No. 08-214

In The Supreme Court of the United States

ATLANTIC SOUNDING CO., INC.
and WEEKS MARINE, INC.,

Petitioners,

v.

EDGAR L. TOWNSEND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

May a seaman recover punitive damages for the willful failure to pay maintenance and cure?

PARTIES TO THE PROCEEDING

Petitioners are Atlantic Sounding, Inc. and Weeks Marine, Inc., defendants-appellants below. Respondent is Edgar L. Townsend.

RULE 29.6 DISCLOSURE

Atlantic Sounding, Inc. is a wholly owned subsidiary of Weeks Marine, Inc. Weeks Marine, Inc. is a privately held corporation.

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JURISDICTION

The trial court certified a legal question to the Eleventh Circuit under 28 U.S.C. § 1292(b). On 23 August 2007, the Eleventh Circuit answered the certified question and created conflict with other circuits and two state courts of last resort. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request for an en banc rehearing. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the Eleventh Circuit's decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, Section 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .

The Federal Employer's Liability Act, 45 U.S.C. § 51:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier. . . .

The Jones Act, 46 U.S.C. §§ 30104-30105(b):

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law . . . against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.
>
> * * *
>
> [A] civil action for maintenance and cure or for damages for personal injury or death may not be brought under a maritime law of the United States if . . . the individual suffering the injury . . . was not a citizen or permanent resident alien of the United States . . . the incident occurred in the territorial waters . . . overlaying the continental shelf of a country other than the United States . . . and the individuals suffering the injury . . . was

> employed . . . by a person . . . engaged in the exploration . . . of energy resources. . . .

The Death on the High Seas Act, 46 U.S.C. §§ 30302-30303:

> When the death of an individual is caused by wrongful act . . . occurring on the high seas . . . of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. . . .
>
> * * *
>
> The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought.

STATEMENT OF THE CASE

I. Introduction and Factual Background

The Eleventh Circuit's holding that allows seaman Edgar Townsend to recover punitive damages for the willful failure to pay maintenance and cure is contrary to the "uniformity principle" articulated by this Court in *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990). *Miles* holds that seamen's remedies for their general maritime law causes of action must be consistent with the remedies available under the

Jones Act and the Death on the High Seas Act ("DOHSA").[1] *Miles*, 498 U.S. at 29.

In this case, Mr. Townsend asserts claims for unseaworthiness and maintenance and cure under general maritime law and a claim for negligence under the Jones Act. *Miles* confirms that non-pecuniary remedies are not available pursuant to the Jones Act or DOHSA. *Miles*, 498 U.S. at 31. Punitive damages are non-pecuniary damages. *Barnes v. Gorman*, 536 U.S. 188, 189 (2002); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1506, n.7 (5th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996).

Despite these holdings, Mr. Townsend demands punitive damages as a remedy for his maintenance and cure claim. The Eleventh Circuit's decision allowing Mr. Townsend to seek punitive damages violates the *Miles* uniformity principle by permitting the recovery of a remedy that is not available under the Jones Act or DOHSA.

II. Proceedings Below

On 16 March 2006, Weeks Marine filed its Motion to Strike or, in the Alternative, Dismiss Mr. Townsend's Request for Punitive Damages ("Motion to Strike"). Weeks Marine's Motion to Strike included the argument that *Miles* precluded Mr. Townsend

[1] *See* 46 U.S.C. §§ 30104-30105; 46 U.S.C. §§ 30302-30303.

from seeking punitive damages under general maritime law.

The District Court denied the Motion to Strike because, notwithstanding *Miles*, the District Court concluded that it was bound by *Hines v. LaPorte*, *Inc.*, 820 F.2d 1187 (11th Cir. 1987). *Hines* is an Eleventh Circuit decision that cites pre-*Miles* decisions to hold that seamen may recover punitive damages for employers willfully failing to pay maintenance and cure. *Hines* follows the pre-*Miles* decisions that create a punitive damages remedy based on the dissent in *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

Weeks Marine filed its Motion for Reconsideration of the Punitive Damages Order, or Alternatively, Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and Stay. The District Court denied Weeks Marine's request to reconsider its Punitive Damages Order, but granted the request for certification and stay pursuant to 28 U.S.C. § 1292(b). The pure question of law certified by the District Court is, "Whether punitive damages may be legally awarded in a case where maintenance and cure has been arbitrarily and willfully withheld from a seaman?"

The Eleventh Circuit granted Weeks Marine's Petition for Permission to Appeal Pursuant to Section 1292(b). On 23 August 2007, the Eleventh Circuit ignored *Miles*, reaffirmed *Hines*, and held that seamen may recover punitive damages in a maintenance and cure case. *Atlantic Sounding Co.*, *Inc. v. Townsend*, 496 F.3d 1282, 1285-86 (11th Cir. 2007).

On 11 September 2007, Weeks Marine filed a Petition for Rehearing En Banc. On 27 May 2008, the Eleventh Circuit denied Weeks Marine's request. Weeks Marine filed its Petition for Certiorari on 18 August 2008 and this Court granted the Petition on 3 November 2008.

SUMMARY OF THE ARGUMENT

Mr. Townsend pursues remedies under the Jones Act and general maritime law. This appeal focuses on Mr. Townsend's claim for punitive damages, a non-pecuniary and a non-compensatory remedy, for the willful failure to pay maintenance and cure. The Eleventh Circuit erred when it ignored *Miles*, 498 U.S. 19, and reaffirmed prior precedent from that court allowing a seaman to recover punitive damages under general maritime law for the willful failure to pay maintenance and cure. *See Townsend*, 496 F.3d 1282; *Hines*, 820 F.2d 1187.

Miles controls because it instructs the lower courts to "be vigilant not to overstep the well-considered boundaries imposed by federal legislation" when determining what remedies are available to seamen. *Miles* confirms that the relevant "federal legislation" for seamen is the Jones Act and DOHSA. *Miles*, 498 U.S. at 29. Once the relevant statutes are identified, *Miles* requires uniformity between the statutes and any general maritime law remedies. *Miles*, 498 U.S. at 32-33. *Miles* holds that both the

Jones Act and DOHSA prohibit a seaman from recovering non-pecuniary damages. *Miles*, 498 U.S. at 31. Punitive damages are non-pecuniary damages. *Barnes*, 536 U.S. at 189; *Guevara*, 59 F.3d at 1506, n.7 (collecting cases). Consequently, as held by all post-*Miles* decisions that have analyzed this issue, *Miles* dictates that seamen may not recover punitive damages in a maintenance and cure case. *See Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007);[2] *Guevara*, 59 F.3d 1496; *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

ARGUMENT

I. Historical Context and Background

A. *The OSCEOLA* And *The IROQUOIS* Define The Remedies Available Under A Maintenance And Cure Claim

The first time that this Court recognized a seaman's general maritime law right to recover maintenance and cure was in *The OSCEOLA*, 189 U.S. 158 (1903). *The OSCEOLA* analyzed the Rules of Oleron,

[2] The Third Circuit "by tradition does not cite to its not precedential opinions as authority." Third Circuit Internal Operating Procedures Rule 5.7. *But see* Fed. R. App. P. 32.1 (stating that a "court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as . . . 'not precedent,' or the like; and . . . issued on or after January 1, 2007."

numerous foreign commercial codes, and case law decided by lower courts in the United States to determine the various rights available to seamen under general maritime law. *The OSCEOLA*, 189 U.S. at 169-75. The Court determined that "the law may be considered as settled" that seamen may not recover against their employer for injuries caused by the negligence of their fellow crewmembers, but could seek recovery for injuries caused by the unseaworthiness of the vessel. *The OSCEOLA*, 189 U.S. at 175. Additionally, *The OSCEOLA* confirms that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure. . . ." *The OSCEOLA*, 189 U.S. at 175.

The Court expanded the concept of maintenance and cure in *The IROQUOIS*, 194 U.S. 240, 247 (1904), by allowing the seaman to recover damages related to the master's failure to provide timely cure by "put[ting] into an intermediate port." Subsequent precedent confirms that *The IROQUOIS* allows seamen to recover "necessary expenses," but also "compensation for the hurt" if the failure to pay maintenance and cure causes or aggravates an illness. *Cortes v. Baltimore Insular Line*, *Inc.*, 287 U.S. 367, 371 (1932). Neither *The OSCEOLA* nor *The IROQUOIS* mentions anything beyond compensatory damages for the failure to pay maintenance and cure.

B. *Vaughan v. Atkinson* Expands Maintenance And Cure To Include The Recovery Of Attorneys' Fees

In *Vaughan v. Atkinson*, 369 U.S. 527 (1962), the Court again analyzed what remedies a lower court may award in a maintenance and cure action. *Vaughan* addresses the issue of whether a seaman may recover the attorneys' fees expended to pursue a claim for maintenance and cure against an employer that "was callous in their attitude, making no investigation of [the seaman's] claim and by their silence neither admitting nor denying" whether the employer believed the seaman was entitled to receive maintenance and cure. *Vaughan*, 369 U.S. at 527. The majority opinion notes that the seaman "was forced to hire a lawyer to get what was plainly owed him" and concludes that "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Vaughan*, 369 U.S. at 531. *Vaughan* explains as follows:

> While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows . . . the recovery may also include 'necessary expenses.'

Vaughan, 369 U.S. at 530 (quoting *Cortes*, 287 U.S. at 371). Thus, the majority in *Vaughan* determines that seamen are entitled to recover their attorneys' fees as necessary expenses. *Vaughan*, 369 U.S. at 531.

The dissenting opinion in *Vaughan* argues that no basis exists for departing "from the well-established rule that counsel fees may not be recovered as compensatory damages," but "traditional concepts of the law of damages" would permit the jury to award "exemplary damages" for the employer's "wanton and intentional disregard" of a seaman's right to maintenance and cure that "would not necessarily be measured by the amount of counsel fees. . . ." *Vaughan*, 369 U.S. at 539-40. The dissent in *Vaughan* sowed the seeds of confusion that ultimately created the dispute currently pending before this Court.[3]

[3] Why the *Vaughan* dissent created confusion regarding punitive damages is unclear. This Court has explained seven times that *Vaughan* represents one of the exceptions to the America Rule, nothing more. *See Summitt Valley Indus., Inc. v. Local 112*, 56 U.S. 717, 721 (1982); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Runyon v. McCrary*, 427 U.S. 160, 183 (1976); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975); *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). Courts that have reviewed this Court's precedent explaining *Vaughan* recognize that *Vaughan* does not permit punitive damages, but "stand[s] for the proposition that attorney's fees can be awarded to a prevailing party when his opponent has engaged in bad-faith conduct during litigation." *See Guevara*, 59 F.3d at 1502 (citing *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226 (6th Cir. 1984) (tracing the citation history of *Vaughan*)).

C. Confusion From *Vaughan* Leads The Eleventh Circuit To Conclude That Seamen May Recover Punitive Damages In A Maintenance And Cure Case

Relying on the *Vaughan* dissent's reference to "exemplary damages," the First Circuit Court of Appeals holds that a seaman can recover attorneys' fees and punitive damages for the willful failure to pay maintenance and cure. *See Robinson v. Pocahantas*, 477 F.2d 1048, 1051 (1st Cir. 1973). *Robinson* never addresses why it finds so much comfort in the dissent.

Five years later, the Second Circuit Court of Appeals rejected *Robinson's* expansive reading of *Vaughan* and declined to award punitive damages in a maintenance and cure case based on the actual holding in *Vaughan*. *See Kraljic v. Berman Enterprises*, *Inc.*, 575 F.2d 412 (2d Cir. 1978). Instead of relying upon the dissent's approval of "exemplary damages" in maintenance and cure cases, *Kraljic* notes that "the majority saw fit to go no further than . . . counsel fees" and thus, "fe[lt] constrained to follow [the holding of *Vaughan*]." 575 F.2d at 416-17.

In 1981, the former Fifth Circuit Court of Appeals relied on *Vaughan*, *Robinson*, and other less relevant case law to hold that a seaman may recover punitive damages "when an employer has willfully violated the duty to furnish and maintain a seaworthy vessel." *Complaint of Merry Shipping*, *Inc.*, 650 F.2d 622, 625 (5th Cir. Unit B 1981). After the

Eleventh Circuit Court of Appeals was created, the new Fifth Circuit relied upon *Vaughan*, *Robinson*, and *Merry Shipping* to hold that seamen are entitled to punitive damages under general maritime law for their employer's willful failure to pay maintenance and cure. *Holmes v. J. Ray McDermott Company*, 734 F.2d 1110, 1117-18 (5th Cir. 1987).

Neither *Robinson*, *Merry Shipping*, nor *Holmes* explain why those courts believed that a dissenting opinion authorized a lower court to create a new remedy not contemplated by the "settled" law referenced in prior Supreme Court opinions. *See Cortes*, 367 U.S. at 378; *The IROQUOIS*, 194 U.S. at 241-42; *The OSCEOLA*, 19 U.S. at 175. Other than acknowledging that *Vaughan* does not provide an answer and with only a perfunctory analysis of its own, the Eleventh Circuit followed *Merry Shipping* and *Holmes* in 1987 when it issued its cursory opinion in *Hines*. *Hines* allows a seaman to recover attorneys' fees and punitive damages for an employer's willful failure to pay maintenance and cure. *Hines*, 820 F.2d at 1188-89.

D. *Miles* Clarifies Any Confusion Regarding The Ability Of Seamen To Recover Non-Pecuniary Damages

Notwithstanding any historical ambiguity regarding punitive damages in maintenance and cure cases, the question of a seaman's right to recover non-pecuniary damages was definitively resolved by

Miles, 498 U.S. 19. In *Miles*, the representative of a seaman's estate brought suit alleging Jones Act negligence and general maritime law unseaworthiness. *Miles*, 498 U.S. at 22. Here, the relevant question addressed by *Miles* is whether non-pecuniary damages for the loss of society are recoverable in a wrongful death action based on general maritime law unseaworthiness.

Before resolving that issue, *Miles* discusses at length the case of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne* created a general maritime wrongful death cause of action for two reasons: (1) to ensure consistency with the policy of the Jones Act and DOHSA and (2) to effectuate "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.

The Court emphasizes *Moragne* in *Miles* because *Moragne* "exemplifies *the fundamental principles that guide [a] decision in [a seaman's] case*." *Miles*, 498 U.S. at 27 (emphasis added). Specifically, *Moragne* recognizes that the Congressional enactment of the Jones Act and DOHSA indicate that "we 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. . . ." *Miles*, 498 U.S. at 27. "[I]n this era, admiralty courts should look primarily to th[ose] legislative enactments for policy guidance." *Miles*, 498 U.S. at 27. Ultimately, "*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. The [Congressional] statutes both direct and delimit [a court's] actions." *Miles*, 498 U.S. at 27 (emphasis added).

After recognizing the fundamental principles set forth in *Moragne*, the Court concludes that the "well-considered boundaries" of legal remedies available to seamen are set forth in DOHSA and the Jones Act. *Miles*, 498 U.S. at 31. The Court then notes that DOHSA specifically limits recoverable damages to "pecuniary loss sustained by the persons for whose benefit the suit is brought." *Miles*, 498 U.S. at 31 (citing 46 U.S.C. §§ 30302-30303). In analyzing the Jones Act, the Court confirms that the Jones Act does not provide for non-pecuniary remedies such as loss of society. Although the statute "does not explicitly limit damages to any particular form," the court reaches its conclusion by relying upon approximately one hundred years of jurisprudence to conclude that by "*[i]ncorporating the [Federal Employers' Liability Act ("FELA")] unaltered into the Jones Act*, *Congress must have intended to incorporate the pecuniary limitation on damages as well*." *Miles*, 498 U.S. at 32 (emphasis added) (citing *Michigan Centr. R. Co. v. Vreeland*, 227 U.S. 59 (1913)); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 224 (1996) (confirming that *Miles* recognizes that the Jones Act, which "provides 'action for damages' to '[a]ny seaman who shall suffer personal injury,' permits *compensation only for pecuniary loss*") (emphasis added); *Pacific S.S. Co. v.*

Peterson, 278 U.S. 130, 138 (1928) (discussing "the right to recover compensatory damages under the new [Jones Act] rule for injuries caused by negligence . . . "); *St. Louis*, *Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648, 656 (1915) (analyzing FELA and noting that plaintiffs may recover compensatory damages for personal injuries).

Miles "restore[s] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 33. Because DOHSA and the Jones Act allow only for the recovery of pecuniary damages, *Miles* holds that "this explicit limitation forecloses recovery for non-pecuniary loss, such as loss of society, in a general maritime action." *Miles*, 498 U.S. at 31. *Miles* further explains the holding by noting that "[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 than Congress has allowed in cases of death resulting from negligence. . . ." *Miles*, 498 U.S. at 32-33; *see also American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994) (confirming that the Jones Act "establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seamen" and that courts must "harmonize" federal common lawmaking in admiralty with "the enactments of Congress in the field"); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (explaining that in an "area covered by the statute, it would

be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries").

II. The Eleventh Circuit Committed Reversible Error By Ignoring *Miles* and Allowing Seamen To Recover More Expansive Remedies Than Those Sanctioned By Federal Statute

In *Townsend*, the Eleventh Circuit ignored *Miles'* detailed analysis of the "fundamental principles" that determine the remedies available for seamen and reaffirmed its prior decision in *Hines*. *Townsend*, 496 F.3d at 1286. The Eleventh Circuit rationalized that it was bound by the prior panel rule to follow *Hines* because this Court had not spoken to the specific issue before the Eleventh Circuit. *Townsend*, 496 F.3d at 1285-86. Simply put, even though *Miles* holds that seamen may not recover non-pecuniary damages, the Eleventh Circuit held (without further analysis) that it was bound by *Hines* because *Miles* did not specifically address the issue of punitive damages.

Every post-*Miles* circuit court decision other than *Townsend* confirms that *Miles* extends beyond its specific holding. In *Glynn v. Roy Al Boat Management Corporation*, 59 F.3d 1495, the Ninth Circuit held that seamen could not recover punitive damages in a maintenance and cure case because *Vaughan* never authorized the remedy and "limiting recovery to pecuniary damages [and prohibiting the recovery of

punitive damages] is consistent with *Miles*[']" admonishment of attempts to utilize general maritime law to expand the remedies offered to seamen beyond the controlling legislation (i.e., the Jones Act and DOHSA). *See also In re EXXON VALDEZ*, 270 F.3d 1215, 1226-27 (9th Cir. 2001) (noting that the Ninth Circuit holds that punitive damages are unavailable in a maintenance and cure case for a number of reasons, including recognition in *Glynn* that "under *Miles* . . . we were not free to expand seamen's remedies at will").

Less than one month after *Glynn* was decided, the Fifth Circuit went en banc to analyze whether *Miles* precludes seamen from recovering punitive damages in a maintenance and cure case. *Guevara*, 59 F.3d 1446. Applying *Miles*, the en banc Fifth Circuit held that punitive damages are not available in maintenance and cure actions. *Guevara* notes that "[a]fter *Miles*, it is clear that [pre-*Miles*] precedent . . . is no longer good law in light of the *Miles* uniformity principle because . . . the Jones Act damages limitations control" seamen's claims for punitive damages. *Guevara*, 59 F.3d at 1507.

The Third Circuit Court of Appeals is the most recent federal appellate court to address punitive damages in a maintenance and cure case. *See Kopacz*, 248 Fed. App'x 319. *Kopacz* joins *Glynn* and *Guevara* to hold that *Miles* precludes that remedy. *Kopacz* begins its review of the issue by noting that "the issue of punitive damages in admiralty cases has generally turned on an analysis of *Miles*. . . ." *Kopacz*, 248 Fed.

App'x at 323. *Kopacz* rejects the argument that *Miles* is distinguishable because it addresses a wrongful death action based on an unseaworthiness claim. The desire for uniformity expressed by *Miles* applies equally to maintenance and cure actions "because the failure to provide maintenance and cure is similar [to the unseaworthiness raised in *Miles* that is] a judicially created cause of action in which liability is without fault." *Kopacz*, 248 Fed. App'x at 323.

As *Miles* points out with words equally applicable to any cause of action permitted by general maritime law, "[i]t would be inconsistent with [a court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *See Miles*, 498 U.S. at 32. The Third Circuit ends its analysis by "following the majority of courts" by recognizing that *Miles* precludes seamen from receiving punitive damages for the willful failure to pay maintenance and cure. *Kopacz*, 248 Fed. App'x at 323.

Townsend is wrongly decided. Although *Miles* may not directly address maintenance and cure claims, the uniformity principle articulated by *Miles* clearly applies. Indeed, *Miles* provides each legal conclusion that is necessary to correctly determine that seamen may not recover non-pecuniary damages such as punitive damages under general maritime law. *See Kopacz*, 248 Fed. App'x at 323; *Guevara*, 59 F.3d at 1507; *Glynn*, 57 F.3d at 1505. *Miles* explains

in detail that seamen are precluded from recovering more expansive remedies under general maritime law than those remedies permitted under the Jones Act and DOHSA. *Miles*, 498 U.S. at 23-33; *see also Higginbotham*, 436 U.S. at 625 (recognizing that in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries"). Moreover, *Miles* reconfirms that Congress limited the damages available under the Jones Act and DOHSA to pecuniary losses. *Miles*, 498 U.S. at 31-33; *see also Glynn*, 57 F.3d at 1502 (noting that *Miles* "assumed that the Congress intended to incorporate the pecuniary limitation on damages [that exists in FELA] into the Jones Act as well"); *Guevara*, 59 F.3d at 1507, n.9 (collecting numerous Supreme Court and circuit court decisions holding that a plaintiff may not recover non-pecuniary damages in personal injury or death claims under the Jones Act); *Peterson*, 278 U.S. at 138 (noting that Jones Act remedies are limited to compensatory damages); *Craft*, 237 U.S. at 656 (noting that FELA remedies are limited to compensatory damages).

Because punitive damages are non-compensatory and non-pecuniary in nature, no reason justifies the Eleventh Circuit's decision to ignore *Miles*. *See Barnes*, 536 U.S. at 189 (noting that "[p]unitive damages are not compensatory" damages); *Guevara*, 59 F.3d at 1506 (stating "[a]lthough the *Miles* Court did not mention punitive damages, they are rightfully

classified as non-pecuniary"); *Glynn*, 57 F.3d at 1505, n.14 ("Punitive damages are nonpecuniary damages.") (citing *Bergen v. F/V ST. PATRICK*, 816 F.3d 1345, 1347 (9th Cir. 1987)); *see also Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) ("'It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under [FELA].'" (quoting *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993))); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1242, n.3 (6th Cir. 1971) (explaining that "[i]t is the general rule in this country that exemplary or punitive damages" are not permitted in statutes modeled after the Lord Campbell's Act such as FELA); *Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17, 18 (Tex. 1996) ("Punitive damages, like loss of society damages, are non-pecuniary losses and are not recoverable in Jones Act claims."). Therefore, Weeks Marine requests this Court to reverse *Townsend*, affirm *Glynn*, *Guevara*, and *Kopacz*, and hold that seamen may not recover punitive damages in a maintenance and cure case.

III. Mr. Townsend's Previous Arguments For Ignoring *Miles* Are Without Merit

A. Despite Attempts At Revisionist History, The Jones Act And Maintenance And Cure Overlap

At the Eleventh Circuit, Mr. Townsend asserted that *Miles* does not prohibit the recovery of punitive

damages because maintenance and cure "predate[d]" the Jones Act and provides a separate remedy that was unchanged by Congressional action. Mr. Townsend's Eleventh Circuit Initial Brief, pp. 5-8. Mr. Townsend argues that Congress knew that punitive damages existed as a potential remedy in a maintenance and cure case, but decided to not "fix something which isn't broken. . . ." Mr. Townsend's Eleventh Circuit Initial Brief, p. 6.

First, Mr. Townsend's argument includes an assumption not necessarily supported by the precedent that existed prior to Congress enacting the Jones Act. No Supreme Court decision decided prior to the passage of the Jones Act authorizes seamen to recover punitive damages in a maintenance and cure case. *See*, *e.g.*, *The OSCEOLA*, 19 U.S. 158; *The IROQUOIS*, 194 U.S. 240. Even after the passage of the Jones Act, no pervasive body of case law existed that would allow one to conclude that Congress knew that seamen were entitled to recover punitive damages in a maintenance and cure case. *See*, *e.g.*, *Kraljic*, 575 F.2d at 415 (emphasizing the novelty of seeking punitive damages by noting that the judge at the District Court level remarked, "In my seventeen years I haven't had a single plaintiff come in and ask for punitive damages for failure to pay maintenance and cure."). Therefore, the argument that Congress "left well enough alone" is unpersuasive. Mr. Townsend's Eleventh Circuit Initial Brief, p. 6.

More importantly, Mr. Townsend's argument fails because it ignores that this Court's precedent

recognizes that the Jones Act and maintenance and cure are not separate and are instead inextricably linked. *See Cortes*, 287 U.S. 367. *Cortes* confirms a clear relationship exists between general maritime law maintenance and cure claims and Jones Act negligence claims. Similar to *Miles*, *Cortes* concludes that there is an overlap between the two causes of action and that the Jones Act supplies the blueprint for the remedies that seamen may claim in a lawsuit.

In *Cortes*, a seaman's estate sought to recover for the wrongful death of the seaman allegedly caused by a failure to provide maintenance and cure. *Cortes*, 287 U.S. at 370. The employer in *Cortes* conceded that the Jones Act and maintenance and cure "overlapped" to the extent that both causes of action applied to personal injuries caused by the failure to pay maintenance and cure. However, with respect to wrongful death actions, the employer requested this Court to "give[ ] a narrow content" to the Jones Act and hold that the statute did not change general maritime law's bar on wrongful death claims. *Cortes*, 287 U.S. at 374.

The Court rejects the employer's argument noting that it "imputes to the lawmakers a subtlety of discrimination which they would probably disclaim." *Cortes*, 287 U.S. at 375. *Cortes* further explains as follows:

> Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of

> the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail.

Cortes, 367 U.S. at 378. *Cortes* makes clear that seamen may pursue a claim for damages under the Jones Act if they suffer *injuries or death* as a result of the failure to pay maintenance and cure. *Cortes* does so by recognizing that causes of action arising under the Jones Act and general maritime law, whether for personal injury or death, overlap.[4]

The Fifth Circuit underscored the importance of the overlap between the Jones Act and maintenance and cure described in *Cortes* when it decided *Guevara*, 59 F.3d 1496. *Guevara* explains as follows:

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[4] The irony of attempting to avoid *Miles* by arguing that the Jones Act and maintenance and cure are separate and distinct causes of action should not be lost on this Court. In *Cortes*, the seaman's estate argued that the Jones Act and maintenance and cure overlapped so that the absence of a death remedy under general maritime law would not preclude the estate's wrongful death claim for the failure to provide maintenance and cure. Now, Mr. Townsend argues that the Jones Act and maintenance and cure do not overlap in an attempt to avoid the damage limitations required by the Jones Act.

> [T]he Supreme Court . . . indicated [in *Cortes* that] there are really two 'types' of maintenance and cure actions. The tort-like type involves a personal injury; i.e., typically a worsening of the seaman's physical or mental health caused by the failure to provide maintenance or, more likely, cure. The contract-like type need not involve a personal injury (although it may); it need only involve the loss of a monetary outlay. Because the tort-like maintenance and cure action involves a personal injury . . . it overlaps with the personal injury coverage of the Jones Act. . . .

Guevara, 59 F.3d at 1511-12 (citations omitted). *Guevara* concludes "once there is a statutory/general maritime law overlap in the factual circumstances that are covered, the *Miles* damages uniformity principle is invoked, and punitive damages would be precluded under the general maritime action for maintenance and cure."[5] *Guevara*, 59 F.3d at 1512; *Stone v. Int'l Marine Carriers, Inc.*, 918 P.2d 551, 556

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[5] "It is [also] noteworthy" that Congress amended the Jones Act to deny maintenance and cure to a particular class of seamen. *Guevara*, 59 F.3d at 1512, n.14; 46 U.S.C. § 30105(b). The amendment "indicates a congressional recognition that maintenance and cure actions are related to the Jones Act scheme" by stating that " '[n]o action may be maintained under [the Jones Act] or under any other maritime law of the United States *for maintenance and cure* or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States. . . .' " *Guevara*, 59 F.3d at 1512, n.14 (quoting 46 U.S.C. § 688(b)) (emphasis supplied by the court).

(Alaska 1996) (adopting *Guevara's* analysis of the overlap between the Jones Act and maintenance and cure and holding that seamen may not recover punitive damages in a maintenance and cure case); *Waiters*, 917 S.W.2d at 19 (same); *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 6-34 (4th ed. 2004) (noting that "punitive damages are not available under the Jones Act" and explaining that the remedy is not available under general maritime law because the "tort-like action for maintenance and cure" overlaps with the Jones Act).

Moreover, any attempt to avoid *Miles* by arguing that the Jones Act is distinguishable because maintenance and cure is "primarily [a] contract-oriented claim" is equally without merit. *Guevara*, 59 F.3d at 1513. Pursuant to the argument, seamen could recover punitive damages for a contractual breach of the employer's duty to pay maintenance and cure, but they could not recover punitive damages if the failure to pay maintenance and cure exacerbated the seaman's injury or illness. The contract/tort distinction fails because "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Barnes*, 536 U.S. at 187; *Guevara*, 59 F.3d at 1513 (rejecting the argument that the contract-like claim for maintenance and cure permits punitive damage because "[p]unitive damages . . . are generally unavailable for breach of contract" claims) (citing *Restatement (Second) of Contracts* § 355, at 154-56 (1979); 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1340, at

209-12 (3d ed. 1968); 5 Arthur Linton Corbin, *Corbin on Contracts* § 1077, at 437-39 (1964)); *Waiters*, 917 S.W.2d at 19 (same); *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* §§ 6-34 (explaining no right exists for recovering punitive damages under the "contract-like" claim for failure to pay maintenance and cure because "punitive damages are generally not available" in contract-like actions).

Mr. Townsend also argued to the Eleventh Circuit that "[i]t is strained logic" to extend *Miles* to personal injury cases because the decisions addressing the issue are nothing more than "a collection of death cases." Mr. Townsend's Eleventh Circuit Initial Brief, pp. 11-12. Mr. Townsend seems willing to concede that *Miles* would preclude a seaman's estate from seeking punitive damages in a wrongful death case arising out of the failure to pay maintenance and cure. Nonetheless, Mr. Townsend believes that Congress intended to allow for different remedies in a personal injury case.

The argument fails whether analyzed through the lens of Supreme Court precedent or as a matter of public policy. This Court's recognition that "[i]t would be inconsistent with [a court's] place in the constitutional scheme" to allow more expansive remedies in a death case arising out of an unseaworthiness claim than one arising out of a negligence claim applies with equal force to an attempt to differentiate personal injury and death claims. *Miles*, 498 U.S. at 32. The plain words of the Jones Act confirm that Congress did not contemplate separate and distinct

causes of action. Rather, in the Jones Act, the death action flows directly from the underlying injury. *See* 46 U.S.C. § 30104 (a "seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law against . . . the employer"). Consequently, "admiralty court[s] must be vigilant not to overstep the well-considered boundaries imposed by federal legislation" that "both direct and delimit [a court's] actions." *Miles*, 498 U.S. at 27; *see also Kopacz*, 248 Fed. App'x at 323; *Guevara*, 59 F.3d at 1507.

Furthermore, this Court rebuked Mr. Townsend's argument in *Cortes*. Like Mr. Townsend, the employer in *Cortes* attempted to convince this Court that Congress intended different remedies for personal injury and wrongful death claims covered by the Jones Act. *Cortes*, 287 U.S. at 374. The Court rejected the argument and assumed that Congress would "disclaim" any suggestion that the legislation intended to differentiate between remedies for torts that cause injury and for torts that cause an injury that results in death. *Cortes*, 287 U.S. at 375. *Cortes'* recognition that Congress did not distinguish between personal injury and death remedies confirms that "actions under the general maritime law for *personal injury* are also subject to the *Miles* uniformity principle, as non-fatal actions for personal injury to a seaman are covered by statute – i.e., the Jones Act." *Guevara*, 59 F.3d at 1506 (emphasis in original); *see also Lollie v. Brown Serv., Inc.*, 995 F.2d 1565

(11th Cir. 1993) (utilizing the *Miles* uniformity principle to preclude a seaman's spouse from recovering loss of society and loss of consortium damages in a *personal injury* lawsuit); *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (agreeing "with the Fifth Circuit's reading of *Miles*" and holding that a seaman's spouse may not recover loss of society damages in a *personal injury* lawsuit); *Murray v. Anthony J. Bertucci Constr. Co., Inc.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865 (1992) (stating that the "reasoning [of *Miles*] applies with equal force to a seaman's claim for injuries" and holding that spouses may not recover loss of society damages in a *personal injury* lawsuit); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992) (utilizing the *Miles* uniformity principle to preclude seamen from recovering loss of consortium damages in a *personal injury* lawsuit).

As a matter of public policy, distinguishing between actions for personal injuries and death creates remedies disproportionate to the negligence underlying the action. No justification exists for allowing punitive damages for personal injuries arising out of the willful failure to pay maintenance and cure, but prohibiting those same damages for more reprehensible conduct that causes the death of a seaman.[6] *See*, *e.g.*, *Chan v. Society Expeditions*, *Inc.*,

[6] Similarly, deciding legal rights based on policy concerns spawned by an outdated stereotype that seamen are "wards of admiralty" is wrong. The correct analysis for determining whether a seaman can recover punitive damages starts with and

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39 F.3d 1398, 1407-08 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) (noting that the argument to ignore *Miles* and allow more expansive remedies in a personal injury lawsuit for passengers "makes no sense" because that "would effectively reward a tortfeasor for killing, rather than merely injuring his victim").

B. Mr. Townsend's "Parade of Horribles" Is Unfounded

Mr. Townsend warns that a decision that follows *Miles* and prohibits punitive damages will incentivize employers to arbitrarily withhold maintenance and cure from seamen. *See* Mr. Townsend's Brief In Opposition to the Petition for Writ of Certiorari, p. 13; Mr. Townsend's Eleventh Circuit Initial Brief, pp. 22-24. Weeks Marine questions whether any empirical evidence supports the prediction that plaintiffs' attorneys will refuse to litigate claims that allow for the recovery of attorneys' fees. Furthermore, Weeks Marine asserts that sufficient deterrents exist in the absence of punitive damages.

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ends with the Jones Act. *See Miles*, 498 U.S. at 37 ("We are not unmindful of [the wards of admiralty] principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand the remedies at will simply because it might work to the benefit of seamen. . . .").

Courts recognize that "'there [are three levels of] an escalating scale of liability'" for the employer in a maintenance and cure case. *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 177 (5th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006) (quoting *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987)). If the employer has been reasonable in denying liability, then the employer is liable only for the amount of maintenance and cure. *See Brown*, 410 F.3d at 177. Second, if the court finds that the employer has refused to pay without a reasonable defense, then the employer also becomes liable for compensatory damages. *See Brown*, 410 F.3d at 177. Third, if the employer not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, then the employer becomes liable for attorneys' fees in addition to compensatory damages. *See Brown*, 410 F.3d at 177. Therefore, beyond the employer's desire to "do the right thing," general maritime law motivates employers to properly compensate seamen by threatening the employer with any consequential damages resulting from the aggravation of the injury and with attorneys' fees. *See Glynn*, 57 F.3d at 1504 (reasoning that "by allowing attorney's fees contrary to the normal American rule, *Vaughan* provides seamen with an appropriate remedy for the 'necessary expenses' and damages caused by a willful and persistent failure to pay what is due: hiring a lawyer, filing suit, and incurring legal expenses on top of expenses for their own maintenance and cure").

Last, Mr. Townsend attacks Weeks Marine's request to apply the *Miles* uniformity principle by arguing that if the Court "followed [the *Miles* uniformity principle] to its logical conclusion, there would be no more duty to provide maintenance and cure at all." Mr. Townsend's Eleventh Circuit Initial Brief, p. 21. Mr. Townsend fails to recognize the purpose of the *Miles* uniformity principle. *Miles* reinforces that "[m]aritime tort law is now dominated by federal statute, and [courts] are not free to expand *remedies* at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles*, 498 U.S. at 36 (emphasis added). *Miles* does not limit causes of action or sound the "death knell" for maintenance and cure. Mr. Townsend's Eleventh Circuit Initial Brief, p. 21. In the end, *Miles* only addresses the need for courts to operate within the "constitutional scheme" by ensuring that Congress, not the courts, authorizes the remedies that seamen may seek in a lawsuit. *Miles*, 498 U.S. at 32; *DoCarmo v. F.V. Pilgrim I Corp.*, 612 F.2d 11, 13, n.3 (1st Cir.), *cert. denied*, 446 U.S. 956 (1980) (stating that "courts have . . . consistently confined Jones Act damage award to pecuniary loss[,]" and that "arguments concerning any injustice alleged to be perpetrated by this rule should properly be addressed to Congress").

CONCLUSION

The Court should reverse the Eleventh Circuit's decision and hold that seamen may not recover punitive damages in a maintenance and cure case as a matter of law.

Respectfully submitted,

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