARE ALSO UNAVAILABLE UNDER *TOWNSEND'S* FRAMEWORK

Miles provides the most straightforward approach to resolving this case, but the result would be the same under the *Townsend* framework. Respondent argues (at 25) that under *Townsend* punitive damages are available because "Congress enacted the Jones Act against a judicial acceptance of punitive damages in unseaworthiness actions." That argument fails for several reasons.

A. Punitive damages were not awarded in unseaworthiness actions before the Jones Act. None of the handful of scattered decisions to which respondent points shows otherwise.

Respondent relies most heavily on *The Rolph*, 293 F. 269 (N.D. Cal. 1923), but the best reading of the case shows it has nothing to do with punitive damages. Nowhere in that decision did the court state it was awarding such damages. As Judge Clement explained in *McBride*, "[t]he damages the court ordered were based on the testimony of medical witnesses and witnesses

concerning 'the expectation of life and earnings of these men.' If this case is the great proclamation of the historical availability of punitive damages for unseaworthiness, one wonders … why the *Rolph* court felt it necessary to shroud its award in language that is patently compensatory …." 768 F.3d at 396-397 (Clement, J., concurring) (quoting *The Rolph*, 293 F. at 272). In affirming, the Ninth Circuit clarified the compensatory nature of the damages, noting that they were "an indemnity for injuries." *The Rolph*, 299 F. 52, 54-55 (9th Cir. 1924). Respondent avoids any discussion of that "patently compensatory" language and reads out of context much of the remainder of the decision.[4]

Respondent's suggestion that the $500 awarded to seamen who "did not claim any personal injury," *The Rolph*, 293 F. at 269, 272, was punitive damages is also unpersuasive. Although punitive damages are not damages for an injury, it was well-settled at the time that a showing of some injury was a necessary predicate before punitive damages could be considered. A person who had suffered no injury could not have recovered damages at all. *See Actual Damages As a Necessary Predicate of Punitive or Exemplary Damages*, 33 A.L.R. 385 (1924). Although the court did not separately explain the basis for the $500 award, there is no reason to conclude it was for punitive damages.

The other decisions on which respondent relies are irrelevant. The awards in *The City of Carlisle*, 39 F. 807 (D. Or. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904), were based on a

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[4] Respondent states (at 26) that the court expressed concern about ensuring that potential seamen were not deterred from entering maritime service, but the court did not do so to justify the award of any particular amount of damages. *See* 293 F. at 271.

failure to provide maintenance and cure after the seaman's injury, as this Court already observed in *Townsend*, 557 U.S. at 414—not the conditions of the ship that led to the injury. *See The City of Carlisle*, 39 F. at 817 (damages for mistreatment of seaman "since his injury"); *The Troop*, 118 F. at 770-771 ("failure to observe the dictates of humanity for the relief of a sufferer"). Respondent claims (at 27) that those cases *should have been* decided (or "properly considered," in respondent's euphemism) based on unseaworthiness (or negligence) because the shipowners selected unacceptable crew members. But respondent's aspirational rewriting of those opinions does not constitute judicial recognition of punitive damages in unseaworthiness cases.

To the extent punitive damages were discussed in *The Noddleburn*, 28 F. 855 (D. Or. 1886), *aff'd*, 30 F. 142 (C.C.D. Or. 1887), they were based not on unseaworthiness, but on maintenance and cure. When the court considered awarding what might be construed as punitive damages, it was only "in consideration of the neglect and indifference with which the libelant was treated by the master *after his injury*." *Id.* at 860 (emphasis added).[5] A master's post-injury treatment of an injured seaman is the purview of the duty of maintenance and cure.

Finally, *Latchtimacker* v. *Jacksonville Towing & Wrecking Co.*, 181 F. 276 (C.C.S.D. Fla.), *aff'd*, 184 F. 987 (5th Cir. 1910), does not support respondent's position. The court did not invoke the duty of seaworthiness; the case appears to have been decided on a negligence theory. *See id.* at 276, 278. The court also did not address whether punitive damages might be allowed,

[5] Respondent omits the phrase "after his injury" from his quotation of this sentence. *See* Resp. Br. 28.

because it found that the conduct at issue would not have warranted such damages. *Id.* at 278.[6]

B. In any event, even were respondent correct that scattered pre-1920 unseaworthiness cases awarded punitive damages, it would not follow that Congress adopted that position. In the Jones Act, Congress did *not* define the scope of damages for personal injury to a seaman by reference to preexisting general maritime law. Rather, Congress circumscribed it by reference to FELA, thus foreclosing punitive damages in such cases. This case is therefore quite different from *Townsend*; whereas the Jones Act does not address remedies for breach of the shipowner's duty to provide maintenance and cure, Congress did make clear that the remedy for a seaman's injuries attributable to the employer should be compensatory in nature. Respondent again seeks aid from *Townsend*, but there the Court said quite precisely that the Jones Act did not "eliminate pre-existing remedies available to seamen *for … maintenance and cure*." 557 U.S. at 415-416 (emphasis added)—not for unseaworthiness.

Respondent invokes (at 21) *Townsend*'s observation that the purpose of the Jones Act was to "'enlarge'" the "'benefit and protection of seamen who are peculiarly the wards of admiralty'" (quoting *Townsend*, 557 U.S. at 417). The Jones Act indeed represented a major advance in the protection of seamen, giving them a powerful compensatory remedy for shipowners' negligence when previously negligence was not an available theory and unseaworthiness was often useless as a claim. But it

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[6] Respondent also cites *The A. Heaton*, 43 F. 592 (C.C.D. Mass. 1890), but that case does not discuss punitive damages. The award of $1,500 was expressly connected to "the extent of the petitioner's injuries." *Id.* at 597.

does not follow that Congress went even further and allowed seamen to recover extra-compensatory punitive damages. Nor does the notion that seamen are "wards of admiralty" require that every disputed legal issue be decided in favor of the seaman. Indeed, the Court made clear in *Miles* that Congress has final authority to define the remedies available to seamen, and courts must adhere to Congress's judgments—just as the Court did in *Miles*. 498 U.S. at 36 ("Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen ….").

C. The "revolution" in the unseaworthiness doctrine that began with *Mahnich* is also dispositive here. *See Miles*, 498 U.S. at 25. Even if punitive damages had been available before the Jones Act, respondent still could not establish that they would be available for unseaworthiness today, because the unseaworthiness doctrine was fundamentally "transformed" after the Jones Act's enactment. *See supra*, pp. 8-9; Pet. Br. 2-5. There is no reason to think Congress blessed punitive damages no matter how expansive the unseaworthiness action was to become in the future—particularly not if unseaworthiness became so expansive as to effectively supplant Jones Act negligence as the "'principal vehicle for recovery by seamen for injury or death.'" *Miles*, 498 U.S. at 25-26.

In sum, *Townsend* involved a claim, maintenance and cure, that (a) had been the basis for punitive damages awards before 1920, (b) was left untouched by Congress in the Jones Act, and (c) remains fundamentally the same as it was before 1920. None of those is true for unseaworthiness claims, whether for wrongful death or personal injury. Even under *Townsend*, therefore, respondent is not entitled to punitive damages.

IV. THE AVAILABILITY OF PUNITIVE DAMAGES WOULD POSE UNIQUE RISKS FOR THE MARITIME INDUSTRY

For the reasons explained above, this Court "need not pause to evaluate the opposing policy arguments"; Congress has already made the relevant policy choice. *Higginbotham*, 436 U.S. at 623. But if the Court determines it is free to tread beyond the boundaries Congress has set, the Court should do so carefully. Miscalibrating the optimal liability rules would undermine the "fundamental interest giving rise to maritime jurisdiction": "the protection of maritime *commerce*." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 25 (2004).

Respondent does not deny the critical role the domestic maritime industry plays in the national economy. Nor does he deny that certain features of the maritime industry render it unusually vulnerable to disruption. As lead counsel for one of respondent's amici has argued: A "shipowner puts its assets at risk in ways that few other businesses can imagine. Both Congress and the courts have recognized that these risks, coupled with the need to encourage investment in such a vital industry, justify limiting a shipowner's liability in ways that do not exist for land-based businesses." Sturley, *Vicarious Liability for Punitive Damages*, 70 La. L. Rev. 501, 519 (2010). Compounding those risks are the inability to insure against punitive damages and foreign shipowners' freedom from these concerns. *See* Pet. Br. 35-36, 39-40. Respondent's amici's counsel is correct: "Because most other nations do not recognize punitive damages at all, it would make sense for the Court to limit the availability of punitive damages to the extent possible in the maritime industry." Sturley, 70 La. L. Rev. at 520.

Respondent also accepts the premise that allowing punitive damages will increase operating costs, but contends (at 48) that firms can avoid this hazard by simply avoiding what a jury might later find to have been "wanton, willful, or outrageous conduct." Of course, that is easier said than done. "[J]uries are accorded broad discretion both as to the imposition and amount of punitive damages," making "the impact of these windfall recoveries … unpredictable and potentially substantial." *Foust*, 442 U.S. at 50; *see Exxon*, 554 U.S. at 499. The resulting increased operating costs affect the national economy. *McBride*, 768 F.3d at 401 (Clement, J., concurring). Respondent cites (at 49 & n.22) a student note to argue that, in theory, a given firm should be unable to pass on costs to consumers in a perfectly competitive market, but that condition does not obtain here. And the cloud of unpredictable punitive awards would loom over every market actor, not just culpable ones. Given the absence of "clear congressional guidance," the Court should "decline to inject such an element of uncertainty" into the maritime industry. *Foust*, 442 U.S. at 52.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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