

In The
Supreme Court of the United States

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SAUL C. TOUCHET,

Petitioner,

v.

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

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND *AMICUS CURIAE* BRIEF OF GLOBAL
MARITIME MINISTRIES, INC. NEW ORLEANS
IN SUPPORT OF PETITIONER**

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No. 17-346

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Pursuant to Rule 37.2 of this Court, *amicus* Global Maritime Ministries, Inc. New Orleans (hereinafter “GMM”), respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of the *amicus curiae* brief; however, counsel for Respondent has not consented as of this filing.

GMM was formed on behalf of the approximate 1.5 million seafarers that serve the nearly 100,000 ships which transport 90% of world trade. GMM exists to provide holistic Christian ministry by meeting the

spiritual, emotional and physical needs of seafarers and marine workers.

Acceptance of GMM's *amicus curiae* in this case is appropriate and prayed for.

WHEREFORE, for the reasons cited herein and in the attached *Amicus Curiae* brief, Global Maritime Ministries, Inc. New Orleans respectfully requests this Honorable Court grant leave to file the attached *Amicus Curiae* brief.

Respectfully submitted,
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QUESTION PRESENTED

The principal question presented is whether a ship owner who has breached his obligation to provide a seaman with a seaworthy vessel, in a willful, wanton or even in a criminal manner, be held responsible to pay punitive damages if that conduct results in injury to a seaman as a result of that conduct as is allowed by the Ninth and Eleventh Circuits and the Washington Supreme Court as opposed to the rule of the First, Fifth, and Sixth Circuits and the Texas Supreme Court.

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**AMICUS CURIAE BRIEF OF GLOBAL
MARITIME MINISTRIES, INC. NEW ORLEANS
IN SUPPORT OF PETITIONER**

Pursuant to Supreme Court Rule 37.2, Global Maritime Ministries, Inc. New Orleans (hereinafter “GMM”) respectfully submits this *amicus curiae* brief, on behalf of itself and its members, in support of Petitioners.¹



INTEREST OF AMICUS CURIAE

Global Maritime Ministries exist as holistic Christian ministry by meeting the spiritual, emotional and physical needs of seafarers and marine workers.

Acceptance of GMM’s *Amicus Curiae* brief in this case is appropriate and prayed for.



SUMMARY OF THE ARGUMENT

The safety of all vessels is important to society. Ensuring a ship is safe – or seaworthy – is not an issue

¹ Pursuant to Supreme Court Rule 37.2(a), notice of the GMM’s intent to file this *amicus curiae* brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief. Petitioner and Respondent Virgie Ann Romero McBride consented to the filing of this *amicus curiae* brief. Respondent Estes Well Service, L.L.C. did not. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the GMM, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

that should be in dispute.² The laws requiring a seaworthy ship are self-effectuating; a ship must be kept in a seaworthy condition. Government officials, like the Coast Guard, have limited personnel to inspect every vessel, every day. Unscrupulous shipowners will take advantage of laws that are under enforced, this is a known. Those who work on an un-safe or unseaworthy ship are injured more frequently than those who work aboard properly maintained vessels. It is more expensive to operate in a safe manner than to risk lives and the environment. The mere threat of punitive damages are one of the few weapons available to help ensure a seaworthy vessel upon which seafarers work. Granting this Writ application will allow the analysis needed to determine if the threat of punitive damages will keep shipowners in line and convince them to follow the law as this Court's recent *Baker*³ and *Townsend*⁴ decisions have done in fostering legitimate interests in imposing

² The character of the duty [to provide a seaworthy ship], said the Court, is "absolute." "It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." 328 U.S. at 94-95. The dissenting opinion agreed as to the nature of the shipowner's duty. "Due diligence of the owner," it said, "does not relieve him from this obligation." 328 U.S. at 104. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548-549, 80 S. Ct. 926, 932, 4 L. Ed. 2d 941, 947-948 (1960) U.S., LEXIS 1881, 17-18 (1960)

³ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-490, 128 S. Ct. 2605, 2619, 171 L. Ed. 2d 570, 584 (2008)

⁴ *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 404, 129 S. Ct. 2561, 2562, 174 L. Ed. 2d 382 (2009)

punitive damages for purposes of punishment and deterrence. The failure to grant will have dangerous repercussions alerting the shipping world that vessels in disrepair are welcomed within U.S. waters.



ARGUMENT

Occupational safety to the seafarer should be the goal of all parties to this litigation and to the seafaring world as a whole. The entire body of the admiralty law revolves around the notion that the seaman, his personal safety and his wages are beyond reproach. Whatever feasible, economically or otherwise, to ensure maritime safety must be done. This Court finds itself in a position to further its goals of protecting the maritime safety in general and of those sailing aboard the ships that call to the U.S. It is of extreme importance for the Court to understand the lack of staff operating the seagoing ships that call to U.S. ports and far into the Mississippi River. On average, 5,000-6,000 ships annually sail into the Mississippi River. On average only 20-24 individuals from across the globe operate those vessels. Most are from third world countries. Most speak limited, if any, English. One error while within the banks of the levies of the Mississippi River can cause a flood the likes of Hurricane Katrina. Holding the owner of a vessel accountable for providing a seaworthy ship is a requirement worthy of enforcing. Punitive damages help further that goal. This Court

has stated repeatedly that punitive damages serve two legitimate purposes: deterrence and retribution.⁵ Courts should have the power to enforce a claim for unseaworthiness through punitive damage awards as sanctioned by the Ninth and Eleventh Circuits and the Washington Supreme Court.

1. Seafarer's Working Conditions

The working conditions for seafarers remain largely unchanged since Justice Story's time. For thousands of today's international seafarers, life at sea is modern slavery and their work place is a slave ship.⁶ Poor or unsafe living conditions, unpaid wages, long hours of work without breaks, abusive employers, abandonment of entire crews and little or no job security, the suppression of legitimate union activity and blacklisting seafarers that participate in union activities are all frequent occurrences on ships.⁷ Most seafarers work seven days a week with long hours each day for months on end.

⁵ "Punitive damages" and "exemplary damages" are synonymous. They reflect two principal purposes of such damages: to punish the wrongdoer and thereby make an example of him in the hopes that doing so will deter him and others from wrongdoing. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 82-83 (1997). For ease of reference, we refer to all such damages as "punitive damages."

⁶ International Commission on Shipping, *Ships, Slaves and Competition*, NeatCorp Group (2000).

⁷ Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, Windsor Review of Legal and Social Issues, 19 W.R.L.S.I. 85 (2005).

Far away from home in distant seas and out of the sight of regulators, shipowners can – and in many instances do – get away with abusing seafarers’ rights without detection. Poor safety practices and unsafe ships make seafaring one of the most dangerous of all occupations and it is estimated there are over 2,000 deaths a year at sea.⁸ In a 2002 study, researchers at Oxford University found that seafarers are up to 50 times more likely to die while working compared to those in other jobs.⁹

To provide redress for the abuse, this Court has traditionally protected seamen, naming these workers the “wards of the court”. Historically, punitive damages have been used as means to protect the injured worker from an unsafe ship.¹⁰ Since 1818, this Court has consistently approved of maritime punitive damages understanding the need for the remedy in this distinct area of the law.¹¹ Punitive damages remain a necessity to ensure a safe, seaworthy work place.

⁸ Source: International Transport Workers Federation (“SRI”). The SRI has been helping seafarers since 1895 and today represents the interests of seafarers worldwide, of whom over 600,000 are members of SRI affiliated unions.

⁹ Dr. Stephen Roberts, Oxford University, *The Lancet*, Volume 360, Issue 9332, Pages 543-544, August 17, 2002.

¹⁰ [See *Robertson*, supra note 104, at 471-75, 495-97. *Id.* at 478-83; see also William E. Aiken, Jr., Annotation, *Recovery of Punitive Damages Under Jones Act* (46 U.S.C.A. Appx. §688) or Federal Employers’ Liability Act (45 U.S.C.A. §51 et seq.), 10 A.L.R. Fed. 511, §2[a] (1972).]

¹¹ See *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); *Lake Shore*

2. Historical Examples Of Punitive Damage Awards

From the earliest days of American shipping, a ship that went to sea without edible food for its crew would have been regarded as unseaworthy. *Swift v. The Happy Return*, 23 F.Cas. 560, 561-62 n.2 (D. Pa. 1799), says admiralty judges should penalize ships that provide “atrocious” food. *The Childe Harold*, 5 F.Cas. 619, 620 (S.D.N.Y. 1846), says a ship should be penalized with a “recompense more punitive and compensatory” than a statutory penalty for short rations if it fed the crew with “mouldy, rotten [bread that was] filled with maggots and vermin.”

& *M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107-08 (1893); *Vaughan v. Atkinson*, 369 U.S. 527, 529-31, 540 (1962); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-91 (2008); *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424-25 (2009). See also Justice Scalia’s concurring opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 27-28 (1991) (demonstrating that “the common-law system for awarding punitive damages is firmly rooted in our history” and stating that it “is approved by the legal traditions of our people”). See also Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1206 (1931) (stating that “[t]he punitive damage doctrine is evidence of an age-old feeling that the admonitory function is sometimes entitled to more emphasis than it receives when judgments in tort . . .”). *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851). But *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. at 107-08 (1893), says that maritime law and federal common law are the same respecting their endorsement of punitive damages, and it cites *Day* as part of the *Amiable Nancy* line of cases actions are limited to compensation and noting that the venerable age of a legal doctrine is something of a *prima facie* case for its usefulness.

The parties have agreed that a ship with unfit officers would be unseaworthy. In *The Noddleburn*, 28 F. 855, 859 (D. Ore. 1886), the vessel was unseaworthy because the master had “with willful negligence [and] wanton indifference” ordered its crew not to replace a defective rope that later caused a seaman’s fall; after the man’s injury, the master treated him with callous neglect. The court held the vessel liable for \$1,571 in compensatory damages and added that it had considered “add[ing] the sum of \$500, in consideration of the neglect and indifference with which the [seaman] was treated by the master after his injury.” *Id.* at 860. The court did not explain the ultimate decision to omit the \$500 punishment.

In *The City of Carlisle*, 39 F. 807, 812, 814, 817 (D. Ore. 1889), the court characterized the master’s treatment of a 16-year-old seaman with a fractured skull as “simply inhuman” and “a grievous wrong,” noting that this “gross neglect and mistreatment . . . much aggravated” the boy’s injury. The master’s lengthy course of mistreatment of the wounded boy signaled an unseaworthy ship. The court awarded compensatory damages of \$530 and added an award of \$1,000 “[o]n the ground of the gross neglect and cruel treatment of the [boy] since his injury.” *Id.* The \$1,000 award included something for the victim’s pain and suffering, but the court clearly signaled that it was primarily punitive and exemplary in nature and that it was based in significant part on the vessel’s unseaworthiness:

It may be said that this result [the \$1,000 award] is a hardship on the owners. . . . [But]

if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews. *Id.* at 817.

The vessel in *The Troop*, 118 F. 769 (D. Wash. 1902), was unseaworthy on the same basis as *The City of Carlisle*. *The Troop* court described the master's treatment of the injured seaman as "horrible" and "sickening" and characterized the master's conduct as "a shocking instance of man's inhumanity to man" (118 F. at 770) and a "monstrous wrong" (*id.* p.773). The court said when proper care of an injured seaman is "not supplied by reason of the cruelty or incompetency of a captain or owners in charge of the vessel, the ship herself is, in the eyes of the maritime law, the guilty thing." *Id.* at 772. It noted that the post-accident mistreatment of the seaman made his injuries far worse and held the vessel liable for \$4,000, which included both compensatory and punitive elements.

As is evidenced by the facts of this case, conditions aboard vessels have not changed over the centuries, nor has the need for punitive damages changed over the centuries.

3. Unsafe Acts Of Shipping Are Regularly Punished Today For Deterrence And Retribution Criminally

Shipowners who commit egregious wrongs, punitive in nature, are sanctioned with monetary fines

by the U.S. Government but those injured or the families of those killed do not have those same rights. There is no justifiable reason for this distinction. Notable examples include:

BP Exploration and Production Inc. pled guilty to felony manslaughter, environmental crimes and obstruction of Congress and was ordered to pay \$4 billion in criminal fines and penalties for its conduct leading to the 2010 Deepwater Horizon disaster that killed 11 people and caused the largest environmental disaster in U.S. history.

In 1999, Royal Caribbean Cruises Ltd., one of the world's largest passenger cruise lines, agreed to pay a record \$18 million criminal fine and agreed to a 21 federal felony count plea agreement for dumping waste oil and hazardous chemicals and lying to the U.S. Coast Guard. In a plea agreement, filed in U.S. District Court in six cities, Royal Caribbean admitted that it routinely dumped waste oil from its fleet of cruise ships, such as the environmentally sensitive Inside Passage of Alaska. It also pleaded guilty to the unprecedented charge that it deliberately dumped into U.S. harbors and coastal areas many other types of pollutants, including hazardous chemicals from photo processing equipment, dry cleaning shops and printing presses.

Similarly, in 2008, Norwegian Cruise Line entered a guilty plea in U.S. District Court in Miami in connection with the May 25, 2003 boiler explosion aboard the S.S. NORWAY in the Port of Miami. NCLL pled guilty to a single charge brought under federal shipping laws

alleging grossly negligent operation of the S.S. NORWAY, which placed the lives and property of persons on board the vessel at risk and led to the death of at least one individual, in violation of Title 46, United States Code, Section 2302(b).

This Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), spoke to the issue of punitive damages provided by statute for the Clean Water Act (“CWA”) as opposed to the *Exxon* plaintiffs’ punitive damage claims; in allowing punitive damages, the Court reasoned: “we 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.” *Id.* at 488-89. In so ruling, this Court announced its authority under the general maritime law to sanction the use of punitive damages in those areas where congress has not directly provided guidance:

To be sure, “Congress retains superior authority in these matters,” and “[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance.” *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990). But we may not slough off our responsibilities for common law remedies because Congress has not made a first move, and the absence of federal legislation constraining punitive damages does not imply a congressional decision that there should be no quantified rule. *Id.* at 508 n.21 (citation omitted).

This Court used the same analysis in granting seamen rights to punitive damages under the general maritime law in *Townsend*.

4. Maritime Punitive Damage Awards Are Scarce In The Jurisprudence Because Deterrence Works

It has been noted that there are few punitive damages awards found in General Maritime Law cases where the remedy is granted. For example, in the area of maintenance and cure, there are few punitive damage awards following this Court's *Townsend* decision. Practitioners who represent injured seafarers will report this is so because of the threat of punitive damages against employers who withhold benefits without just cause has decreased litigation and seamen are receiving the care legally justified. Prior to *Townsend*, employers and their maritime insurance carriers would withhold basic living and medical expenses on a regular basis as a litigation tactic to encourage a fast, unjust settlement. Instead of seamen being allowed to live and heal to attempt to work another day, seafarers were forced to suffer in pain and were forced to litigate in order to receive basic food for their families and necessary medical needs. *Townsend* has not caused a rush of punitive damage judgments for wrongful withholding of maintenance and cure. Quite the opposite, the lack of published judicial decisions awarding large punitive damage sums for willful failure to pay maintenance and cure shows the *Townsend* decision has provided its intended result. Like maintenance and

cure, a seaworthy vessel is a basic right for every worker guaranteed – by strict liability – under the general maritime law. A safe workplace is even more important if your workplace is the most dangerous workplace in the world – sailing the high seas.



CONCLUSION

Petitioners herein are not seeking to expand existing substantive rights, the right to a seaworthy ship exists. The remedy of punitive damages enhances the ability to enforce the right. Providing a financial incentive to ensure safe practices furthers the stated goals of the statutory and general maritime law. Seamen who happen to be harmed through negligent actions are compensated for their losses, no more – no less. This is the nature of our remedial system. However, if one causes harm to a worker resulting from a ship that was in horrific condition, even intentional – criminal condition, then our courts should be able to exhaust all means available under the law, means that will result in deterrence and retribution.¹² The goal is to prevent such actions from occurring in the future and the only available means is to allow a judge or jury to punish

¹² Punitive damages are meant as a threat to discourage egregious misconduct. If the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to work. Robertson, 28 J. Mar. L. & Com. at 162-63.

the actor after being presented with all of the evidence with punitive damages.

Respectfully submitted,

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