No. 17-

IN THE

Supreme Court of the United States

AMERICAN TRIUMPH LLC AND AMERICAN SEAFOODS COMPANY LLC,

Petitioners,

v.

ALLAN A. TABINGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

CORPORATE DISCLOSURE STATEMENT

American Triumph LLC is a wholly owned subsidiary of American Seafoods Company LLC. The controlling parent company of American Seafoods Company LLC is American Seafoods Partners LLC. Petitioners are not aware of any publicly held company that owns 10% or more of any of these companies' equity interests.

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PETITION FOR A WRIT OF CERTIORARI

American Triumph LLC and American Seafoods Company LLC respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Washington (App. 1a-15a) is reported at 391 P.3d 434. The Superior Court of Washington's order dismissing respondent's claim for punitive damages (App. 17a-20a) is available at 2016 WL 6407582.

JURISDICTION

The Supreme Court of Washington entered judgment on March 9, 2017. App. 1a. On May 2, 2017, the Supreme Court of Washington amended its opinion, *id.*, and on May 10, 2017, that court denied petitioners' motion for reconsideration, App. 21a. On July 19, 2017, Justice Kennedy extended the time for filing a petition for certiorari to September 7, 2017, and on August 25, 2017, he further extended the time for filing to September 22, 2017.

This Court has jurisdiction under 28 U.S.C. §1257(a). *See* pp. 26-28, *infra*.

INTRODUCTION

The Supreme Court of Washington has ruled that punitive damages may be awarded to a seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel. That ruling is directly contrary to a recent decision of the en banc Fifth Circuit, which concluded, based on this Court's decision in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), that punitive damages are not available in unseaworthiness cases. The Fifth Circuit was correct, and the court below was wrong.

In *Miles*, this Court held that, because Congress did not allow recovery for loss of society or lost future income in a negligence action under the Jones Act, which provides remedies for seamen injured or killed in the course of their employment as a result of the employer's negligence, such damages also could not be recovered in an unseaworthiness action under general maritime law, which is a close relative of Jones Act negligence and provides an alternative cause of action for the same injuries. That conclusion was compelled,

the Court explained, by the Court's own limited institutional role in fashioning remedies in maritime cases where Congress has spoken to the precise question, and by the constitutional mandate to achieve uniform admiralty law. Precisely the same analysis compels the conclusion that punitive damages are not available here.

The court below found *Miles* inapplicable on two grounds, both of which are erroneous. First, the court believed that this case is controlled not by *Miles* but by *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404 (2009), which held that punitive damages may be awarded in claims based on the separate general maritime doctrine of maintenance and cure. But as the Fifth Circuit explained, there are significant functional and historical differences between unseaworthiness claims and maintenance and cure claims. A claim for breach of the duty of maintenance and cure is not an alternative to Jones Act negligence but rather a distinct claim grounded in contract. And unlike the doctrine of unseaworthiness, the doctrine of maintenance and cure has not undergone a fundamental transformation subsequent to the enactment of the Jones Act.

Second, the court below determined that *Miles*'s analysis applies only to a suit for wrongful death, whereas this case arises out an alleged personal injury. That distinction cannot be squared with *Miles*'s rationale. As other appellate courts have recognized, the Jones Act's limitations on damages for negligence apply to both personal injury and wrongful death actions, and thus the constitutional considerations that drove the *Miles* analysis hold true for personal injury actions as well.

The Washington Supreme Court's decision is incorrect, conflicts with the decisions of the Fifth Circuit and other federal and state appellate courts, and has the

potential to harm the economy, the environment, and national security. The decision therefore warrants this Court's review. Indeed, even though the decision below anticipates further proceedings in the state trial court, the circumstances here warrant immediate review, without waiting for the completion of any proceedings on remand. The division that the decision below has created undermines the fundamental, constitutional principle that maritime law should be uniform across the Nation. This Court's review is necessary to ensure national consistency on an important question of remedies in federal maritime law.

Alternatively, this Court should grant the petition for a writ of certiorari filed recently in *Touchet* v. *Estis Well Service, LLC*, No. 17-346 (U.S. filed Sept. 5, 2017), which presents the same question of whether punitive damages may be awarded to a Jones Act seaman for unseaworthiness. In that event, the Court should hold this petition pending disposition of *Touchet*.

STATEMENT

Respondent Allan Tabingo filed suit in Washington state court against petitioners after he was allegedly injured while employed aboard the *American Triumph*, a factory trawler fishing vessel. App. 1a. He brought two claims under general maritime law—breach of the duty to provide a seaworthy vessel and breach of the duty to provide maintenance and cure—and a claim of negligence under the Jones Act, 46 U.S.C. §30104. App. 1a-2a. He sought punitive damages for his unseaworthiness claim. *Id.*

The Superior Court of Washington dismissed respondent's claim for punitive damages. App. 18a-19a. The court relied on this Court's decision in *Miles* and the Fifth Circuit's decision in *McBride* v. *Estis Well*

Service, LLC, 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (May 18, 2015), to hold that punitive damages are not available as a matter of law for unseaworthiness claims. App. 19a.

The Washington Supreme Court reversed, and held that "a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law." App. 14a. The court found that question to be controlled not by *Miles*, which—like this case—involved an unseaworthiness claim, but by this Court's decision in *Townsend*, which held that punitive damages may be available for the distinct maritime cause of action for breach of the duty to provide maintenance and cure—a cause of action that is not at issue in this petition. The court noted that, in *Townsend*, this Court observed that punitive damages were historically available for at least some claims under general maritime law, and it found "no reason to believe unseaworthiness has been excluded from this general maritime rule." App. 9a.

The court also found *Miles* to be inapposite because (it believed) "*Miles* limits its holding solely to wrongful death claims," whereas this case involves a personal injury claim. App. 10a. According to the court, in the Jones Act "Congress had directly spoken to wrongful death recovery" in maritime cases, but Congress had apparently not addressed the scope of recovery in personal injury actions. *Id.*

The court expressly rejected the decision of the en banc Fifth Circuit in *McBride*, which held that *Miles* forecloses punitive damages for unseaworthiness claims. The court acknowledged that the Fifth Circuit "followed *Miles*'s reasoning" when it held that "because the Jones Act limits recovery of punitive damages for

actions brought under it, the same result must occur when a Jones Act claim and general maritime claim are joined in the same action." App. 11a-12a. But that conclusion, the court stated, "misinterprets both *Miles* and its interaction with *Townsend*," and under "*Townsend*'s rationale, … punitive damages are available for unseaworthiness claims." App. 12a.

Finally, the court stated that punitive damages should be available in unseaworthiness cases because "[c]ourts have historically identified seamen as wards of the admiralty." App. 14a (quotation marks omitted). Addressing the "policy question" of whether "punitive damages would help effectuate the goal of providing seamen with particular protection," the court concluded that they would, and so punitive damages would be consistent with "the law's historical treatment of seamen." *Id.*

REASONS FOR GRANTING THE PETITION

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

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS FEDERAL AND STATE APPELLATE DECISIONS

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

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

36 ("Because [the seaman's] estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.").

B. The question in this case is whether *Miles*'s reasoning also forecloses the award of punitive damages in unseaworthiness actions. In rejecting the application of *Miles* to punitive damages, the Washington Supreme Court opened a division with other appellate courts around the country.

Until the decision below, federal and state appellate courts had consistently held since *Miles* that punitive damages are not available in unseaworthiness actions. *See McBride*, 768 F.3d at 388-389; *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller* v. *American President Lines, Ltd.*, 989 F.2d 1450, 1455, 1457-1459 (6th Cir. 1993); *Wahlstrom* v. *Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp.* v. *Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993); *Sky Cruises, Ltd.* v. *Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).[1]

The Washington Supreme Court's decision rejected this post-*Miles* consensus. The court concluded that the governing framework is provided not by *Miles* but by this Court's later decision in *Townsend*, which held that punitive damages *are* available in actions based on a breach of the general maritime duty to provide maintenance and cure.[2] *Townsend* explained that there

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[1] *But cf. Gaither* v. *Hunter Marine Transp., Inc.*, 990 F.2d 442, 442 (8th Cir. 1993) (per curiam) (without analyzing the question, affirming jury verdict apparently awarding "punitive damages" for claim based on unseaworthiness).

[2] Maintenance and cure is a general maritime legal duty requiring a vessel owner to provide wages, food, lodging, and medical treatment to a seaman while he is wounded or ill in the service

was a "common-law tradition of punitive damages" in the maritime context before the Jones Act was enacted, "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule," and "[n]othing in the text of the Jones Act … undermines the continued existence of the common-law cause of action providing recovery." *Townsend*, 557 U.S. at 414-415, 418. The court below thought that all of the factors identified in *Townsend* were also true with respect to unseaworthiness. *See* App. 7a-9a.

In reaching that conclusion based on *Townsend*, the Washington Supreme Court expressly disagreed with the en banc Fifth Circuit. The Fifth Circuit, considering the same question after *Townsend*, concluded that *Miles* rather than *Townsend* provides the proper framework governing punitive damages on unseaworthiness claims. *McBride*, 768 F.3d at 389-390; *see also id.* at 391-401 (Clement, J., concurring); *id.* at 401-404 (Haynes, J., concurring).[3] As the Fifth Circuit ex-

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of the vessel as long as the voyage continues, regardless of whether the vessel owner caused the injury or illness. *Townsend*, 557 U.S. at 407-408, 413.

[3] Unless otherwise indicated, references to the Fifth Circuit's decision in *McBride* are to the lead opinion authored by Judge Davis. The Washington Supreme Court described the *McBride* court as "fractured," App. 11a, but nine of the fifteen judges on the en banc court concluded that punitive damages may not be awarded in unseaworthiness actions. *See McBride*, 768 F.3d at 384-391 (opinion of Davis, J.); *id.* at 391 (Clement, J., concurring) ("I join the majority opinion"); *id.* at 401 (Haynes, J., concurring). A subsequent panel in the same case recently confirmed that the en banc decision "foreclosed" the claims for punitive damages for unseaworthiness (and for negligence under the Jones Act), *McBride* v. *Estis Well Serv., LLC*, 853 F.3d 777, 780 n. 1 (5th Cir. 2017), and a petition for certiorari has been filed in that case seeking this Court's review of the same question, Pet. 10-12, *Touchet* v. *Estis Well Serv., LLC*, No. 17-346 (U.S. filed Sept. 5, 2017). Although

plained, *Townsend* expressly distinguished the maintenance and cure claim in that case from the unseaworthiness claim considered by the Court in *Miles* and left *Miles* undisturbed: Whereas "the maintenance and cure right is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" "the [Jones Act] negligence/unseaworthiness actions are alternative, overlapping actions derived from the same accident and look toward the same recovery." *Id.* at 389 & n. 36 (quoting *Townsend*, 557 U.S. at 423) (brackets omitted). In the Fifth Circuit, therefore, punitive damages may not be awarded in unseaworthiness claims brought by seamen—the exact opposite of the conclusion of the Washington Supreme Court in this case.

The Washington Supreme Court suggested that the *Miles* framework did not govern here because "*Miles* limits its holding solely to wrongful death claims." App. 10a. As explained below (pp. 17-20), that assertion is wrong. It is also in conflict with decisions of other appellate courts, which have recognized that *Miles* applies equally to unseaworthiness claims based on personal injuries. *See Horsley*, 15 F.3d at 203

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two of the concurring judges perceived a possible distinction between *Miles*'s application to wrongful death cases and personal injury cases, they still concurred in the en banc court's affirmance of the dismissal of all the punitive damages claims in that case, and they expressly rejected the dissenters' submission that, under *Townsend*, punitive damages should be available in personal injury cases based on an unseaworthiness claim. *See McBride*, 768 F.3d at 402, 404 (Haynes, J.). As they explained, "Congress is the more appropriate forum to weigh competing policy concerns about the punitive damage remedy." *Id.* at 403 (Haynes, J.). Those two concurring judges also observed that the arguable "tension between (at least) two Supreme Court precedents" can be "definitive[ly] resol[ved]" only by this Court. *Id.* at 404 (Haynes, J.).

("*Miles* mandates the conclusion that punitive damages are not available in an unseaworthiness action"); *Penrod Drilling Corp.*, 868 S.W.2d at 296-297 ("The rationale of *Miles* compels its extension to the present case, a Jones Act seaman's claim for punitive damages in an unseaworthiness action arising from nonfatal injuries."); *Smith* v. *Trinidad Corp.*, 992 F.2d 996, 996 (9th Cir. 1993) (per curiam) (under *Miles*, "wives of injured mariners may no longer sue the ship for damages for their nonpecuniary losses, if any, caused by the injuries to the spouse"); *Lollie* v. *Brown Marine Serv., Inc.*, 995 F.2d 1565, 1565 (11th Cir. 1993) (per curiam) (same); *accord McBride*, 768 F.3d at 385, 388-389 (Davis., J.); *id.* at 391 (Clement, J., concurring).

Given this division between the Washington Supreme Court and other federal and state appellate courts, the availability of punitive damages in many maritime cases will turn on the happenstance of where a case is brought. This Court should grant review to resolve the lower courts' disagreement on this important issue of remedies under federal maritime law.[4]

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[4] The same question is pending before the Ninth Circuit in *Batterton* v. *Dutra Group*, No. 15-56775 (9th Cir.). The district court permitted the plaintiff in that case to seek punitive damages for his personal injury unseaworthiness claim, *Batterton* v. *Dutra Grp.*, No. 14-7667, 2014 WL 12538172, at *2 (C.D. Cal. Dec. 15, 2014), and the defendant appealed. The Ninth Circuit heard oral argument on February 8, 2017.

II. THE DECISION BELOW IS WRONG

A. *Miles* And Other Precedents Make Clear That Because Punitive Damages Are Not Available Under The Jones Act, They Are Also Not Available In An Unseaworthiness Action

The resolution of the question presented in this case is straightforward: Punitive damages are not available in any action by a seaman under general maritime law based on a claim of unseaworthiness. That result follows inexorably from this Court's decision in *Miles* and other cases.

In *Miles*, this Court held that any "limit" that Congress has placed on damages in a negligence action under the Jones Act "forecloses more expansive remedies in a general maritime action founded on strict liability"—*i.e.*, unseaworthiness. 498 U.S. at 36. Were the Court "to sanction more expansive remedies" in the "judicially created cause of action" for unseaworthiness than Congress has sanctioned for claims of negligence under the Jones Act, the Court would step outside its proper "place in the constitutional scheme." *Id.* at 32-33; *see also id.* at 24 ("Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits."); *id.* at 27 ("Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

It is well settled that punitive damages are not available in negligence actions brought under the Jones Act. As the Fifth Circuit has explained, "no cases have awarded punitive damages" under the nearly century-old Jones Act. *McBride*, 768 F.2d at 388; *see Miller*, 989 F.2d at 1457; *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345,

1347 (9th Cir. 1987); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984).

That conclusion follows from the fact that the Jones Act incorporates "unaltered" the remedies available under the Federal Employers Liability Act ("FELA"), *Miles*, 498 U.S. at 32, and FELA also forecloses punitive damages. This Court has long assumed that punitive damages are precluded under FELA. *See Seaboard Air Line Ry.* v. *Koennecke*, 239 U.S. 352, 354 (1915) (faced with a complaint that was ambiguous as to the source of the cause of action, the Court observed that "[i]f [the complaint] were read as manifestly demanding exemplary damages," *i.e.*, punitive damages, "that would point to the state law" rather than the FELA as the basis for the claim).[5] Courts of appeals have uniformly reached the same conclusion. *See Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987) (rejecting punitive damages under FELA); *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240 (6th Cir. 1971) (same).

In both FELA and the Jones Act, Congress limited recovery to *compensatory* damages. *See, e.g.*, *Gulf, Colo., & Santa Fe Ry. Co.* v. *McGinnis*, 228 U.S. 173, 175 (1913) ("The recovery [under the FELA] must … be limited to compensating those relatives … as are shown to have sustained some pecuniary loss."); *Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 69-71 (1913) (holding that FELA provides "only for compensation for pecuniary loss" in both personal injury and wrongful death actions); *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 149 (1913) (noting that "[t]he scope of the compensation recoverable under this statute has been so

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[5] The terms "exemplary, punitive, [and] vindictive" damages are synonymous. *See Townsend*, 557 U.S. at 410.

fully considered in *Michigan C. R. Co.* v. *Vreeland*," and declaring, "The damage [under the FELA] is limited strictly to the financial loss thus sustained").[6] Under *Miles*, therefore, the same rule should govern general maritime claims based on unseaworthiness: Punitive damages are not authorized for such claims.

Indeed, long before *Miles*, this Court effectively ruled both that the remedies available for unseaworthiness claims under general maritime law are coterminous with those available for Jones Act negligence claims, and that the remedies authorized for both types of claims are limited to compensatory damages. In *Pacific Steamship Co.* v. *Peterson*, 278 U.S. 130 (1928), this Court emphasized the close relation between the two claims when it explained that "[t]he right to recover compensatory damages under the new rule for injuries caused by negligence [*i.e.*, the Jones Act] is … an alternative of the right to recover indemnity under the old rules [*i.e.*, general maritime law] on the ground that the injuries were occasioned by unseaworthiness." *Id.* at 138. Therefore, the Court stressed, "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the

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[6] Punitive damages are distinct from compensatory damages. *See, e.g.*, *Lake Shore & Mich. S. Ry. Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others …."); *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 492-493 (2008) ("[T]he consensus today is that punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct."); *Restatement (Second) of Torts* §908(1) (1979) ("Punitive damages are damages, *other than compensatory* or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." (emphasis added)).

master or members of the crew [under the Jones Act], or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to *but one indemnity by way of compensatory damages*." *Id.* (emphasis added).[7] And in *Townsend*, the Court reaffirmed *Pacific Steamship*'s recognition that unseaworthiness is "'an alternative of[] the right to recover compensatory damages under the Jones Act.'" 557 U.S. at 423 (quoting *Pacific S.S.*, 278 U.S. at 138). Thus, as Judge Clement put it, "we reach the right result … by taking the *Osceola* and *Pacific Steamship* Courts at their word— … unseaworthiness defendants are liable for an indemnity by way of compensatory damages and nothing more." *McBride*, 768 F.3d at 397-399.[8]

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[7] *See also The Osceola*, 189 U.S. 158, 175 (1903) ("the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship"); *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958) (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action" (citing *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316 (1927))).

[8] A handful of pre-*Miles* appellate decisions suggested that punitive damages could be available for claims of unseaworthiness. Judge Clement explained in *McBride*, however, that those cases relied on a cursory analysis that failed to account for this Court's emphasis in *Pacific Steamship* of the close connection between Jones Act negligence claims and unseaworthiness claims and for "the post-Jones Act expansion of unseaworthiness liability," as discussed *infra* pp. 17-18. 768 F.3d at 395-401. In any event, those decisions did not survive *Miles*. *See Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 624-625 (5th Cir. Unit B July 1981) (relying partly on cases that did not involve unseaworthiness and partly on availability at that time of loss of society damages in unseaworthiness claims, which this Court subsequently rejected in *Miles*); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (relying on older decisions based in general maritime law,

The Washington Supreme Court also emphasized that courts have traditionally been especially solicitous of the interests of seamen, treating them as "wards of the admiralty." App. 13a. But that reasoning disregards *Miles*, which emphasized that "[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." 498 U.S. at 27. Congress has legislated extensively for seamen's remedies, and the courts "must keep strictly within the limits imposed by Congress," *id.*; the courts are "not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.* at 36. That imperative has equal force in this case. Congress's considered decision in the Jones Act to reject punitive damages forecloses the award of such damages in unseaworthiness claims as well.

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

The Washington Supreme Court believed that the framework articulated by this Court in *Townsend* should apply also to unseaworthiness actions. That conclusion is incorrect. This Court limited its holding in *Townsend* to maintenance and cure actions and expressly distinguished its ruling on unseaworthiness claims in *Miles*, the "reasoning" of which "remains sound." 557 U.S. at 420.

There are important reasons why the Jones Act's limits on damages should apply also to claims for un-

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but not specifically unseaworthiness); *Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987) (following *Merry Shipping* and *Marine Sulphur Queen*); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) (following *Merry Shipping*).

seaworthiness, even if not to claims for maintenance and cure. First, Jones Act negligence and unseaworthiness are substantive siblings, whereas maintenance and cure is a more distant relative. As the Court in *Townsend* explained, unseaworthiness is "'an alternative of[] the right to recover compensatory damages under the Jones Act,'" such that "the seaman may have … one of the … two." *Townsend*, 557 U.S. at 423-424 (quoting *Pacific S.S.*, 278 U.S. at 138) (brackets omitted); *see also Pacific S.S.*, 278 U.S. at 138 (Jones Act negligence is "an alternative of the right to recover indemnity [for] unseaworthiness"); *McAllister*, 357 U.S. at 225 (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action"). Both claims may be brought to redress a seaman's personal injury or death occurring in the scope of his employment.

In contrast, as *Townsend* further explained, "'the maintenance and cure right is in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act,'" and thus "the seaman may have maintenance and cure *and*" a Jones Act negligence (or unseaworthiness) recovery. 557 U.S. at 423 (quoting *Pacific S.S.*, 278 U.S. at 138) (emphasis added). Indeed, maintenance and cure is not even a tort but rather is a "contractual right." *Pacific S.S.*, 278 U.S. at 139 (emphasis added).

Second, the judicial origins of the contemporary theory of unseaworthiness liability are quite different from the origins of maintenance and cure—a point stressed by this Court in *Miles*. More than two decades *after* the Jones Act was enacted, unseaworthiness underwent a "revolution" in which "this Court transformed the warranty of seaworthiness into a strict liability obligation." *Miles*, 498 U.S. at 25-26 (quotation

marks omitted). "As a consequence of this radical change, unseaworthiness" went from "an obscure and relatively little used remedy" to "the principal vehicle for recovery by seamen for injury or death." *Id.* at 25 (quotation marks omitted). Because the contemporary doctrine of unseaworthiness provides a broader basis of liability than Jones Act negligence for the same conduct but was fashioned by the courts after enactment of the Jones Act, this Court considered it "inconsistent with [its] place in the constitutional scheme … to sanction more expansive remedies" for unseaworthiness than Congress did for negligence under the Jones Act. *Id.* at 32; *see also McBride*, 768 F.3d at 399-401 (Clement, J., concurring).

Again in contrast, the doctrine of maintenance and cure has not undergone a "revolution." *Miles*, 498 U.S. at 25 (quotation marks omitted). Rather, "a seaman's right to maintenance and cure is 'ancient,'" *McBride*, 768 F.3d at 393 (Clement, J., concurring) (quoting *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527 (1938)), and "has remained unchanged in substance for centuries," *id.* at 415 (Higginson, J., dissenting).[9]

Those differences led this Court to conclude in *Townsend* that the congressional remedial judgments embodied in the Jones Act did not foreclose the courts from awarding punitive damages in claims for mainte-

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[9] *See also Weeks Marine, Inc.* v. *Garza*, 371 S.W.3d 157, 163 (Tex. 2012) ("Historically, conceptually, and functionally, the unseaworthiness and Jones Act tort actions are '[conjoined] twins.' Both compensate a seaman for injuries suffered. The much older maintenance and cure action does not derive from tort principles and is something like a first cousin to the other two. It does not compensate for injuries but instead serves a curative function …. A claim for maintenance and cure is considered contractual in nature and arises from the relationship between seaman and employer.").

nance and cure. But unseaworthiness and Jones Act claims remain as closely connected as they were before, and allowing punitive damages in unseaworthiness when Congress has foreclosed them in negligence would, as the Court made clear in *Miles*, go "well beyond Congress's ordered system of recovery." 498 U.S. at 36.[10]

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

1. The Washington Supreme Court suggested that *Miles* is limited to wrongful death actions. That reading of *Miles* is plainly wrong. The central holding of *Miles* is that the courts may not expand the scope of recovery for the judge-made action of unseaworthiness beyond what Congress had provided for negligence under the Jones Act. *See* 498 U.S. at 22-23, 32-33. Because—as this Court noted in *Miles*—"[t]he Jones Act provides an action in negligence for the death *or injury* of a seaman," *id.* at 29 (emphasis added),[11] that holding applies equally to personal injury actions and wrongful death actions. This Court said so in *Miles* itself: "We will not create, under our admiralty powers, a remedy … that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury* and death." *Id.* at 36 (emphasis added).[12]

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

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

[12] The FELA, which the Jones Act incorporates, also provides remedies for an employee's personal injury or death. *See* 45 U.S.C. §51 ("Every common carrier by railroad while engaging in

The "constitutional mandate" to achieve "uniform" maritime law—which this Court heeded in *Miles*, both in recognizing wrongful death actions and in disallowing recovery for loss of society and survival rights for unseaworthiness claims, 498 U.S. at 27; *see id.* at 29-30, 33, 35, 37—also precludes recognition of punitive damages for personal injury claims based on unseaworthiness. Indeed, the Washington Supreme Court's view would make a crazy quilt of remedies for seamen's injuries. As discussed, the Jones Act disallows punitive damages based on negligence in both personal injury and wrongful death actions. *Supra* pp. 12-15, 19. And *Miles* surely makes clear that punitive damages are not available in wrongful death actions based on unseaworthiness. Recognizing punitive damages for a seamen's personal injury—but not his death—based on unseaworthiness—but recognizing punitive damages for both a seaman's personal injury and his death if based on Jones Act negligence—would be illogical and would create unjustifiable "anomalies" in admiralty law. *Miles*, 498 U.S. at 26.

2. The court below rejected this analysis because it thought that *Miles* "is limited to claims rooted in statute." App. 10a. In that court's understanding of *Miles*, "Congress had directly spoken to wrongful death recovery" in the Jones Act and the Death on the High Seas Act. *Id.* But the court nonetheless believed that

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commerce … shall be liable in damages to any person *suffering injury* while he is employed by such carrier in such commerce, or, *in case of the death* of such employee, to his or her personal representative …." (emphasis added)); *The Arizona* v. *Anelich*, 298 U.S. 110, 118 (1936) ("the Federal Employers' Liability Act, thus incorporated in the Jones Act by reference, gives a right of recovery for the *injury or death* of an employee of a common carrier by rail" (emphasis added)).

Miles does not apply here because "[c]laims for unseaworthiness predate the Jones Act and are not based on a statutory remedy" and "the Jones Act does not directly address damages for general maritime claims." App. 11a; *see also* App. 12a ("*Miles* is limited to tort remedies grounded in statute. Unseaworthiness is not such a remedy.").

The Washington Supreme Court's analysis reflects deep confusion about *Miles*. The cause of action at issue in *Miles* was the same as here: a claim of breach of the duty to provide a seaworthy vessel under general maritime law. The claim in *Miles* was "based on" the Jones Act only in the sense that Congress's decision in the Jones Act to create an action for wrongful death resulting from negligence and to delimit the remedies for such an action provided "guidance" to this Court when it was called upon to decide whether a wrongful death action should be recognized and what the remedies would be for such a claim under the general, judicially developed maritime doctrine of unseaworthiness. *Miles*, 498 U.S. at 27-28. The cause of action at issue in *Miles* was just as judge-made as the unseaworthiness claim here, and the Jones Act did not "directly address" the damages sought in *Miles* any more than it directly addresses the damages sought here. Rather, when the Court in *Miles* concluded that certain damages should not be available in unseaworthiness claims, it emphasized the need to defer to, and to harmonize any judge-made rule with, the considered judgment that Congress had made about the proper scope of remedies under the Jones Act. That imperative is as true for personal injury claims as for wrongful death actions.

The Washington Supreme Court's approach also lacks any grounding in coherent policy. In the judicially fashioned doctrine of unseaworthiness, which is al-

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

The Court has consistently recognized the importance of adopting "a uniform rule" of recovery for injuries under maritime law. *Miles*, 498 U.S. at 33. It would be odd now for the more serious penalty (punitive damages) to be available only where the less serious result (injury) obtains. That would be odder still given that a seaman's death can occur not immediately but long after the accident, when the full effects of an injury are finally felt. A plaintiff's entitlement to punitive damages, and a vessel owner's liability for them, should not shift and spring depending on the vagaries of whether a particular seaman eventually dies of his injuries.

III. THE IMPORTANCE OF THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

This case presents an important question of federal law warranting review. In fact, the potential consequences of the Washington Supreme Court's decision are sufficiently serious for the maritime industry and the Nation as a whole that, although the ruling anticipates further proceedings in the state trial court, this Court can and should decide the question now rather than awaiting final resolution of the case.

A. The domestic maritime industry may often go unnoticed by the average American, but it has a substantial effect on the economy. The Nation's commercial fleet comprises more than 40,000 fishing boats, tankers, container ships, tugboats, barges, ferryboats, cruise ships, water taxis, and other working vessels.[13] Operating along the country's seacoasts and throughout its internal waterways, those vessels transport about 100 million passengers for work and pleasure each year, and every conceivable type of raw material and consumer good for export or distribution, including seafood, agricultural products, crude and finished petroleum products, steel, and more.[14] For example, in 2009, U.S. marine vessels transported $1 trillion worth

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[13] American Maritime Partnership, *Frequently Asked Questions*, *at* https://www.americanmaritimepartnership.com/faq/ (last visited Sept. 22, 2017).

[14] Navy League of the United States, *America's Maritime Industry: The Foundation of American Seapower* 7-8, 14, *at* https://navyleague.org/files/legislativeaffairs/americas-maritime-industry.pdf; American Maritime Partnership, *Frequently Asked Questions*, *at* https://www.americanmaritimepartnership.com/faq/ (last visited Sept. 22, 2017).

of imports and exports.[15] All told, the maritime industry annually accounts for about $30 billion in wages, $11 billion in taxes, and $100 billion in economic output, and the industry continues to grow.[16]

Moreover, marine transportation does all this in a relatively cost-effective and environmentally friendly way.[17] Maritime shipping costs have been declining, whereas the costs for other modes of freight transportation have been increasing.[18] That helps keep costs down to consumers—and also to the American taxpayer, since U.S. commercial vessels play a vital role in transporting our troops and military supplies around the world, including 95% of the dry cargoes to U.S. and Coalition Forces in Iraq and Afghanistan since 2008.[19] Indeed, a robust domestic maritime industry is essential to American military readiness and strength.[20]

By exposing vessel owners and operators to punitive damages for claims of unseaworthiness, the decision below creates "devastating potential for harm" to the industry and the national economy, environment, and security. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). Punitive damages may substantially increase any eventual damages award rendered in maritime cases. *See Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 513 (2008);

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[15] *The Foundation of American Seapower* 12-13.

[16] *Id.* at 14; American Maritime Partnership, *What We Do*, *at* https://www.americanmaritimepartnership.com/about-amp/what-we-do/ (last visited Sept. 22, 2017).

[17] *The Foundation of American Seapower* 4, 7, 11, 15.

[18] *Id.* at 15.

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

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

Clausen v. *Icicle Seafoods, Inc.*, 272 P.3d 827, 834-836 (Wash. 2012). As Judge Clement explained in *McBride*, the increased cost to owners and operators resulting from potential liability for punitive damages are likely to "be eventually passed along to consumers," whether private or governmental. 768 F.3d at 401; *see also, e.g.*, *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1490 (D.C. Cir. 1991) ("The award of punitive damages … would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation."). And "[g]iven the sizeable percentages of the world's goods that travel on ships, … the decision in this case needs to have only the minutest impact on shipping prices to have a significant aggregate cost for consumers." *McBride*, 768 F.3d at 401 (Clement, J., concurring). Faced with higher prices, consumers may choose to buy less, and manufacturers, distributors, and exporters may shift to other modes of transportation, which may be less environmentally friendly and which cannot substitute for the maritime industry's role in supporting U.S. military and homeland security operations.

B. The decision below is highly problematic not only because of the potential adverse consequences to the economy, environment, and national security, but also because it contravenes "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27 (quotation marks omitted); *see also The Lottawanna*, 88 U.S. 558, 575 (1874). As explained above, the Washington Supreme Court's decision creates inconsistency between the State of Washington on the one hand and the First, Second, Fifth, and Sixth Circuits and the States of Texas and Florida on the other hand. *Supra* p. 8. It also creates inconsistency between claims based on negligence and on

unseaworthiness, as well as between personal injury and wrongful death actions. *Supra* pp. 12-15, 19-20, 22. Just as "no [state] legislation is valid if it … interferes with the proper harmony and uniformity of [general maritime] law," *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917), a state court decision with like effect—such as the decision below—cannot be allowed to stand.

C. In light of these consequences, the Court can and should take jurisdiction under 28 U.S.C. §1257(a) to hear this case now, even though the decision below allowed respondent's claim for punitive damages to proceed in the state trial court. The Court has not administered Section 1257's requirement of a final state-court judgment in "a mechanical fashion," but rather has "recurringly encountered situations … in which [it] treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). That approach is fitting here.

First, the Washington Supreme Court's "judgment is plainly final" on the federal issue of whether punitive damages are available in an unseaworthiness action "and is not subject to further review in the state courts." *Cox Broad.*, 420 U.S. at 485. Second, this issue is a purely legal one that is "separate and independent" from other issues in the case. *Id.* at 483-484.

Third, "immediate rather than delayed review would be the best way to avoid the mischief of economic waste" should the parties have to fully litigate petitioners' liability for punitive damages now only for this Court to later hold that they are unavailable as a matter of law. *Cox Broad.*, 420 U.S. at 477-478. Fourth,

there is a substantial risk that "later review of [this] issue cannot be had." *Id.* at 481. If petitioners ultimately prevail on the merits of respondent's unseaworthiness claim or on the merits of his punitive damages claim, the Washington Supreme Court's decision recognizing the availability of punitive damage would persist without review by this Court. Further, the prospect of a large punitive damages award could itself short-circuit this Court's later review by increasing the pressure for a settlement. *See Lust* v. *Sealy, Inc.*, 383 F.3d 580, 590-591 (7th Cir. 2004) (punitive damages act as "a means of coercing settlement"); Seamon, *An* Erie *Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37, 89 (2006) ("[T]he mere pleading of a large punitive damage request can force a defendant to settle the case quickly and on unfavorable terms.").

And fifth, "a refusal immediately to review the state court decision might seriously erode federal policy," *Cox Broad.*, 420 U.S. at 483—here, the constitutional policy to ensure the harmony and uniformity of admiralty law around the country. Particularly given the potentially serious consequences to the national economy, environment, and security that the decision below threatens, "it would be intolerable to leave unanswered … [such] an important question" of federal maritime law that demands a consistent position across all jurisdictions. *Id.* at 485 (quotation marks omitted); *see also North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) ("there [has] been a departure from this requirement of finality for federal appellate jurisdiction" "where intermediate rulings may carry serious public consequences").

Indeed, just like this case, *Townsend* arose from a denial of a motion to dismiss a punitive damages claim. 557 U.S. at 408. Although that case came to this Court

from a federal court of appeals and therefore was not governed by §1257(a), this Court's decision to grant certiorari to resolve a lower-court split about the availability of punitive damages in maintenance and cure actions confirms the imperative for immediate review of decisions that disrupt the uniformity of maritime law. *See Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501 (1959) (granting certiorari of interlocutory ruling by circuit court because issue presented was "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care").

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition in *Touchet* v. *Estis Well Service, LLC*, No. 17-346 (U.S. filed Sept. 5, 2017), and hold this petition pending disposition of that case.

Respectfully submitted.

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SEPTEMBER 2017

APPENDICES

APPENDIX A

SUPREME COURT OF WASHINGTON

No. 16-92913-1

ALLAN A. TABINGO,
Petitioner,
v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY, LLC,
Respondents.

[391 P.3d 434; 188 Wash. 2d 41]
Argued Jan. 17, 2017
Filed March 9, 2017
Amended May 2, 2017
Reconsideration Denied May 10, 2017

OPINION

****436** OWENS, J.

***43** ¶1 Allan Tabingo was seriously injured while working aboard a fishing trawler owned and operated by American Seafoods Company LLC and American Triumph LLC (collectively American Seafoods). Tabingo alleges the lever used to operate a hatch in the trawler's deck broke when an operator tried to stop the hatch from closing. The hatch closed on Tabingo's hand, leading to the amputation of two fingers. He brought numerous claims against American Seafoods, including a general maritime unseaworthiness claim for

which he requested punitive damages. American Seafoods argued that as a matter of law, punitive damages are unavailable for unseaworthiness claims.

¶2 Unseaworthiness is a general maritime claim. Neither the United States nor the Washington State Supreme Court have ruled on whether punitive damages are available under this theory. However, the United States Supreme Court has recently held that punitive damages are available for maintenance and cure, another general maritime claim. The Court held that because both the claim and the damages were historically available at common law and because Congress had shown no intent to limit recovery of punitive damages, those damages were available. Here, we follow the United States Supreme Court's rationale and find that, like maintenance and cure, punitive damages are available for a general maritime unseaworthiness claim. We reverse the trial court and remand for further proceedings.

FACTS

¶3 Allan Tabingo was a deckhand trainee aboard the fishing trawler *American Triumph*, owned and operated by ***44** American Seafoods. "Fishing trawlers" are vessels that catch and haul fish onto their decks using large nets. After the fish are aboard and dumped from the nets, one deckhand opens a steel hatch using hydraulic controls while another deckhand shovels the fish through the hatch for processing. Though deckhands can push most of the fish below decks with shovels, the design of the vessel requires them to get on all-fours and use their hands to move the final fish.

¶4 In February 2015, Tabingo was tasked with moving the fish below decks. He was on his knees near

the hatch's hinge, gathering the last remaining fish, when another deckhand started closing the hatch. Realizing how close Tabingo's hands were to the hatch, the deckhand attempted to correct his mistake. However, the hatch's control handle was broken and the deckhand could not stop the hatch. The hydraulic hatch closed on Tabingo's hand, resulting in the amputation of two fingers. Tabingo alleges that American Seafoods knew about the broken handle for two years before the incident but had failed to repair it.

¶5 Tabingo filed suit against American Seafoods. He claimed negligence under the Jones Act (also known as the Merchant Marine Act of 1920 (46 U.S.C. § 30104)), as well as several general maritime claims, including one for unseaworthiness of the vessel. He requested compensatory damages against American Seafoods for all of his claims and punitive damages for his unseaworthiness claim.

¶6 American Seafoods filed a motion for partial summary judgment moving to dismiss Tabingo's punitive damages claim. It argued that Tabingo had not stated a claim for which relief could be granted under CR 12(b)(6), and asked that the trial court follow a recent Fifth Circuit case, *McBride v. Estis Well Serv.*, LLC, 768 F.3d 382 (5th Cir. 2014) (plurality opinion), holding that punitive damages are disallowed in general maritime law cases. American Seafoods claimed that punitive damages are prohibited under ***45** the Jones Act's provision for maritime negligence actions, and because the unseaworthiness claim was joined with a Jones Act negligence claim, punitive damages are barred for the unseaworthiness claim as well.

¶7 After oral argument, a King County Superior Court judge granted the motion for partial summary

judgment on CR 12(b)(6) grounds. The judge found that, based on Washington and federal law, the measure of damages available in a Jones Act negligence claim and an unseaworthiness claim are identical. Because of this, the Jones Act circumscribes the damages available under the doctrine ****437** of unseaworthiness. The trial court ruled that a plaintiff may not seek nonpecuniary damages in either general maritime or negligence claims and, because punitive damages are nonpecuniary, dismissed Tabingo's punitive damages claim.

¶8 Tabingo filed a direct interlocutory petition for review with this court, which was granted. Ruling Granting Review, *Tabingo v. American Triumph, LLC*, No. 92913-1, 2016 WL 4474681 (Wash. Jun. 28, 2016).

ISSUE

¶9 Can a seaman request punitive damages under a general maritime unseaworthiness claim?

STANDARD OF REVIEW

¶10 At issue here is a challenge to a motion to dismiss for failure to state a claim on which relief can be granted. CR 12(b)(6). The trial court may grant a CR 12(b)(6) motion when the plaintiff can provide no conceivable set of facts consistent with the complaint that would entitle him or her to a relief. *Becker v. Cmty. Health Sys., Inc.*, 184 Wash.2d 252, 257-58, 359 P.3d 746 (2015) (citing *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 961, 577 P.2d 580 (1978)). All allegations set forth by the nonmoving party are presumed to be true. *Kinney v. Cook*, 159 Wash.2d 837, 842, 154 P.3d 206 (2007). If it is possible ***46** that facts could be established to support relief, the motion will not be granted. *Kumar v. Gate Gourmet Inc.*, 180 Wash.2d 481, 488, 325 P.3d 193 (2014). A trial court's

ruling to dismiss a claim under CR 12(b)(6) is a matter of law this court reviews de novo. *See Kinney*, 159 Wash.2d at 842, 154 P.3d 206. In addition, maritime actions brought in Washington courts "are governed by federal maritime law, both common law ... and statutory." *Clausen v. Icicle Seafoods, Inc.*, 174 Wash.2d 70, 76, 272 P.3d 827 (2012).

1. Claims for Unseaworthiness Predate the Negligence Claims Provided for under the Jones Act

¶11 The general maritime claim for unseaworthiness has a long history. Historically, seamen had only two methods of recovery for personal injury suffered at sea: maintenance and cure, and unseaworthiness. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995). Common law did not recognize a right to recover for the negligence of the owner of a ship, the ship's master, or other crew members. *Id.* While maintenance and cure has been available for centuries, unseaworthiness arose as an independent cause of action in American maritime law in the 1870s.

¶12 Maintenance and cure has existed from at least the 13th century. *See The Osceola*, 189 U.S. 158, 169, 23 S.Ct. 483, 47 L.Ed. 760 (1903) (citing the "Rules of Oleron," a medieval set of maritime laws and the first formal statement of maritime law in northwestern Europe); *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 543-49, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960) (explaining the history of general maritime law claims in minute detail). Maintenance and cure is a ship owner's obligation to care for sick or injured seamen and to pay those seamen their wages "so long as the voyage is continued." *The Osceola*, 189 U.S. at 175, 23 S.Ct. 483. It includes food and lodging as well as medical treatment.

Atl. Sounding Co. v. Townsend, 557 U.S. 404, 413, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009).

***47** ¶13 Unseaworthiness, a broad category, arose as an independent cause of action in the United States beginning in the 1870s. *The Osceola*, 189 U.S. at 175, 23 S.Ct. 483 (noting a departure in English and American maritime law from European "Continental codes" beginning in 1876). The owner of a ship owes the crew of that ship a duty to provide a vessel fit to take to sea, which could even include the owner's selection of crew members. *See, e.g.*, *The Rolph*, 299 F. 52 (9th Cir. 1924) (holding that the hiring of a physically abusive first mate can render a vessel unseaworthy). Unseaworthiness, though a separate claim, was initially influenced by negligence concepts. *See* 1B BENEDICT ON ADMIRALTY § 23, 3-12 to 3-14 (Joshua S. Force ed., 7th rev. ed. 2014). This was because general maritime law did not provide for recovery on negligence claims against an employer who was also the owner of a seafaring ****438** vessel. *See The Osceola*, 189 U.S. at 159-60, 23 S.Ct. 483. To remedy this prohibition on negligence, Congress passed the Jones Act in 1920, creating causes of action for employer negligence in navigable waters. *See* 46 former U.S.C. § 688 (1920) (codified as amended at 46 U.S.C. § 30104). Thus, negligence and unseaworthiness claims are separate causes of action. BENEDICT ON ADMIRALTY, *supra*, § 23, at 3-14 to 3-15.

¶14 Though the limits of an unseaworthiness claim were still developing when Congress passed the Jones Act, unseaworthiness was open to seamen before the passage of the act in 1920. The language of the act initially led courts to reason that seamen had to choose between a Jones Act negligence claim and a common law unseaworthiness claim. *See id.* § 2, at 1-8. Howev-

er, the United States Supreme Court has since declared that a seaman can bring both claims and recover under both theories in the same action. *Id.* (citing *McAllister v. Magnolia Petrol. Co.*, 357 U.S. 221, 78 S.Ct. 1201, 2 L.Ed.2d 1272 (1958)).

***48** *2. The United States Supreme Court's Rationale in Townsend Is Applicable Here*

¶15 Neither this court nor the United States Supreme Court has decided whether punitive damages are available for general maritime unseaworthiness claims. However, the United States Supreme Court has provided strong guidance for our decision in this case. Because this is a case involving maritime law, the outcome is governed "by federal maritime law, both common law ... and statutory." *Clausen*, 174 Wash.2d at 76, 272 P.3d 827; *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) (explaining that the " 'saving to suitors' " clause of the Constitution preserves state courts' jurisdiction in some maritime cases, but also requires state decisions to conform to federal jurisprudence).

¶16 The United States Supreme Court has held that punitive damages may be available in general maritime actions. In *Atlantic Sounding Co.*, the Court found that a seaman could recover punitive damages from his employer's willful and wanton disregard for its maintenance and cure obligations. In that case, the plaintiff injured his shoulder while aboard his employer's vessel; he sued for maintenance and cure, seeking punitive damages. 557 U.S. at 411, 129 S.Ct. 2561. The Court noted that the common law had long recognized punitive damages and that such damages extended to "claims arising under federal maritime law." *Id.* The

Townsend Court noted further that nothing in maritime law prohibited the application of punitive damages in the maintenance and cure context. *Id.* at 412, 129 S.Ct. 2561. The Court stated three points central to deciding whether punitive damages were available in general maritime actions: (1) "punitive damages have long been available at common law," (2) "the common-law tradition of punitive damages extends to maritime claims," and (3) "there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule." *Id.* at 414-15, 129 S.Ct. 2561. The intent of the Jones Act was to protect seamen as ***49** " 'wards of admiralty,' " and was designed " 'to enlarge that protection, not to narrow it.' " *Id.* at 417, 129 S.Ct. 2561 (quoting *The Arizona v. Anelich*, 298 U.S. 110, 123, 56 S.Ct. 707, 80 L.Ed. 1075 (1936)). Therefore, because the Jones Act was not an explicit federal prohibition, punitive damages were available under the general maritime maintenance and cure claim.

¶17 Townsend applies in this case. Tabingo seeks punitive damages for his unseaworthiness claim. As noted in Townsend, punitive damages have historically been available at common law and those common law punitive damages extend to general maritime law. The only question then is whether there is reason to believe that unseaworthiness is excluded from this "general admiralty rule." *Id.* at 415, 129 S.Ct. 2561. We find it is not excluded.

¶18 As noted above, unseaworthiness claims were available in general maritime law before negligence claims were recognized. Because recovery for pure negligence was either totally unavailable or so limited as to be functionally inaccessible, courts began recognizing recovery based on unseaworthy conditions caused by negligence. ****439** *Mitchell*, 362 U.S. at 544-

45, 80 S.Ct. 926 (discussing the evolution of American unseaworthiness doctrine). However, these unseaworthiness claims were not treated as negligence claims. Rather, the owner's duty to provide a seaworthy vessel was a duty separate from and in addition to other maritime duties. *The Osceola*, 189 U.S. at 175, 23 S.Ct. 483. A seaman can recover for both negligence and unseaworthiness in the same action. *See* BENEDICT ON ADMIRALITY, *supra*, § 2, at 1-8.

¶19 The intent of the Jones Act was to protect seamen as wards of admiralty and to expand protections rather than limit them. *Townsend*, 557 U.S. at 417, 129 S.Ct. 2561. Similar to maintenance and cure, neither the United States Supreme Court nor Congress has indicated that unseaworthiness should be excluded from the general admiralty rule. American Seafoods urges that the Jones Act prohibits recovery of punitive damages. However, because this statutory remedy was in ***50** addition to other, preexisting remedies in general maritime law, the Jones Act does not disturb the availability of punitive damages. *Id.* at 416, 129 S.Ct. 2561.

¶20 As explained above, at common law punitive damages were available and common law remedies extended to general maritime law, and there is no reason to believe unseaworthiness has been excluded from this general maritime rule. Because this is a maritime case, this court follows federal maritime law. Therefore, we find that a request for punitive damages may be brought for a general maritime unseaworthiness claim.

3. The Townsend Decision Indicates That Miles Is Not Controlling in This Case

¶21 American Seafoods urges that *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), should steer our reasoning in this case. However, we decline to adopt that rationale here. Due to its own language and subsequent United States Supreme Court precedent, *Miles* does not control this case.

¶22 *Miles* limits its holding solely to wrongful death claims. In *Miles*, the mother of a dead seaman brought an unseaworthiness claim stemming from wrongful death and sought punitive damages. *Id.* at 21-22, 111 S.Ct. 317. The Court recognized that the "legislative judgment behind the Jones Act, [the Death on the High Seas Act], and the many state statutes" warranted the recognition of a general maritime wrongful death action. *Id.* at 24, 111 S.Ct. 317. However, because Congress had directly spoken to wrongful death recovery and explicitly limited it to pecuniary loss, the Court reasoned the damages for maritime wrongful death were limited as well. *Id.* at 31, 111 S.Ct. 317. It held that punitive damages, as nonpecuniary damages, were not available.

¶23 But this rule is limited only to particular types of claims. The Court noted that the Jones Act "evinces no general hostility to recovery under maritime law," and that the act "does not disturb seamen's general maritime claims ***51** for injuries resulting from unseaworthiness." *Id.* at 29, 111 S.Ct. 317. This indicates the Court did not intend this limitation on damages to expand beyond the claims at issue in *Miles*. That case is limited to claims rooted in statute.

¶24 The United States Supreme Court also analyzed *Miles* in *Townsend*, determining that it has limited applicability in the general maritime context. While the Court stated that the "reasoning of *Miles* remains sound," it also noted that the reasoning in *Miles* is not universally applicable. 557 U.S. at 420, 129 S.Ct. 2561. Because the cause of action in *Townsend* and the remedy sought were both "well established before the passage of the Jones Act," and because Congress had not spoken directly to the issue, punitive damages for maintenance and cure were appropriate. *Id.* at 420-21, 129 S.Ct. 2561. The *Miles* rationale did not apply. We use that same reasoning here. Claims for unseaworthiness predate the Jones Act and are not based on a statutory remedy. Further, as noted in *Townsend*, the Jones Act does not directly address damages for general maritime claims. *Id.* at 420, 129 S.Ct. 2561. There is no other indication that unseaworthiness should be excluded from the general maritime rule. Because of this, *Miles* does not ****440** restrict a general maritime claim for unseaworthiness.

¶25 Nonetheless, American Seafoods argues that we should follow the Fifth Circuit's decision in *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) (plurality opinion), which articulates a limit on punitive damages for unseaworthiness. In *McBride*, two living seamen and the personal representative of a deceased seaman all brought unseaworthiness claims and Jones Act negligence claims, seeking both compensatory and punitive damages. *Id.* at 384. The lead opinion for a fractured court held that punitive damages were unavailable for all the plaintiffs. *Id.* at 391 (lead opinion for a 7-2-6 en banc decision). It followed *Miles*'s reasoning, noting that because the Jones Act limits recovery of punitive damages for actions brought under it, the

same result must occur when a Jones Act claim and general maritime claim are joined in the same action. ***52** *McBride*, 768 F.3d at 388-89. However, as discussed above, this rationale misinterprets both *Miles* and its interaction with *Townsend*. *Miles* is limited to tort remedies grounded in statute. Unseaworthiness is not such a remedy. Congress has not directly addressed the damages available for an unseaworthiness claim. Because of this, following *Townsend*, punitive damages for unseaworthiness have not been curtailed.

¶26 Absent an indication that a general maritime cause of action has been removed from the general maritime rule, common law remedies are still available. Therefore, we apply *Townsend*'s rationale and find that punitive damages are available for unseaworthiness claims.

4. Washington Jurisprudence Suggests That Punitive Damages May Be Available Here

¶27 Washington courts have not dealt squarely with this issue, but our jurisprudence suggests that punitive damages are available for unseaworthiness claims. Washington is one of only a few states that does not regularly provide punitive damages for egregious conduct. *Dailey v. N. Coast Life Ins. Co.*, 129 Wash.2d 572, 575, 919 P.2d 589 (1996). However, maritime actions brought in state courts "are governed by federal maritime law." *Clausen*, 174 Wash.2d at 76, 272 P.3d 827. Therefore, federal law, rather than state law, governs whether punitive damages are available here. *Id.*

¶28 We briefly addressed the punitive damages question in *Clausen*. There, we noted that *Townsend* dealt with the availability of punitive damages in gen-

eral maritime law. *Id.* at 80, 272 P.3d 827. We also noted that the Jones Act did not restrict the damages available under the common law. *Id.* Thus, "the statutory limitations [of the Jones Act] did not affect the types of damages recoverable under general maritime law, such as punitive damages in maintenance and cure actions." *Id.* (emphasis added). Though the parties did not directly challenge whether punitive damages could be recovered, the reasoning in *Clausen* indicates that punitive ***53** damages could be available under general maritime causes of action. *Id.* at 83-84, 272 P.3d 827. Because unseaworthiness is such a general maritime action, we now hold that plaintiffs may recover punitive damages for unseaworthiness claims.

5. Federal Policy Provides Seamen Special Protection as Wards of Admiralty

¶29 Finally, the policy of treating seamen with particular care suggests that seamen should be able to recover punitive damages under certain circumstances. Courts have historically identified seamen as "wards of the admiralty." *Harden v. Gordon*, 11 F.Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103, 64 S.Ct. 455, 88 L.Ed. 561 (1944); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355, 91 S.Ct. 409, 27 L.Ed.2d 456 (1971). Common law provided seamen special protection because they were "subject to the rigorous discipline of the sea, and all the conditions of [their] service constrain [them] to accept, without critical examination and without protest, working conditions and appliances as commanded by [their] superior officers." *Mahnich*, 321 U.S. at 103, 64 S.Ct. 455.

¶30 Allowing for punitive damages here is consistent with this policy of protecting seamen. The pur-

pose of punitive **441 damages is not to compensate a harmed party, but to serve as punishment and to deter others from engaging in similar conduct in the future. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492-93, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008). Federal law indicates that punitive damages may be available for anything from reckless to malicious conduct. *Id.* at 493-94, 128 S.Ct. 2605. Here, Tabingo alleges that American Seafoods knowingly maintained an unseaworthy vessel for two years before the incident. Taking his allegations as true, American Seafoods' conduct could fall into the realm of reckless or malicious behavior. As such, an award of punitive damages would punish American Seafoods, serve as an *54 example for other ship owners, and maintain the law's historical treatment of seamen as special wards of admiralty.

¶31 The policy question we answer is whether punitive damages would help effectuate the goal of providing seamen with particular protection. Though the finder of fact is the one tasked with determining whether punitive damages are warranted, our jurisprudence and policy indicate that as a matter of law, punitive damages are not barred. We hold that availability of punitive damages furthers the policy surrounding general maritime causes of action.

CONCLUSION

¶32 We hold that a seaman making a claim for general maritime unseaworthiness can recover punitive damages as a matter of law. First, the rationale in *Townsend* indicates as such. Punitive damages are available in general maritime claims. Because there is no indication that unseaworthiness claims have been excluded from this general rule, punitive damages are available for unseaworthiness. Second, the *Miles* deci-

sion is limited to wrongful death actions. It is therefore inapplicable to unseaworthiness claims. Finally, recognizing the availability of punitive damages supports the policy of protecting seamen as wards of admiralty. Because of this, we reverse the trial court's partial dismissal and remand to that court for further proceedings consistent with this decision.

WE CONCUR:

Fairhurst, C.J.

Johnson, J.

Madsen, J.

Stephens, J.

Wiggins, J.

González, J.

Gordon McCloud, J.

Yu, J.

APPENDIX B

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY AT SEATTLE

No. 15-2-17089-9 SEA

ALLAN A. TABINGO,
Plaintiff,

v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY, LLC,
Defendants.

HONORABLE BILL BOWMAN
Hearing Date: 02/05/2016
Hearing Time: 10:30 a.m.
February 22, 2016

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES

THIS MATTER came before the Court on Defendants American Triumph LLC and American Seafoods Company, LLC's motion for partial summary judgment dismissing Plaintiff's claim for punitive damages not recoverable under the Jones Act or under the general maritime doctrine of unseaworthiness as a matter of law. The Court has reviewed the files and records herein, the memoranda and declarations submitted and incorporated by the parties in support of and in opposition to the motion, including specifically:

1. Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages;

2. Declaration of Markus B.G. Oberg in Support of Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Punitive Damages, with Exhibits;

3. Plaintiffs Opposition to Defendants' Motion for Partial Summary Judgment Dismissing Plaintiffs Claim for Punitive Damages;

4. Declaration of Joseph S. Stacey in Opposition to Defendants' Motion to Dismiss Plaintiffs Claim for Punitive Damages; and

5. Reply in support of Defendants' Motion for Partial Summary Judgment Dismissing Plaintiffs Claim for Punitive Damages;

The Court additionally considered the oral argument presented by counsel for all interested parties on Friday, February 5, 2016.

The Court being fully advised on the premises finds as follows:

1. Plaintiffs Amended Complaint states claims upon which relief may not be granted and Defendants are entitled to judgment on the pleadings.

2. Specifically, Plaintiffs Amended Complaint asserts claims for damages that are not recoverable under a personal injury claim predicated on the Jones Act or the general maritime theory of unseaworthiness, specifically punitive damages.

3. The Jones Act, by incorporation of FELA, limits Plaintiffs recovery, if any, to pecuniary damages. Punitive damages are non-pecuniary and therefore not

available under the Jones Act for the injury or death of a seaman.

4. Washington State Supreme Court interpretations of maritime law, as well as the uniformity principle set forth by the United States Supreme Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), and confirmed in subsequent decisions, mandate that the measure of damages available under the Jones Act are identical to, and circumscribe, the damages available under the doctrine of unseaworthiness. The United States Court of Appeals for the Fifth Circuit has specifically found that the uniformity principle of *Miles* applies when a general maritime law personal injury claim is joined with a Jones Act claim. *McBride v. Estis Well Service, LLC*, 768 F.3d 382 (2014), *Cert. Denied*, 135 S.Ct. 2310 (2015). Additionally, the Washington State Supreme Court has held that "unseaworthiness and a Jones Act negligence case have essentially identical measures of damages." *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 944 P.2d 1005 (1997) (en banc).

5. Accordingly, Plaintiff may not recover non-pecuniary damages, including punitive damages, under either of his liability theories.

6. Plaintiffs claim for punitive damages, under the Jones Act and general maritime law (unseaworthiness) are dismissed under CR 12(b)(6) for failure to state a claim, because even accepting Plaintiffs allegations as true, no set of facts consistent with the Amended Complaint would entitle Plaintiff to those damages.

NOW, THEREFORE, the Court hereby ORDERS, ADJUDGES, AND DECREES that Defendants' Motion for Partial Summary Judgment Dismissing Plaintiffs Claim for Punitive Damages is **GRANTED**. Plain-

tiffs claim for punitive damages under the Jones Act and the general maritime law doctrine of unseaworthiness is **DISMISSED with prejudice**.

DATED this 22nd day of February, 2016.

/s/ E-Filed
THE HONORABLE BILL BOWMAN
KING COUNTY SUPERIOR COURT JUDGE

Presented By:

s/ Markus B. G. Oberg
Markus B.G. Oberg, WSBA #34914
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APPENDIX C

SUPREME COURT OF WASHINGTON

No. 92913-1
King County No. 15-2-17089-9 SEA

ALLAN A. TABINGO,
Petitioner,
v.

AMERICAN TRIUMPH LLC, and
AMERICAN SEAFOODS COMPANY, LLC,
Respondents.

[STAMP: FILED May 10, 2017]

ORDER DENYING FURTHER RECONSIDERATION

The Court considers Respondents' "MOTION FOR RECONSIDERATION". The Court entered an order changing opinion in the above cause on May 2, 2017.

Now, therefore, it is hereby

ORDERED

That further reconsideration is denied.

DATED at Olympia, Washington this 10th day of May, 2017.

For the Court

/s/ Fairhurst, CJ.
CHIEF JUSTICE

17-1327

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