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' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Weeks Marine's position rests on two unassailable principles: (1) *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), confirms that seamen may not recover damages under general maritime law that are inconsistent with the damages available under the Jones Act and the DOHSA and (2) the Jones Act and the DOHSA limit damages for seamen to no more than the recovery of pecuniary damages and pain and suffering. Adhering to these principles, all circuit courts addressing *Miles* hold that *Miles* prevents the recovery of punitive damages in a maintenance and cure case as a matter of law. *See Kopacz v. Delaware River and Bay Authority*, 248 Fed. App'x 319 (3d Cir. 2007); *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996).

Mr. Townsend's response necessarily asks this Court to overrule these principles and precedent. First, Mr. Townsend suggests that the substantial body of law rejecting punitive damages in Jones Act and DOHSA cases is wrongly decided. Congress, however, has had ample opportunity to "correct" the long-settled precedent holding that the DOHSA, the Jones Act and its predecessor, the FELA, do not permit the recovery of punitive damages. Yet, Congress has never amended the statutes to allow for the damages claimed by Mr. Townsend. Mr. Townsend should address his arguments to Congress, not this

Court. *See, e.g., Miles*, 498 U.S. at 32 (reasoning that Congress affirmed this Court's pecuniary limitation on seamen's damages because Congress passed the Jones Act after this Court decided *Michigan Centr. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913)).

After his unsuccessful attack on the long-standing precedent precluding the recovery of punitive damages under the governing statutes, Mr. Townsend then fails to distinguish *Miles*. Mr. Townsend suggests that *Miles* and its progeny concern only wrongful death remedies. But, as shown below, this argument fails to justify allowing greater damages in an injury case and ignores precedent that requires consistent damages for seamen in injury and death cases. Mr. Townsend and his amici also resort to word play in attempting to avoid the reasoning of *Miles*. Regardless of how Mr. Townsend defines "pecuniary damages," the conclusion remains that the Jones Act and DOHSA do not permit the recovery of punitive damages because they are not compensatory damages, pecuniary losses, or pain and suffering.

Mr. Townsend's and his amici's reliance upon *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), is also misplaced. *Baker* addresses the remedies under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, not the Jones Act. In sharp contrast to the seven decades of precedent under the Jones Act holding that punitive damages are unavailable, *Baker* wrote on a clean slate with respect to the CWA.

Finally, Mr. Townsend supports his attempt to overrule long-settled precedent by marshalling policy arguments in favor of punitive damages. Mr. Townsend resorts to the ancient presumption that seamen are "wards of admiralty." This Court holds in *Miles* itself that this presumption cannot overcome the principle that Congress, not the courts, determines the damages available to seamen. Mr. Townsend also argues that, without punitive damages, plaintiffs' attorneys will not represent seamen. Mr. Townsend fails to offer any proof for his hypothesis.

ARGUMENT

I. *Miles* Requires Uniformity Between The Damages Recoverable Under The Jones Act, The DOHSA, And General Maritime Law

Miles emphasizes that the primary source of a maritime plaintiff's remedies is no longer the general maritime law. Instead, a seaman's death damages are controlled and limited by the damages permitted by the Jones Act (incorporating the FELA) and the DOHSA: pecuniary losses in the wrongful death action and a limited remedy in the survival action for a seaman's pre-death pain and suffering. *Miles*, 498 U.S. 19; *see also Dooley v. Korean Airlines Co., Ltd.*, 524 U.S. 116 (1998); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996); *Mobil Oil Corp. v. Higginbotham*, 43 U.S. 618 (1978); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

In analyzing the estate's request for loss of society damages in its wrongful death claim, *Miles* denies the request because recovery under the Jones Act (and DOHSA) is strictly limited to "pecuniary loss." *Miles*, 498 U.S. at 32. *Miles'* holding is consistent with an established line of precedent recognizing that recovery under the FELA and the Jones Act "is limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss." *Gulf, Colorado and Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175-76 (1913) (citing *Vreeland*, 227 U.S. at 68-69; *American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913)); *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648 (1915); *see also Dooley*, 524 U.S. at 122 (DOHSA limits damages to "compensation for the pecuniary loss"); *Zicherman*, 516 U.S. at 231 (same).

Miles' focus on pecuniary losses is not surprising when one considers that every Supreme Court decision preceding *Miles* described the FELA as limited to the recovery of compensatory damages. *Craft*, 237 U.S. at 656 (FELA "invests the injured employe[e] with a right to such damages as will compensate him for his personal loss and suffering"); *McGinnis*, 228 U.S. at 175-76 (stating FELA recovery is "limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss"); *Vreeland*, 227 U.S. at 68-69 (noting that if the seaman "had survived he might have recovered such damages as would have

compensated him for his expense, loss of time, suffering, and diminished earning power"); *Didricksen*, 227 U.S. at 149 (clarifying that the "damage[s recoverable in a FELA death action are] limited strictly to financial loss thus sustained").[1]

Punitive damages are not pecuniary damages. *See, e.g., In re Amtrack "Sunset Limited" Train Crash in Bayou Canot, Alabama*, 121 F.3d 1421 (11th Cir. 1997). Punitive damages are not compensatory damages. *See Baker*, 128 S. Ct. at 2620-21; *Barnes v. Gorman*, 536 U.S. 188 (2002). "'Compensatory damages and punitive damages . . . serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered. . . . The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrong doing.'" *Baker*, 128 S. Ct. at 2633, n. 27 (quoting *Cooper*

[1] *See also Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 136-39 (1928). *Peterson* addresses the question of whether an *injured* seaman may recover damages under the Jones Act for negligence and maintenance, cure, and unearned wages to the end of the voyage. In deciding that a seaman may concurrently seek recovery for both claims, *Peterson* states nine times that seamen are entitled to "compensatory damages" under the Jones Act. *Peterson*, 278 U.S. at 136-39. *Peterson* also refers to the recovery under the statute as a "right to indemnity." *Peterson*, 278 U.S. at 138. Like the concept of compensatory damages (compensating the injured party for the injury sustained and nothing more), the concept of indemnity (agreeing to reimburse an individual *for a loss*) has nothing to do with punitive damages.

Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)).

Because punitive damages do not compensate for pecuniary losses, courts have historically recognized that the FELA and the Jones Act do not allow for the recovery of punitive damages in injury or death cases. *See, e.g., Kopacz*, 248 Fed. App'x 319; *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201-03 (1st Cir. 1994) (prohibiting a seaman from recovering punitive damages in an unseaworthiness injury case because "it has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under [the FELA]")[2]; *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993) (following the guidance of the Jones Act and the DOHSA by prohibiting the recovery of punitive damages in an unseaworthiness death case); *Glynn*, 57 F.3d 1495; *Guevara*, 59 F.3d 1496; *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392 (9th Cir. 1987) (prohibiting the recovery of punitive damages in a personal injury FELA case);

[2] The First Circuit's decision in *Horsley* undermines Mr. Townsend's reliance upon *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973), and decisions that adopted *Robinson's* analysis. *Horsley* essentially overrules *Robinson* because it recognizes (like all other post *Miles*' decisions) that the FELA and the Jones Act do not permit the recovery of punitive damages and that *Miles* requires consistent damages under the Jones Act and general maritime law. *Horsley's* affect on *Robinson* confirms that the Eleventh Circuit is the only circuit court that has ignored *Miles*.

Bergen v. F/V ST. PATRICK, 816 F.3d 1345, 1347 (9th Cir. 1987) (prohibiting the recovery of punitive damages in a seaman's wrongful death case because "[p]unitive damages are non-pecuniary damages unavailable under the Jones Act [or DOHSA]"); *Kozar v. Chesapeake and Ohio Ry. Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971) (prohibiting the recovery of punitive damages in a FELA death case because of the "clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under [the FELA] are compensatory only"); *Kopczynski v. The JACQUELINE*, 742 F.2d 555, 560-61 (9th Cir. 1984) (prohibiting the recovery of punitive damages in a Jones Act personal injury case and stating that any "argument that [punitive damages] should be available ought to be addressed to Congress"); *see also Maritime Overseas Corp. v. Waiters*, 917 S.W.2d 17 (Tex. 1996); *Stone v. Int'l Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993); *State ex rel. Burlington N., Inc. v. District Court of Eighth Judicial District, in and for County of Cascade*, 548 P.2d 1390 (Mont. 1976); *O'Gara v. Cedar Rapids and Iowa City Ry. Co.*, No. C00-0076, 2001 WL 34148161 (N.D. Iowa Sept. 13, 2001); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F. Supp. 1559 (N.D. Ga. 1995); *In re Mardoc Asbestos Case Clusters 1, 2, 5, and 6*, 768 F. Supp. 595 (E.D. Mich. 1991); *Toscano v. Burlington N. R.R. Co.*, 678 F. Supp. 1477 (D. Mont. 1987); *Mahan v. Metro-North Commuter R.R.*, No. 86CIV0922, 1987 WL 7937 (S.D.N.Y.

March 9, 1987); *Cain v. Southern Ry. Co.*, 199 F. 211 (E.D. Tenn. 1911).

Thus, as all the circuits addressing this question in light of *Miles* have observed, *Miles* dictates that seamen may not recover punitive damages under any cause of action, including the failure to pay maintenance and cure. *See also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-34 (4th ed. 2004) (stating that because "punitive damages are not available under the Jones Act, the principle of uniformity precludes them under even a tort-like action for maintenance and cure"). *Miles* demands uniformity with the Jones Act and the DOHSA. Neither statute permits the recovery of punitive damages.

II. Mr. Townsend Ignores Congress' Affirmation Of More Than Seven Decades Of Precedent Holding That The FELA And The Jones Act Do Not Permit The Recovery Of Punitive Damages

Mr. Townsend attempts to argue around decisions holding that the Jones Act limits recovery to "pecuniary damages" or "compensatory damages" by criticizing the opinions as a "large leap of logic." *Miles*, 498 U.S. at 32; Mr. Townsend's Merits Brief at p. 18. Despite Mr. Townsend's criticism and the ink spilled in attempting to divine that seamen *may* have recovered punitive damages in earlier, lower court cases, exhaustive research by Mr. Townsend and his amici fail to reveal *any* cases that hold a plaintiff may

recover punitive damages in a FELA or Jones Act case. The absence of punitive damages cases in this area of law has been commented on by other courts. *See Kozar*, 449 F.2d at 1240-43 (stating "there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed"); *In re Mardoc Asbestos Case Clusters*, 768 F. Supp. at 597 (emphasizing that the plaintiffs failed to "cite even a single Jones Act case in which punitive damages were permitted" and acknowledged that the "weight of authority is against such recovery [of punitive damages] in view of the judicially imposed pecuniary loss limitation on compensatory damages recoverable under the Jones Act").

The inability to locate any "on point" precedent to support what Mr. Townsend describes as a "historically available remedy" suggests a contrary conclusion. Attorneys and courts have known for decades that nothing within the ancient maritime codes summarized by this Court in *The OSCEOLA*,[3] nothing within the FELA, and nothing within the Jones Act permit the recovery of punitive damages for seamen. A unanimous string of decisions that begins

[3] This Court emphasizes the limitations that *The OSCEOLA*, 189 U.S. 158 (1903), placed on recoverable damages for seamen in *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). *Chelentis* makes clear that the damages seamen could recover from their employer prior to the Jones Act were no more than pain and suffering and "the cost of cure and maintenance." *See Warner v. Goltra*, 293 U.S. 155, 159 (1934) (explaining the holding of *Chelentis*).

almost immediately after Congress enacted the FELA holds that neither the FELA nor the Jones Act permit the recovery of punitive damages. *See* Section I above. Persuasive "hornbook law" recognized as early as 1935 that "the [FELA] denies . . . recovery [of punitive damages]." McCormick, *Handbook on the Law of Damages*, § 81 (West Publishing Co. 1935); *Vaughan v. Atkinson*, 369 U.S. 527, 540 (1962) (citing to McCormick when discussing punitive damages in the context of maintenance and cure, but failing to analyze the preclusive effect of the Jones Act as explained by *Miles*).

Congress has never expressed its disapproval of the decisions that disallow the recovery of punitive damages under the FELA and the Jones Act. Congress' inaction is not for lack of opportunity. Congress was "aware" of this Court's decisions that deny recovery beyond pecuniary damages in a FELA case, but did nothing to address that issue when it enacted the Jones Act.[4] *See Miles*, 498 U.S. at 32 (noting that when "Congress passed the Jones Act, the *Vreeland* gloss on FELA . . . was well established" and "Congress must have intended to incorporate the pecuniary limitations on damages"). Congress amended the

[4] As explained in *Warner*, Congress enacted the Jones Act to avoid the damages limitations on seamen's claims that were reiterated in *Chelentis*. *Warner*, 293 U.S. at 158-59. Consequently, the historical context of the passage of the Jones Act suggests that Congress was acutely aware of the affect of this Court's interpretation of recoverable damages for a worker covered by federal statute when it passed the Jones Act.

FELA in 1939 and the Jones Act in 1982. Nothing within those amendments addresses the "hornbook law" that punitive damages are precluded by the FELA.

Congress amended the Jones Act as recently as 2006 and 2008 without attempting to insert a punitive damages remedy into the statute. This congressional inaction is in the face of multiple circuit court decisions in the last decade that have followed the reasoning of *Miles* to preclude the recovery of punitive damages and other non-pecuniary damages in a variety of contexts involving seamen. *See Miller*, 989 F.2d 1450; *Horsley*, 15 F.3d 200; *Lollie v. Brown Serv., Inc.*, 995 F.2d 1565 (11th Cir. 1993); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Constr., Inc.*, 958 F.2d 127 (5th Cir.), *cert. denied*, 506 U.S. 865 (1992); *Guevara*, 59 F.3d 1496; *Glynn*, 57 F.3d 1495.

Congress' failure to disturb a consistent judicial interpretation of a statute provides some indication that "Congress at least acquiesces in, and apparently affirms, that [interpretation]." *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979); *see also Miles*, 498 U.S. at 32 (stating that this Court "assume[s] that Congress is aware of existing law when it passes legislation"). As in *Miles*, this Court should refuse Mr. Townsend's overtures to allow punitive damages in view of Congress' inaction on the issue. *See Miles*, 498 U.S. at 32; *Horsley*, 15 F.3d at 201, 203 (relying on congressional silence regarding the courts' consistent interpretation of the FELA and the Jones Act to determine that the reasoning of *Miles* precludes the

recovery of punitive damages for seamen); *Kopczynski*, 742 F.2d at 561 (holding that seamen may not recover punitive damages in a personal injury case and stating that any "argument that they should be available ought to be addressed to Congress"); *Padilla v. Consolidated Rail Corp.*, 463 N.Y.S.2d 1000, 1001 (N.Y. Sup. Ct. 1983) (stating that Congress' "silence over the years both in the statute [and the] legislative history on the subject of damages theory can only be viewed as foreclosing any basis for punitive damages").

III. Mr. Townsend Fails To Distinguish *Miles*

A. *Miles* Applies With Equal Force To Personal Injury And Death Damages

Recognizing the difficulty of discrediting one hundred years of precedent rejecting the recovery of punitive damages under the Jones Act, the FELA and the DOHSA, Mr. Townsend attempts to partially avoid *Miles*. Mr. Townsend suggests that this Court should analyze death and injury damages differently under *Miles*. *See* Mr. Townsend's Merits Brief at pp. 14-28. In addition to the stark conflict that Mr. Townsend's request creates with *Miles*, Mr. Townsend's proposed "disuniformity principle" fails for several other reasons.

The text of the Jones Act indicates that Congress intended harmony between claims for injury and death by utilizing language that closely linked claims for the two types of actions. The Jones Act provides a

claim for "a seaman injured in the course of his employment or, *if the seaman dies from that injury*." 46 U.S.C. § 30104 (emphasis added). Furthermore, 46 U.S.C. § 30105 recognizes the interrelationship of a seaman's personal injury and death causes of action. *See* 46 U.S.C. § 30105 (preventing certain foreign seaman from recovering under the Jones Act in a "civil action for maintenance and cure or *for damages for personal injury or death*. . . ." 46 U.S.C. § 30105(b) (emphasis added). The text of the Jones Act contradicts the argument that Congress intended for disparate remedies for personal injury and death.

Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 (1932), further contradicts Mr. Townsend's argument. Like Mr. Townsend, the employer in *Cortes* requested disparate damages for injury and death. *Cortes* rejects the request stating that it "imputes to the lawmakers a subtlety of discrimination which they would probably disclaim." *Cortes*, 287 U.S. at 375-76; *see also Zicherman*, 516 U.S. at 224 (citing to *Miles* in noting that the Jones Act is a statute that "permits compensation only for pecuniary loss" for any "seaman who shall suffer personal injury"); *Miles*, 498 U.S. at 36 (recognizing the Jones Act as "Congress' ordered system of recovery for *seamen's injury and death*") (emphasis added); *see also Miller*, 989 F.2d at 1458 (noting that the court would not "irrigate what has been called the 'Serbonian bog' that is the law relating to a seaman's recovery for death and

injury" by allowing for punitive damages under general maritime law, but not the Jones Act).

Mr. Townsend's suggestion that this Court create an "anomaly" by applying a different rule to personal injury and death claims also contravenes *Moragne v. States Marine Lines,* 398 U.S. 375. In *Moragne*, this Court addresses the need for a general maritime law wrongful death action in the context of correcting three "anomalies in maritime law." 398 U.S. at 395-96. One of the anomalies included the fact that the general maritime law unseaworthiness doctrine allowed a claim for personal injury arising in state territorial waters, but not for deaths. *Moragne*, 398 U.S. at 395-96; *Miles*, 498 U.S. at 26. *Moragne* corrected that anomaly (and the others) by recognizing a general maritime law wrongful death cause of action. Now, Mr. Townsend seeks to reintroduce an inconsistency in injury and death cases contrary to *Moragne*. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281 (1980) (holding that whether a non-seaman is injured or dies is irrelevant to authorizing the recovery of loss of society under general maritime law).[5]

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[5] Mr. Townsend also cites to *Alvez* for the proposition that it is not appropriate to use the Jones Act to restrict the scope of available maritime remedies. *See* Mr. Townsend's Merits Brief at pp. 25-26. However, *Alvez* is a case addressing longshoremen damages and is inapposite to the business at hand. Seamen and longshoremen are mutually exclusive categories. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 356-57 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 US. 337, 347 (1991).

Last, Mr. Townsend's request to differentiate injury and death damages for the failure to pay maintenance and cure simply does not make sense. As noted in Weeks Marine's Merits Brief, no justification exists for allowing punitive damages in a case involving injury, but not in a case that involves the death of a seaman. *See, e.g., Chan v. Society Expeditions, Inc.*, 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. Regardless Of The Semantics Employed By Mr. Townsend, The Jones Act Does Not Allow For The Recovery Of Punitive Damages

Mr. Townsend's third attempt to avoid *Miles* is pure semantics based on a misuse of the word "pecuniary." Mr. Townsend utilizes the following syllogism to avoid *Miles*: *Miles* states that the Jones Act does not allow for the recovery of non-pecuniary damages; punitive damages are not non-pecuniary damages; therefore, *Miles* allows the recovery of punitive damages. *See* Mr. Townsend's Merits Brief at pp. 3-4. The fallacy in Mr. Townsend's argument stems from his misstatement of *Miles* in his initial premise. *Miles* holds that the seaman's estate in a wrongful death action can recover damages only for pecuniary losses

(e.g., loss of support, loss of services). *Miles* does not hold that the estate can recover any type of damage that is not non-pecuniary. Simply put, *Miles* restricts the recovery of the estate in a Jones Act death action to the recovery of pecuniary damages, i.e., compensatory damages. Punitive damages are not pecuniary (or compensatory) damages and are unrecoverable under the Jones Act.

Again playing with words, Mr. Townsend also suggests that *Miles* permits "non-pecuniary" damages because *Miles* allows for pain and suffering damages in survival claims. *See* Mr. Townsend's Merits Brief at p. 20. This argument misses the point. It is entirely academic whether pain and suffering damages are characterized as pecuniary or non-pecuniary. The clear point is that all of the damages recoverable under *Miles* are designed to compensate the plaintiff for his or her loss. In other words, *Miles* makes very clear that all of the damages recoverable under the Jones Act are limited to compensatory damages. *Miles*, 498 U.S. at 33-36. Thus, punitive damages are unavailable because they have nothing to do with compensating for loss, pecuniary or otherwise. *See Miles*, 498 U.S. at 35 (citing *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347 (1937) and *Craft*, 237 U.S. at 656). *Van Beeck* and *Craft* address damages available for a survival claim under the FELA and the Jones Act, respectively. Both decisions restrict recovery to "[reasonable compensation] for the loss and suffering of the injured person while he lived." *Craft*, 237 U.S. at 658; *Van Beeck*, 300 U.S. at 347

(explaining that wrongful death and survival claims are "quite distinct" by stating that survival claims are "confined to [the seaman's] personal loss and suffering before he died, while the [wrongful death action] is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death").

The argument that punitive damages are pecuniary damages because they are paid in money is equally unhelpful to Mr. Townsend's cause and this Court's analysis. *See, e.g.,* AAJ Amicus Brief. First, the argument ignores the obvious fact that pecuniary damages are a subset of compensatory damages, and by definition, "are to restore the injured party to the position he or she was in prior to the injury." *Black's Law Dictionary*, 390 (6th ed. 1990). Second, the argument makes a distinction without a difference. All damages, including loss of society damages, are paid in money. Therefore, under the AAJ's definition of pecuniary damages, the *Miles* pecuniary limitation is rendered meaningless.

IV. Mr. Townsend's Reliance On *Exxon Shipping Co. v. Baker* Is Misplaced

Mr. Townsend's and his amici's reliance on *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, is misplaced because that case does not involve a statute that applies to seamen. In *Baker*, the question was whether the CWA prevents the recovery of punitive

damages by private individuals in a vessel pollution case. Here, the question is whether *Miles* and this Court's other precedent restrict damages recoverable under the Jones Act, the DOHSA, and the FELA.

In *Baker*, no case law existed with respect to analyzing whether the CWA allows for punitive damages. After reviewing the text of the CWA (including the savings clause), this Court found "no clear indication of congressional intent to occupy the entire field of pollution remedies." *Baker*, 128 S. Ct. at 2619. Conversely, one hundred years of case law and over eighty years of congressional history reveal that seamen may not recover punitive damages under the FELA, the Jones Act, or the DOHSA because the damages are neither compensatory nor pecuniary.[6]

V. Mr. Townsend's Public Policy Arguments Are Unpersuasive

A. Stereotyping Seamen As "Wards Of Admiralty" Provides No Justification For Ignoring The Jones Act

Left without support from Supreme Court precedent, statutory text, or congressional action to support

[6] Again, the DOHSA specifically limits recovery to "pecuniary loss." 46 U.S.C. § 30303. Punitive damages are not a pecuniary loss under the DOHSA. *See, e.g., Motts v. M/V GREEN WAVE*, 210 F.3d 565, 572 (5th Cir. 2000) (holding that application of the DOHSA's limitation to pecuniary damages precludes the recovery of punitive damages); *Bergen,* 816 F.2d at 1347 (same).

their argument, Mr. Townsend and his amici invoke the inaccurate, outdated "wards of admiralty" stereotype in an attempt to justify the request to construe the Jones Act and the FELA in a way that allows for the recovery of punitive damages. Mr. Townsend's Merits Brief at p. 23, n. 24. *Miles* recognizes that admiralty has previously "shown a special solicitude for the welfare of seamen and their families" and that "it better becomes the human and liberal character of proceedings in admiralty to give rather than to withhold the remedy," but determines that those policies are insufficient to override the Jones Act. 498 U.S. at 36. *Miles* explains as follows:

> We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits in [wrongful death and] survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

Miles, 498 U.S. at 36. In determining what remedies are available to seamen, this Court should resist Mr. Townsend's request to substitute a rule stating that seamen always triumph because they are a "favored class" for legal analysis based on the Jones Act and the applicable precedent.

Moreover, the stereotype that supports the statement that seamen are wards of the court has become factually untrue and serves no purpose in deciding remedies for seamen living in the twenty-first century. Courts often cite to *Harden v. Gordon*, 11 F. Cas. 480, 483-85 (C.C.D. Me. 1823) (No. 6,047), to support the assertion that seamen are wards of the court. In 1823, the court provides the following description of seamen:

> Every court should watch with jealousy an encroachment upon the rights of seamen, *because they are unprotected and need counsel*; *because they are thoughtless and require indulgence*; *because they are credulous and complying; and are easily overreached*. . . . They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, *they are treated in the same manner, as courts of equity are accustomed to treat young heirs* . . . [and] wards with their guardians. . . . They are *considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life*, the most rigid scrutiny is instituted into the terms of every contract, in which they engage.

Harden, 11 F. Cas. at 485 (emphasis added); *see also Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782-83, n. 5 (1952) (noting that seamen "are perhaps better educated and better dressed than their fellows of a

century ago, but, in general, as improvident and prone to the extremes of trust and suspicion as their forebears who ranged the seas, but withal a likeable lot"). Other precedent suggests that seamen were "wards of the admiralty" because they were isolated and have "little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman." *Socony-Vacuum Oil Co., v. Smith*, 305 U.S. 424, 431 (1939).

Regardless of the merits of the stereotype employed in 1823 or even 1952, it has no justification today. Instead of "thoughtless," many of today's Jones Act seamen are graduates of the United States Coast Guard Academy, the Merchant Marine Academy, or one of the many other institutions of higher learning that exist in our nation. *Harden*, 11 F. Cas. at 485. Other seamen may not have college educations, but do graduate from high school and take educational courses that allow them to obtain professional sailing licenses from the United States Coast Guard or a comparable organization in their country of origin. The United States Department of Labor statistics further contradict the stereotype that seamen are like "young heirs" and without training "in other pursuits of life." United States Dep't of Labor, *Dictionary of Occupational Titles*, 0.1, § 197 *et seq.* (4th ed. 1991), *available at* http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOT01F.HTM (describing the average vocational preparation, reasoning development, mathematical development, and language development of ship captains, mates, and engineers);

United States Dep't of Labor, *Dictionary of Occupational Titles*, 0.1, § 911 *et seq.* (4th ed. 1991), *available at* http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOT09A.HTM (describing the average vocational preparation, reasoning development, mathematical development, and language development of boatswain, able-bodied seaman, deckhand, ordinary seaman, oiler, and deck cadet). Finally, a review of the complex and dizzying array of international conventions that seamen must follow eliminates the possibility that today's seamen are "thoughtless." *See, e.g.,* 33 C.F.R. § 151.01 *et seq.* (2008) (U.S. Coast Guard regulations implementing procedures, standards and rules commensurate with the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (collectively referred to as the MARPOL Protocol)); 46 C.F.R. § 10.101 *et seq.* (2008) (U.S. Coast Guard regulations implementing procedures, standards and rules commensurate with the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended in 1995 (commonly referred to as STCW)).

Likewise, circumstances have dramatically changed with respect to seamen's working conditions since 1823. Seamen are no longer isolated. Seamen have the benefit of computers, global positioning systems, cellular telephones, and ship-to-shore satellite telephones. *See also* Port Ministries International Amicus Brief, p. 1, n. 2 (explaining that the organization

provides seamen with "free transportation to locations near ports; serv[es] free home cooked meals; provid[es] recreation and relaxation . . . television and reading material . . . free used clothes . . . free internet and e-mail and low cost phone cards so the seafarers can communicate with their families and friends . . . "). Instead of "helpless," seamen may report safety violations to the United States Coast Guard without fear of retaliation. *See* 46 U.S.C. § 2114. Many of today's seamen belong to unions that "champion[ ] the[ir] rights and interests . . . " and provide benefits beyond those provided by federal statute and general maritime law. Sailors' Union of the Pacific Amicus Curiae Brief, p. 2; *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 636-37 (3d Cir. 1990) (noting that the seaman in that case belonged to a union that had "obtained for its members overtime and premium pay, vacation allowances, disability pensions, and amenities such as televisions, washers and dryers, coffee breaks and midnight lunches"). Even this legal proceeding provides a reminder that seamen are no longer "easily overreached" and "helpless": the American Association for Justice, the Sailors' Union of the Pacific, and Port Ministries International have all jumped aboard to attempt to aid the seaman's cause.

In 2009, no basis exists in law or fact for the assumption that seamen need special protections unavailable to other classes of working men and women. Determining a seaman's legal rights based on policy concerns spawned by an outdated stereotype is

wrong. *See Robertson v. Baldwin*, 165 U.S. 275, 299 (1897) (Harlan, J., dissenting) (addressing the wards of the court theory and arguing that the "constitution furnishes no authority for any such distinction between classes of persons in this country"). The correct analysis for determining whether a seaman can recover punitive damages starts and ends with the Jones Act. This Court should decline any invitation to allow the extraordinary remedy of punitive damages because of stereotypes and employment conditions that may have existed over one hundred years ago.

B. Adding Punitive Damages To Jones Act Seamen's Arsenal Of Remedies Is Unnecessary

In a further effort to circumvent the applicable legal analysis, Mr. Townsend and his amici argue that this Court's confirmation that Jones Act seamen are not entitled to punitive damages in maintenance and cure case will leave them without adequate legal remedies or counsel. *See* Mr. Townsend's Merits Brief at pp. 30-31. Essentially, the opposing briefs argue that plaintiffs' attorneys will refuse to take seamen's cases.

The absence of punitive damages does not change the fact that seamen have more causes of action and remedies than most other employees. As far as causes of action, seamen have a strict liability cause of action for unseaworthiness, a negligence cause of action, and a no fault cause of action for maintenance, cure, and

unearned wages to the end of the voyage. A seaman's estate's potential wrongful death remedies include pecuniary losses (loss of support, loss of nurture and guidance to minor children, and loss of services). A seaman's survival remedy is pre-death pain and suffering and his personal injury remedies include past and future loss wages, past and future medical expenses, and past and future pain and suffering. And, a seaman's maintenance and cure remedies include consequential damages if maintenance and cure are unreasonably withheld and attorneys' fees if the failure to pay is willful.

Seamen have historically preferred the plethora of remedies extended to them under the Jones Act and general maritime law. Prior to the *Vaughan* dissent and the First Circuit's *Robinson* decision, no court allowed seamen to recover punitive damages for the failure to pay maintenance and cure. Even so, seamen lobbied Congress to specifically exclude them from the coverage provided by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, that was adopted in 1927. *See Warner v. Goltra*, 293 U.S. 155, 160 (1934); *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 135-36 (1930). Seamen requested the statutory exclusion from the LHWCA because "*they preferred the remedy for damages under the [Jones A]ct of 1920* to the benefits that would be theirs under a system of workmen's compensation." *Warner*, 293 U.S. at 160 (emphasis added). This Court notes in *Warner* that the subsequent exclusion of a "master or member of a

crew of any vessel" from the LHWCA indicates that "[t]here can be little doubt that Congress did this in the belief that under the statutes then in force master and crew alike *were already adequately protected in case of injury* or death." *Warner*, 293 U.S. at 160 (emphasis added).

Despite the efforts made to ensure that seamen are not covered under the LHWCA, Mr. Townsend references penalty provisions within the LHWCA as support for his belief that Congress would approve if this Court allowed seamen to recover punitive damages under the Jones Act. *See* Mr. Townsend's Merits Brief at pp. 33-37. Contrary to Mr. Townsend's suggestion, the LHWCA and the Jones Act are mutually exclusive. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 356-57 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Mr. Townsend's reference to the LHWCA ignores *Miles'* instruction to utilize the Jones Act as the guiding statute for determining seamen's remedies and ignores the historical fact that seamen prefer the protection of the Jones Act, not the LHWCA.[7]

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[7] Mr. Townsend's attempt to create a new intentional tort is similarly unavailing. Apparently not comfortable with the legal underpinnings of the Eleventh Circuit's decision below, Mr. Townsend proposes that this Court reinvent a seaman's faultless right to maintenance and cure into a new intentional tort action "where the shipowner withholds medical care with the intent to cause pain, disability or injury, or as a part of a scheme or plan to punish seamen. . . ." Mr. Townsend's Merits Brief at p. 2. Mr. Townsend's proposal ignores one hundred years of precedent and

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Nothing has changed since seamen emphatically confirmed their preference for seamen's remedies in 1927. Maritime workers still seek seaman, and not longshoreman, status. Seamen's remedies are so pervasive and the desire to seek recovery as a seaman is so attractive that this Court was required to address seaman status four times between 1990 and 1997. *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997); *Latsis*, 515 U.S. 347; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Wilander*, 498 U.S. 337. In all four cases, the facts involved maritime workers who claimed seaman status, not longshoreman status.

Mr. Townsend also projects a "parade of horribles" if punitive damages are not available for the failure to pay maintenance and cure. Tellingly, Mr. Townsend provides no proof ("scholarly" or otherwise) that the elimination of punitive damages by the Fifth and Ninth Circuits in *Guevara* and *Glynn* created any

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congressional silence on the question presented to create yet another cause of action for seamen. Even if this Court were inclined to twist the contractually based maintenance and cure action defined by *The OSCEOLA*, 189 U.S. 158, *The IROQUOIS*, 194 U.S. 240 (1904), and *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), into an intentional tort, previous decisions of this Court confirm that recovery for such an action is still confined to Jones Act negligence. *See, e.g., Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) (recognizing that the intentional tort of assault is available as a "negligence" action under the FELA): *Alpha S.S. Corp. v. Cain*, 281 U.S. 642, 643 (1930) (recognizing that the intentional tort of assault is a negligence action under the Jones Act).

hardship for seamen. Research of reported Jones Act cases reveals no "shortage" of lawsuits in these circuits, especially when compared to the Eleventh Circuit.

In the end, there is no credible support for the argument that tilting the playing field slightly less in the favor of seamen unfairly diminishes their plentiful remedies or prohibits seamen from access to the courts. Even if future empirical data suggests that an adjustment of the Jones Act is necessary, Weeks Marine reiterates that Congress, not this Court, is the appropriate body to make that change.

CONCLUSION

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

Respectfully submitted,

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