No. __-____

IN THE
Supreme Court of the United States

SAUL C. TOUCHET,
Petitioner,

v.

ESTIS WELL SERVICE, L.L.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

NICHOLAS A. BLANDA
ANDERSON, DOZIER, BLANDA & SALTZMAN
2010 West Pinhook Road
Lafayette, LA 70508
(337) 233-3366

BRIAN C. COLOMB
1819 West Pinhook Road
Suite 250
Lafayette, LA 70508
(337) 258-9437

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
AMELIA I.P. FRENKEL
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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QUESTIONS PRESENTED

1. Whether seamen may recover punitive damages for their employer's willful and wanton breach of the general maritime law duty to provide a seaworthy vessel, as held by the Washington Supreme Court and the Ninth and Eleventh Circuits, or whether punitive damages are categorically unavailable in an action for unseaworthiness, as held by the Fifth, First, and Sixth Circuits and the Texas Supreme Court.

2. Whether the Jones Act, 46 U.S.C. § 30104, "prohibits the recovery of punitive damages in actions under that statute," a question explicitly left open by this Court in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 n.12 (2009).

PARTIES TO THE PROCEEDINGS

Petitioner Saul C. Touchet was a plaintiff-appellee and cross-appellant in the district court and court of appeals proceedings.

Respondent Estis Well Service, L.L.C. was the defendant-appellant and cross-appellee in the district court and court of appeals proceedings.

Respondent Virgie Ann Romero McBride was a plaintiff-appellee and cross-appellant in the district court and court of appeals proceedings, but is not participating in the proceedings before this Court.

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Saul C. Touchet respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit.

INTRODUCTION

This case presents a stubborn split of authority over the availability of punitive damages to seamen harmed aboard an unseaworthy vessel. Notwithstanding the historical availability of punitive damages under the general maritime law, the First and Sixth Circuits and the Texas Supreme Court have, in the quarter-century since this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), declared punitive damages categorically unavailable in an unseaworthiness action. The Fifth Circuit joined them in this case, denying the district court discretion to award petitioner Saul Touchet punitive damages for the injuries incurred in his attempt to save a dying seaman in the aftermath of an avoidable accident.

By contrast, the Washington Supreme Court and the Ninth and Eleventh Circuits allow recovery of punitive damages in unseaworthiness actions. Most recently, in *Tabingo v. American Triumph LLC*, 391 P.3d 434 (Wash. 2017), the Washington Supreme Court correctly read this Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 407 (2009), as clarifying that *Miles* did not eliminate punitive damages under the general maritime law, including in actions for unseaworthiness.

This Court's review is necessary to resolve this persistent split of authority and the attendant confusion among federal and state courts. In so doing, the Court can ensure that seamen and ship owners are subject to the same law, regardless of the State or circuit in which their case is litigated. Because this purely legal issue is the sole remaining issue to be

decided, this case represents an ideal vehicle for resolving this deep and entrenched conflict.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 853 F.3d 777. The judgment of the district court (App. 11a-13a) is not reported.

JURISDICTION

The court of appeals entered its judgment on April 10, 2017. On July 5, 2017, Justice Alito extended the time for filing a certiorari petition to and including September 5, 2017. App. 68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Jones Act, 46 U.S.C. § 30104, are reproduced at App. 67a.

STATEMENT OF THE CASE

A. Factual Background

In March 2011, petitioner was an employee of Estis Well Service, L.L.C. and a crew member on *Estis Rig 23*, "a barge supporting a truck-mounted drilling rig." *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 384 (5th Cir. 2014) (en banc). He was a "seaman" as that term is used in general maritime law and the Jones Act. App. 18a.

On March 9, 2011, as a consequence of Estis's admitted negligence and the unseaworthiness of *Estis Rig 23*, App. 17a, the derrick on board *Estis Rig 23* collapsed. *McBride v. Estis Well Serv., L.L.C.*, 872 F. Supp. 2d 511, 512 (W.D. La. 2012). A derrick is a framework that supports a drilling apparatus on a rig. When the derrick on *Estis Rig 23* collapsed, petitioner was injured and another crew member, Skye Sonnier, was killed. *Id.* at 512-13; App. 2a-3a.

The collapse of the rig can be traced to events beginning the day before the tragedy occurred.[1] On March 8, 2011, crew members loaded approximately 80,000 pounds of metal pipes onto the derrick. App. 18a. The pipes were stacked on the rig's "monkey board." *Id.* The monkey board was a catwalk extending from the derrick. *See* Tr. of Bench Trial at 30:11-13, Dkt. No. 149 (Mar. 29, 2016) ("3/29/16 Tr.") (testimony of Robert Pinson). Overnight, the hull of the weighted-down barge filled with water as the result of unrepaired holes in the bottom of the barge, and the barge began to list, causing the pipes and monkey board to shift and lean precariously away from the derrick. App. 18a.

Action was required to stabilize the monkey board. According to testimony presented in the bench trial below, an Estis supervisor rejected the option of moving the pipes to another barge before adjusting the monkey board because that would "take too long." 3/29/16 Tr. 93:6-12 (testimony of Brian Suire); *id.* at 37:14-16 (testimony of Robert Pinson); *see also id.* at 58:23-24 (same). The supervisor then ordered the crew to move the fully loaded monkey board, notwithstanding concerns voiced by members of the crew (including petitioner) that it was "dangerous" to attempt to do so without unloading the pipes. *Id.* at 36:12-15, 37:11-21 (testimony of Robert Pinson); *id.* at 55:11-14 (same); *id.* at 92:25-93:3 (testimony of Brian Suire).

"During the [crew's] attempt to straighten the pipe and the monkey board, the derrick, the truck on which the derrick was mounted, and all of the pipe that was racked in the derrick" began to fall,

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[1] Unless otherwise noted, the following facts are drawn from the parties' stipulations and were not disputed. *See* App. 17a.

and "[a]ll of the crew members ran for their lives." App. 18a-19a. Although most escaped the collapse, Mr. Sonnier was crushed by equipment toppled by the derrick. App. 19a. Responding to Mr. Sonnier's scream, petitioner located Mr. Sonnier in the wreckage and, along with another crew member, tried to pull his body free. *Id.* When they could not, petitioner then tried to use a crane to free Mr. Sonnier, but the crane would not reach his location. *Id.* Mr. Sonnier died on board the rig. *Id.*

The district court found that, during his effort to rescue Mr. Sonnier from the wreckage, petitioner suffered injury to his left arm and his spine. App. 46a, 52a. And, because of the rig collapse, petitioner "has experienced – and continues to experience – depression, anxiety, and post-traumatic stress disorder exemplified by flashbacks, nightmares, and hypervigilance." App. 52a.

B. Legal Background

A seaman injured in the course of his employment has three potential causes of action. One is an action against the employer in negligence under the Jones Act, 46 U.S.C. § 30104. Another is a general maritime law action against the vessel owner for unseaworthiness "based on the vessel owner's duty to ensure that the vessel is reasonably fit to be at sea." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). And a third is a general maritime law action against the employer for maintenance (food and lodging) and cure (medical services). *See Vella v. Ford Motor Co.*, 421 U.S. 1, 6 (1975). The family of a seaman killed in the course of employment may assert a cause of action under the Jones Act or the general maritime law of unseaworthiness for wrongful death. *See* 46 U.S.C. § 30104; *Miles v. Apex*

Marine Corp., 498 U.S. 19, 30 (1990). The estate of a deceased seaman may pursue a survival action under the Jones Act, and many courts have held that the estate may also pursue an action for unseaworthiness. *See Miles*, 498 U.S. at 33-34.

In 1920, Congress enacted the Jones Act to enlarge legal protection afforded to seamen, including by creating a wrongful-death action. *See*, *e.g.*, *The Arizona v. Anelich*, 298 U.S. 110, 121 n.2 (1936) (citing *Dixon v. The Cyrus*, 7 F. Cas. 755 (D. Pa. 1789) (No. 3930)); *The Osceola*, 189 U.S. 158, 175 (1903) (describing causes of action then available to injured seamen). The Jones Act requires proof of negligence by the seaman's employer. *See Miles*, 498 U.S. at 29. This Court held in *Miles* that the Jones Act's wrongful-death remedy for the seaman's surviving beneficiaries is limited to pecuniary damages. *See* 498 U.S. at 32. The *Miles* Court explained that the Jones Act remedy was drawn from the wrongful-death provision of the Federal Employers' Liability Act ("FELA"), which Congress understood to provide recovery only for pecuniary loss. *Id.* (citing *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913)). The *Miles* Court did not, however, disturb the lower court's award for pain and suffering occurring before the death of the decedent in that case. *Id.* at 22.

The general maritime law causes of action for unseaworthiness and maintenance and cure substantially predate the Jones Act. *See Miles*, 498 U.S. at 24-25. Punitive damages were available under the general maritime law before the Jones Act's passage. *See Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 411 (2009); *see also The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818) (describing "exemplary damages" as "the proper punishment which belongs

to . . . lawless misconduct"). After the Jones Act was enacted, courts continued to recognize the availability of punitive damages under the general maritime law. *See*, *e.g.*, *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972); *In re Merry Shipping, Inc.*, 650 F.2d 622, 624-25 (5th Cir. Unit B July 1981); *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987); *Baptiste v. Superior Court*, 164 Cal. Rptr. 789, 798 (Cal. Ct. App. 1980).

Such was the state of the law when this Court decided *Miles*. Although the *Miles* plaintiff was not seeking punitive damages on appeal and the *Miles* Court did not address their availability, the decision precipitated an upheaval in maritime law pertaining to punitive damages.

Miles held that the non-dependent mother of a fatally injured seaman had a wrongful-death cause of action based on the unseaworthiness of the vessel on which her son had been killed, but that she could not recover non-pecuniary loss-of-society damages in that action. 498 U.S. at 27-31. The Court explained that the Jones Act and a related statute, the Death on the High Seas Act ("DOHSA"), "created a strong presumption in favor of a general maritime wrongful death action" with remedies sufficient to "eliminate . . . inconsistencies" in maritime wrongful-death law. *Id.* at 24, 26. Although those statutes "do[] not disturb seamen's general maritime claims for injuries resulting from unseaworthiness," *id.* at 29, they impliedly foreclose certain compensatory damages "for non-pecuniary loss, such as loss of society, in a general maritime action," *id.* at 31. The Court explained that it would be inappropriate "to sanction more expansive remedies in a judicially created cause of action [for

unseaworthiness] in which liability is without fault than Congress has allowed in [Jones Act] cases of death resulting from negligence." *Id.* at 32-33.[2]

Several courts of appeals read *Miles* "to limit remedies in many situations that were not contemplated by the Court." Robert D. Peltz, *Circuit Courts Gone Wild: Restoring Rationality to the Interpretation of* Miles, 26 U.S.F. Mar. L.J. 49, 49 (2013-2014). For example, following *Miles*, the Fifth Circuit rejected the availability of punitive damages under both the Jones Act and the general maritime law. In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc), which involved a claim for maintenance and cure, the Fifth Circuit read *Miles* broadly to hold that the damages recoverable by injured seamen or their survivors were limited to those provided by the Jones Act regardless of the cause of action asserted. *See id.* at 1506 (if the "factual setting of the case . . . is covered" by the Jones Act, the seaman may not recover any damages that are not authorized by the Jones Act) (emphasis omitted). Because the Fifth Circuit also opined that the Jones Act does not provide for punitive damages, it concluded that punitive damages must be unavailable under the general maritime law as well. *Id.* at 1512.

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[2] The *Miles* Court also held that the deceased seaman's estate could not recover lost future earnings in a general maritime law survival action. 498 U.S. at 33-36. The Court noted that, "[u]nder traditional maritime law, . . . there is no right of survival," meaning that the estate of a deceased seaman had no cause of action. *Id.* at 33. It further noted that the Jones Act, like most survival statutes, limits recovery to losses suffered during the decedent's lifetime. Therefore, even if such statutes "dictate[d] a change in the general maritime rule against survival," losses recoverable under maritime law would not include lost future earnings. *Id.* at 34-36.

This Court overruled *Guevara* in *Townsend*. In *Townsend*, the Court held that general maritime law permits "an injured seaman [to] recover punitive damages for his employer's willful failure to pay maintenance and cure." 557 U.S. at 407. The *Townsend* Court reasoned that "punitive damages have long been available at common law," "the common-law tradition of punitive damages extends to maritime claims," and "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule." *Id.* at 414-15.

The *Townsend* Court explained that "[t]he reasoning of *Miles* remains sound," given that "it was only because of congressional action that a general federal cause of action for wrongful death on the high seas and in territorial waters even existed." *Id.* at 420. Where both the general maritime cause of action and the remedy asserted were "well established" before the Jones Act, courts can "adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act." *Id.* at 420-21. That was true in *Townsend* for maintenance and cure and punitive damages. *Id.* The Court further noted that "[t]he laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for distinct causes of action." *Id.* at 424. And it rejected as "far too broad" a reading of *Miles* that would "limit[] recovery in maritime cases involving death or personal injury to the remedies available under the Jones Act and [DOHSA]." *Id.* at 418-19. Because it concluded that the Jones Act did not affect the availability of punitive damages in a maintenance-and-cure action, the *Townsend* Court "d[id] not address the . . . argument that the Jones

Act . . . prohibits the recovery of punitive damages in actions under that statute." *Id.* at 424 n.12.

C. Procedural Background

1. The District Court

On September 20, 2011, petitioner filed suit against respondent Estis, asserting claims under the Jones Act and the general maritime law based on the negligence of the defendant and the unseaworthiness of *Estis Rig 23*. App. 16a. Petitioner sought compensatory as well as punitive damages on the basis that Estis's conduct was "gross, willful, wanton, and/or reckless" and that it "constituted a callous disregard of, or showed indifference to, the safety of the crew members." *McBride*, 872 F. Supp. 2d at 513. Mr. Sonnier's estate and family, whose interests were represented by Virgie Ann Romero McBride, likewise sought compensatory and punitive damages in wrongful-death and survival actions. App. 16a. The cases were consolidated. *Id.*

Estis offered to stipulate to liability in exchange for the plaintiffs' withdrawal of their punitive-damages claims. *McBride*, 872 F. Supp. 2d at 513. When the plaintiffs rejected the offer, Estis then moved to dismiss the punitive-damages claims. *Id.* at 512-13. A magistrate judge (presiding by consent of the parties) granted the motion. *Id.* at 512.

Because the availability of punitive damages in these circumstances is "the subject of national debate with no clear consensus," the district court certified the judgment for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. No. 52, at 2.

2. The Interlocutory Fifth Circuit Panel Decision

A Fifth Circuit panel unanimously reversed. The panel relied on the "straightforward rule" of *Townsend*: "[I]f a general maritime law cause of action and remedy were established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes." *McBride v. Estis Well Serv., L.L.C.*, 731 F.3d 505, 514 (5th Cir. 2013) (citing *Townsend*, 557 U.S. at 414-15). The panel explained that "Estis d[id] not dispute" that petitioner would prevail under that rule, because "the cause of action (unseaworthiness) and the remedy (punitive damages) were both established before the passage of the Jones Act, and that statute did not address unseaworthiness or its remedies." *Id.* at 514-15.

The panel rejected the alternative rule proposed by Estis and drawn from the Fifth Circuit's abrogated *Guevara* decision: "If the situation is covered by a statute like the Jones Act . . . , and the statute informs and limits the available damages, [then] the statute directs and delimits the recovery available under the general maritime law as well." *Id.* The panel explained that *Townsend* had abrogated *Guevara* "because of" that decision's unfounded extension of *Miles*, not "in spite of" it. *Id.*

3. The Interlocutory Fifth Circuit En Banc Decision

In view of the importance of the issues, the Fifth Circuit agreed to rehear the case en banc. On rehearing, by a 9-6 vote, the majority affirmed the district court's judgment. Seven of the nine judges in the majority joined the court's principal opinion,

written by Judge Davis. The other two judges joined a separate opinion written by Judge Haynes. Five of the seven judges who joined the court's principal opinion also joined a concurring opinion written by Judge Clement. Judge Higginson, the author of the panel opinion, wrote the principal dissent, which all six dissenting judges joined. Two of the six dissenting judges also joined a separate dissenting opinion written by Judge Graves.

a. The Principal Opinion

Seven of the nine judges in the en banc majority concluded that this case is "controlled by" *Miles*. *McBride*, 768 F.3d at 384. They reasoned that "no cases have awarded punitive damages under the Jones Act" and "[i]t follows from *Miles* that the same result flows when a general maritime law personal injury claim is joined with a Jones Act claim." *Id.* at 388-89.

They rejected the argument that *Townsend*, rather than *Miles*, should guide the decision. They described *Townsend* as bearing only on "the limited issue of whether a seaman can recover punitive damages from his employer for willful failure to pay maintenance and cure." *Id.* at 384. In contrast, they construed *Miles* expansively. They viewed *Miles* as controlling, notwithstanding two key distinctions between *Miles* and petitioner's case. First, the *Miles* plaintiff had sought loss-of-society damages, *id.* at 387-88, which, unlike punitive damages, were not historically available under the general maritime law causes of action. *Id.* at 405-07 (Higginson, J., dissenting). Second, *Miles* concerned wrongful death, *id.* at 388-89 (majority), for which no recovery had been available under the general maritime law prior to passage of the Jones Act, as opposed to wrongful injury as alleged by

petitioner, which was historically compensable, *see The Osceola*, 189 U.S. at 175.

b. Judge Haynes's Concurring Opinion

The remaining two judges in the en banc majority, in an opinion by Judge Haynes, concurred in the court's judgment and in the reasoning of the principal opinion "with respect to the wrongful death and associated claims of Ms. McBride." 768 F.3d at 401. But they disagreed that *Miles* "dictates the outcome for" petitioner, "the surviving seam[a]n." *Id.* Judge Haynes explained that, because "[a]n action for wrongful death (in general) did not exist at common law," unlike an action for injury, it is "entirely logical as a matter of legal history (though not as a matter of social policy) that the family of a deceased seaman might not be able to recover punitive damages for his death, while the surviving injured seamen could." *Id.* at 401, 402. Nonetheless, Judge Haynes concluded that it would be "inappropriate," in her view, "for a federal intermediate appellate court to extend the law" to permit punitive damages in unseaworthiness actions. *Id.* at 403-04.

c. Judge Clement's Concurring Opinion

Judge Clement wrote separately to articulate the view that punitive damages were not historically available in pre-Jones Act unseaworthiness cases. 768 F.3d at 391-92 (Clement, J., concurring). In her view, "decades of maritime practice, along with the Supreme Court's discussions of unseaworthiness liability in *The Osceola*, 189 U.S. 158 (1903), as well as the Court's subsequent clarification in *Pacific Steamship Co. v. Peterson* that unseaworthiness plaintiffs are 'entitled to . . . [an] indemnity by way of *compensatory* damages,' 278 U.S. 130, 138 (1928), demonstrate that punitive damages were not avail-

able for unseaworthiness." *Id.* at 392 (alterations in original; parallel citations omitted).

d. Judge Higginson's Dissenting Opinion

Judge Higginson reiterated the reasoning of the earlier panel opinion and responded to the additional historical argument made by Judge Clement. Quoting this Court's decision in *Townsend*, Judge Higginson explained that, "'[h]istorically, punitive damages,' though not always designated as such, 'have been available and awarded in general maritime actions.'" 768 F.3d at 406 (Higginson, J., dissenting) (quoting 557 U.S. at 407) (footnote omitted). Further, "*Townsend* makes clear that in the face of historical dispute, the default rule of punitive damages applies." *Id.* at 413 n.15.

e. Judge Graves's Dissenting Opinion

Judge Graves joined Judge Higginson's opinion in full, but also wrote separately to explain that "the pecuniary damages limitation recognized in *Miles* applies only to the wrongful death causes of action brought by McBride" and "does not apply to Touchet . . . , who [is a] seam[a]n asserting Jones Act negligence and general maritime law unseaworthiness causes of action on [his] own behalf." 768 F.3d at 419. Judge Graves explained that "[t]he pecuniary damage limitation was created in the context of wrongful death statutes, and by statute, history and logic, it applies only to survivors asserting wrongful death claims." *Id.*

Petitioner sought this Court's review of the Fifth Circuit's interlocutory decision, and this Court denied certiorari. *McBride v. Estis Well Serv., L.L.C.*, 135 S. Ct. 2310 (2015).

4. The District Court Opinion On Remand

Following a week-long bench trial, the district court entered judgment in petitioner's favor.[3] The court concluded that petitioner "met his burden of establishing that he sustained both physical and mental injuries that were caused by the negligence of [Estis] and by the unseaworthiness of [Estis's] vessel." App. 38a-39a. The court accordingly awarded compensatory damages. App. 64a-65a.

The court also entered findings of fact consistent with a conclusion that Estis was grossly negligent and that it knowingly, intentionally, willfully, and wantonly failed to ensure that its vessel was seaworthy. *See supra* p. 9. Additional evidence admitted during the trial would likewise support that conclusion. *See supra* p. 3 (testimony concerning the "dangerous[ness]" of the supervisor's decision).

5. The Fifth Circuit Appeal

The Fifth Circuit affirmed the district court's judgment. App. 7a-10a. In so doing, it rejected petitioner's challenge to the court's purely legal decision to deny punitive damages, holding that the Circuit's prior en banc decision foreclosed that argument. App. 2a n.1.

The availability of punitive damages is the only issue left to resolve in this case.

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[3] Estis had stipulated to its negligence under the Jones Act and the unseaworthiness of *Estis Rig 23*. *See supra* p. 2.

REASONS FOR GRANTING THE PETITION

Substantial disagreement persists among federal and state courts on the question whether seamen may recover punitive damages in unseaworthiness actions. That question is important and recurring. Only this Court can resolve the lower courts' conflicting interpretations of 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), with regard to the first question presented. Until the Court grants review on this issue, seamen in some States and circuits will wrongly be denied the opportunity even to make a case for punitive damages in unseaworthiness actions.

I. AN ENTRENCHED SPLIT OF AUTHORITY EXISTS REGARDING THE AVAILABILITY OF PUNITIVE DAMAGES IN AN UNSEAWORTHINESS ACTION

Six federal circuits and two state supreme courts have either answered the first question presented here or signaled their answer to it. Four have held that punitive damages are available to seamen in unseaworthiness actions, and four have held that they are unavailable.

A. The Washington Supreme Court And The Ninth And Eleventh Circuits Allow Punitive-Damages Claims In Unseaworthiness Actions

The Washington Supreme Court and the Ninth and Eleventh Circuits hold that seamen can recover punitive damages in unseaworthiness actions.

This year, the Washington Supreme Court, in *Tabingo v. American Triumph LLC*, 391 P.3d 434 (Wash. 2017), relied on *Townsend* in holding that punitive damages are available for a general maritime

law unseaworthiness claim. The issue was presented to the court on an interlocutory petition for review from a decision of the superior court dismissing the punitive-damages claim of a seaman who was seriously injured while working aboard a fishing trawler. *Id.* at 436-37. Applying *Townsend*, the court explained that there was no reason to exclude a claim for unseaworthiness from the "general admiralty rule" that punitive damages are available. *Id.* at 438.

The same rule applies in the Ninth Circuit. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), the personal representatives of a seaman who drowned when his fishing vessel sank in Alaska waters brought a survival action against the vessel owner alleging that the vessel had been unseaworthy. The Ninth Circuit held that "[p]unitive damages are available under general maritime law for claims of unseaworthiness," notwithstanding circuit precedent precluding punitive damages under the Jones Act. *Id.* at 258. The court explained that punitive damages are justified under the general maritime law because, where the defendant has acted recklessly or with callous disregard, gross negligence, or actual malice, punitive damages "punish[] the defendant . . . and . . . deter[] others from following his example." *Id.*

Recently, a district court within the Ninth Circuit denied a motion to dismiss the punitive-damages claim of a permanently disabled seaman in a maritime action, expressly recognizing that *Evich* remains "good law." *Batterton v. Dutra Grp.*, No. 14-CV-7667-PJW, 2014 WL 12538172, at *2 (C.D. Cal. Dec. 15, 2014).[4]

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[4] The Ninth Circuit accepted an interlocutory appeal of the decision. The court heard oral argument in the case on February 8, 2017, but has not yet issued a decision. *See Batterton v. Dutra Grp.*, No. 15-56775.

Punitive damages are also available in unseaworthiness actions in the Eleventh Circuit. In *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), a vessel owner "had been warned . . . about the possibility of the exact type of collision that occurred . . . , yet . . . chose to ignore the warnings" of the danger at hand, *id.* at 1550, just as crew members on board the *Estis Rig 23* warned about the dangerousness of the course of action resulting in petitioner's tragic injuries, *see supra* p. 3. The *Self* plaintiff's husband died and others were injured. 832 F.2d at 1543. The Eleventh Circuit held that "[p]unitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship." *Id.* at 1550. *Self* remains good law in the Eleventh Circuit. *See Wolf v. McCulley Marine Servs., Inc.*, 2013 AMC 1768, 1776 (M.D. Fla. 2012) ("[P]unitive damages may be awarded in an unseaworthiness action when the plaintiff can prove 'wanton, willful, or outrageous conduct.'").

B. The Second Circuit Has Recognized That Seamen May Recover Punitive Damages In Unseaworthiness Cases

In *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972), the Second Circuit recognized that punitive damages are permitted in an unseaworthiness case, in the district court's discretion, if "the defendant was guilty of gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct." *Id.* at 105. That discussion was not necessary to the outcome in *Marine Sulphur Queen* because the district court had determined that the defendants' conduct was not sufficiently egregious to warrant punitive damages,

notwithstanding that it caused the wrongful deaths of the vessel's crew. Even so, the Second Circuit's analysis in *Marine Sulphur Queen* is regularly cited for the proposition that punitive damages are available in unseaworthiness cases. As Judge Friendly (a member of the *Marine Sulphur Queen* panel) explained, the decision "recognized that punitive damages may be awarded under general maritime law." *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 62 (2d Cir. 1985); *see also*, *e.g.*, *In re Merry Shipping, Inc.*, 650 F.2d 622, 624-25 (5th Cir. Unit B July 1981) ("In *Marine Sulphur Queen*, the Second Circuit held punitive damages could be recovered upon a showing the defendant was guilty of 'gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct.'") (footnote omitted).[5]

C. The First And Sixth Circuits And The Texas Supreme Court Do Not Allow Punitive-Damages Claims In Unseaworthiness Actions

Like the Fifth Circuit in this case, the First and Sixth Circuits and the Texas Supreme Court have held that punitive damages are categorically unavailable in an unseaworthiness action.

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[5] In *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993), a collision case in which neither the Jones Act nor the unseaworthiness doctrine was implicated, the Second Circuit cited several district court decisions construing *Miles* to disallow punitive damages under the general maritime law and noted that contrary decisions exist. *Id.* at 1094. The court expressed no view on whether *Miles* precludes a seaman from claiming punitive damages in an unseaworthiness case, but said that the cited cases "len[t] additional support" to its holding that the parents of a recreational boater who died in the collision could not recover punitive damages. *Id.*

In *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994), a seaman who injured his back while working on a tugboat in Maine waters brought an action for unseaworthiness. The district court summarily denied his punitive-damages claim. Affirming, the First Circuit relied on a broad reading of *Miles* in holding that "an admiralty court may not extend the remedies available in an unseaworthiness action under the general maritime law to include punitive damages." *Id.* at 203.

In *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993), the district court had awarded punitive damages to an injured seaman in an unseaworthiness case. As summarized by the Sixth Circuit, the district court's analysis foreshadowed this Court's reasoning in *Townsend*: "The district court refused . . . to dismantle the longstanding availability of punitive damages in general maritime tort claims based on unseaworthiness by extending *Miles*." *Id.* at 1455. The Sixth Circuit, however, adopted a broad reading of *Miles* and reversed the punitive-damages award. The court recognized that the holding of *Miles* did not address punitive damages, *id.*, but it thought that "the course set by . . . *Miles*" dictated a holding "that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman," *id.* at 1459.

Finally, the Texas Supreme Court in *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993) (per curiam), adopted the broad reading of *Miles* to hold punitive damages categorically unavailable to a seaman "in an unseaworthiness action arising from *nonfatal* injuries." *Id.* at 296.

D. Substantial Confusion Exists In State Courts And Federal District Courts In Circuits That Have Not Yet Addressed The Availability Of Punitive Damages In An Unseaworthiness Action

In circuits and States without a controlling decision, disagreement and confusion persist. Some state courts and federal district courts have permitted punitive-damages claims in unseaworthiness cases; other courts have held that punitive damages are unavailable. *Compare In re Osage Marine Servs., Inc.*, 2012 AMC 953, 957 (E.D. Mo. 2012) (relying on *Townsend* to permit an injured seaman's claim for punitive damages to proceed in an unseaworthiness action), *and Baptiste v. Superior Court*, 164 Cal. Rptr. 789, 795-98 (Cal. Ct. App. 1980) (holding that punitive damages are available under the general maritime law to an injured seaman in an unseaworthiness action), *with Hackensmith v. Port City S.S. Holding Co.*, 938 F. Supp. 2d 824, 827 (E.D. Wis. 2013) (holding, after "difficulty . . . reaching [a] decision" due to the "unsettled" state of the law, that punitive damages are unavailable in a wrongful-death unseaworthiness case), *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam) (concluding that "under general maritime law there is no entitlement to punitive damages in a claim for the death of a Jones Act seaman based upon unseaworthiness"), *and In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL Docket No. 875, 2014 WL 3353044, at *2 (E.D. Pa. July 9, 2014) (noting the "unsettled" state of the law and concluding that punitive damages were available under *Townsend* in asbestos personal-injury cases but that *Miles* precluded punitive damages in asbestos death cases).

The issues raised have been percolating in the lower courts for decades. A substantial body of academic literature has long recognized the confusion in this area of the law, and that confusion has not diminished with time. *See*, *e.g.*, Stephen K. Carr, *Living and Dying in the Post-*Miles *World: A Review of Compensatory and Punitive Damages Following* Miles v. Apex Marine Corp., 68 Tul. L. Rev. 595, 621 (1994) ("[A] universal rule governing the recoverability of punitive damages by seamen in maritime law will not be realized until the Supreme Court or Congress provides a clearer, more express rule."); Robert Force, *The Curse of* Miles v. Apex Marine Corp.*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 La. L. Rev. 745, 762 (1995) ("[T]he lower federal courts are divided on the issue of whether punitive damages are recoverable under the general maritime law after *Miles*.").

II. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING A FUNDAMENTAL QUESTION OF NATIONAL IMPORTANCE THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW

The availability of punitive damages to injured seamen is a question of great significance. This Court has granted certiorari in recent decades in cases raising questions as to the availability of punitive damages, both in maritime cases (*Townsend* and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)) and in non-maritime cases (*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)). The district court in this case acknowledged the importance of the question whether punitive damages were available in certifying the question for interlocutory appeal,

and the Fifth Circuit likewise acknowledged its importance in granting en banc review. Without a decision from this Court, the remedies available to injured seamen – and the deterrent effect of those remedies upon shipowners – will vary by State and circuit.

This case presents an ideal vehicle for resolving the two questions left open by the Court's decision in *Townsend*. Both are pure questions of law that are ripe for this Court's resolution and on which the en banc Fifth Circuit has issued robust opinions on both sides. The first question presented – whether punitive damages are available to seamen in an action for unseaworthiness – was fully litigated before the district court, a Fifth Circuit panel, and the Fifth Circuit en banc. No other issue remains in this case.[6]

The second question presented – whether punitive damages are available in Jones Act actions – was explicitly left open by this Court in *Townsend*. This case presents the opportunity to answer that question as well. Clarifying that the Jones Act permits recovery of punitive damages would both resolve this case and provide important guidance to the maritime bench and bar nationwide. Even so, the Court can instead decide only the first question presented, and reverse the Fifth Circuit's judgment,

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[6] Two other pending cases raise the same issue in an interlocutory posture. *See Batterton*, 2014 WL 12538172, at *1 (defendant moved to dismiss plaintiff's punitive-damages claim under Federal Rule of Civil Procedure 12(b)(6)); *Tabingo*, 391 P.3d at 436-37 (interlocutory appeal of partial summary judgment). Those cases demonstrate the ongoing importance of the underlying question, but this case, which is not in an interlocutory posture, is a better vehicle. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282 (10th ed. 2013).

without having to review or decide the second question. Indeed, although the district court and the en banc majority addressed the second question presented, the panel below did not reach the issue.

III. THE FIFTH CIRCUIT'S CATEGORICAL REJECTION OF PUNITIVE DAMAGES IN UNSEAWORTHINESS ACTIONS AND UNDER THE JONES ACT IS ERRONEOUS

The judgment below should be reversed.

First, punitive damages are available in unseaworthiness actions. This Court in *Townsend* awarded an injured seaman punitive damages for his employer's willful failure to pay maintenance and cure. 557 U.S. at 414-15. The Court reasoned that "punitive damages have long been available at common law," that "the common-law tradition of punitive damages extends to maritime claims," and that there was "no evidence that claims for maintenance and cure were excluded from this general admiralty rule." *Id.* Like maintenance and cure, the unseaworthiness cause of action at issue here derives from general maritime law and predated the Jones Act. Accordingly, the rule recognized in *Townsend* applies. Here, too, petitioner seeks only what was historically available to him: punitive damages in a general maritime law action.

Contrary to the Fifth Circuit's en banc decision, *Miles* does not prohibit the award of punitive damages "when a general maritime law personal injury claim is joined with a Jones Act claim." *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 388-89 (5th Cir. 2014) (en banc). On the contrary, as the Court explained in *Townsend*, *Miles* requires only that courts determine whether "the general maritime cause of action . . . and the remedy . . . were well established before the passage of the Jones Act." 557

U.S. at 420. Here, that test is clearly satisfied. Both the cause of action (unseaworthiness) and the remedy (punitive damages) were well established before the passage of the Jones Act. Judge Clement's assertion to the contrary, *see supra* p. 12, ignores this Court's recognition in *Townsend* that "[p]unitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct" and "[t]he general rule that punitive damages were available at common law extended to claims arising under federal maritime law." 557 U.S. at 409, 411. In any case, *Townsend* makes clear that, under the general maritime law, the burden is on the defendant to establish an exception from the general availability of punitive damages. *See id.* at 414 n.4; *see also McBride*, 768 F.3d at 413 n.15 (Higginson, J., dissenting) (discussing *Townsend*'s default rule). Because the Jones Act "envision[s] the continued availability of [general maritime] common-law causes of action," no such exception exists. 557 U.S. at 416.

Second, punitive damages are available under the Jones Act. "[T]he general rule" is that "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 68 (1992). Further, "[w]here federal statutes sounding in tort are silent on the availability of punitive damage, courts look to common law principles to determine the scope of remedies." *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 26 (D.D.C. 2013) (finding punitive damages available under the Trafficking Victims Protection Act of 2000); *see also Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding punitive damages available under 42 U.S.C. § 1983).

As noted above, this Court has already determined that the scope of remedies available in general maritime law actions includes punitive damages. And there is no evidence that Congress intended to exclude punitive damages from remedies available to seamen under the Jones Act. *See Exxon*, 554 U.S. at 488-89 (rejecting the argument that "a statute expressly geared to protecting" particular interests would "*sub silentio*" "preempt the common law punitive-damages remedies" that helped to protect those interests, adding that, "'[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law'") (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); *see also Larson v. Kona Blue Water Farms, LLC*, No. RG09-439287, slip op. 4, 2010 WL 1727429 (Cal. Super. Ct. Feb. 9, 2010) (punitive damages may be recovered by a surviving seaman in a Jones Act case).[7]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The Fifth Circuit mistakenly relied on lower court cases construing FELA not to permit punitive damages. The earliest court of appeals decision identified by the Fifth Circuit was decided more than 50 years after the Jones Act was passed. *See* 768 F.3d at 388 n.32 (citing *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971)). In any event, this Court has on multiple occasions rejected the argument that the Jones Act necessarily has the same meaning as FELA. *See*, *e.g.*, *Cox v. Roth*, 348 U.S. 207, 209-10 (1955); *The Arizona v. Anelich*, 298 U.S. 110, 120-23 (1936).

Respectfully submitted,

NICHOLAS A. BLANDA
ANDERSON, DOZIER,
BLANDA & SALTZMAN
2010 West Pinhook Road
Lafayette, LA 70508
(337) 233-3366

BRIAN C. COLOMB
1819 West Pinhook Road
Suite 250
Lafayette, LA 70508
(337) 258-9437

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
AMELIA I.P. FRENKEL
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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