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

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a voluntary national bar association whose lawyer members primarily represent individual plaintiffs in civil actions. The mission of AAJ is to promote a fair and effective judicial system and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms. Through its Admiralty Law Section, AAJ has championed the remedies that courts have traditionally made available under general maritime law. Those remedies would be undermined if the Court adopted Petitioners' proposed new rule barring seamen from seeking punitive damages.

SUMMARY OF ARGUMENT

Seamen have always had the right under general maritime law (a body of federal common law) to sue shipowners for punitive damages. Seamen deserve and need this right because of the unique circumstances of their work environment. Seamen have "heightened legal protections (unavailable to other maritime workers) ... because of their exposure to the 'perils of the sea'." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). Seamen also need these protections because, "as a class, they are peculiarly

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to its preparation. Letters on file with the Clerk show that all parties consent to its submission.

[exposed to] the harsh consequences of arbitrary and unscrupulous actions of their employers." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982).

In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), this Court unanimously held that general maritime law entitles commercial fishermen to recover punitive damages for seriously blameworthy violations of their right to earn a living at sea. Seamen have traditionally been a more "favored class" of litigants than fishermen. *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932). *Baker* thus reaffirms seamen's rights to sue for punitive damages.

No Act of Congress addresses punitive damages at maritime law, and none casts any doubt on seamen's rights to seek punitive damages. The Jones Act, 46 U.S.C. § 30104, granting seamen a negligence cause of action against their employers, "was remedial [legislation], for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936). The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308, provides a wrongful death remedy covering fatal accidents "on the high seas beyond three nautical miles from the shore of the United States" (§ 30302). It does not mention seamen or punitive damages, it does not apply to matters arising in territorial waters, and it has nothing to say about nonfatal accidents.

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which is incorporated by reference in the Jones Act, was enacted to "extend

and enlarge" railroad workers' rights and does not "limit or take away from ... an employee any right theretofore existing by which ... employees were entitled to a more extended remedy than that conferred upon them by the Act." 45 Cong. Rec. 4048 (1910). Railroad workers could sue for punitive damages before FELA was enacted, and under the better view of the law they still can. In any event, this Court has repeatedly held that FELA restrictions on railroad workers' rights cannot displace maritime law's protections of seamen.

Punitive damages issues were not involved in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which dealt solely with the types of compensatory damages available when seamen are killed at work. To the extent that *Miles* has any indirect bearing on the right of seamen to seek punitive damages, it supports the right. *Miles* holds that the Jones Act "incorporate[s]" the pre-Jones Act jurisprudence (*id.* at 32), and it states that "[t]he Jones Act evinces no general hostility to recovery under maritime law" (*id.* at 29).

ARGUMENT

I. *EXXON SHIPPING CO. v. BAKER* SHOWS THAT FEDERAL MARITIME LAW ALLOWS SEAMEN TO SEEK PUNITIVE DAMAGES.

A. *Baker* Reaffirms Maritime Law's Recognition of Punitive Damages.

1. *Baker* awarded maritime punitive damages.

Last term in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), this Court upheld a punitive damages award to fishermen whose livelihoods were damaged by the *Exxon Valdez* oil spill. The Court was unanimous (8-0, Justice Alito not participating) that a punitive award was appropriate.[2]

The Court was also unanimous that the punitive award was based solely on federal maritime common law. (A frequently-used synonym for federal maritime common law is "general maritime law."[3]) The Court emphasized this, stating that "maritime law remains federal common law" (*id.* at 2616) and asserting its "jurisdiction [under the grant of admiralty and maritime jurisdiction in U.S. Const. art. III, § 2, cl. 3] to decide [the case] in the manner of a common law court, subject to the authority of

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[2] Five Justices held that the lower courts' punitive award of $2.5 billion must be cut to $507.5 million; three argued that the $2.5 billion award should have been left standing.

[3] See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 21 (1990).

Congress to legislate otherwise if it disagrees with the judicial result" (*id.* at 2619).

Astonishingly, Petitioner's Brief does not even mention *Baker*. The case is nevertheless definitive that general maritime law includes the punitive damages remedy.

2. *Baker* rests on deep history.[4]

Writing for the Court in *The Amiable Nancy*, 16 U.S. 546, 558 (1818), Justice Story affirmed that general maritime law authorized "exemplary damages [for] the proper punishment [of] lawless misconduct." In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), the Court stated:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.

And in *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107 (1893), the Court cited *The Amiable Nancy* and *Day* for the following proposition:

> In this court the doctrine is well settled that in actions of tort the jury, in

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[4] See generally David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 (1997).

> addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.

The *Lake Shore* Court went on to say that "courts of admiralty ... proceed ... upon the same principles as courts of common law, in allowing exemplary damages" (*id.* at 108).

B. Seamen Have Always Had the Right To Seek Punitive Damages.

Study of the early American jurisprudence on seamen's rights soon brings the realization that "nineteenth-century seamen led miserable lives."[5] Shipowners owed passengers decent treatment,[6] but they could often harshly misuse seamen without anyone's batting an eye. Congress did not outlaw "cruel and unusual punishment" of seamen until 1835,[7] and flogging was legal until 1850.[8]

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[5] David W. Robertson, Steven F. Friedell & Michael F. Sturley, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 163 (2d ed. 2008).

[6] See Robertson, *supra* note 4, at 88-90 (analyzing *Chamberlain v. Chandler*, 5 F. Cas. 413, 414 (C.C.Mass. 1823) (No. 2,575), in which punitive damages were awarded against a ship's captain for "lasciviousness" and other misconduct toward passengers).

[7] Act of March 3, 1835, 4 Stat. 777.

[8] See Act of Sept. 28, 1850, 9 Stat. 515.

Throughout the century, a seaman who deserted the ship could be arrested by public authorities and forcibly returned.[9]

Nevertheless, seamen were "emphatically the wards of the Admiralty." *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 620 (1827) (Johnson, J., concurring). (This Court has called seamen "wards of admiralty" in at least 23 decisions.[10]) When seamen's employers went too far, admiralty courts would award punitive damages, just as in cases involving mistreated passengers and other victims of abuse. In reviewing these awards, it must be noted that "[t]he distinction between punitive and compensatory damages is a modern refinement." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927). "American courts [began] to speak of punitive damages as separate and distinct from compensatory damages [only as] the [19th] century progressed." *Baker*, 128 S.Ct. at 2621.

The earliest published indication that American admiralty courts would protect seamen by mulcting their abusers with monetary punishment seems to be *Swift v. The Happy Return*, 23 F. Cas. 560, 561 n.2 (D.Pa. 1799) (No. 13,697), where Judge Peters discussed an earlier (unnamed) case in which he had found a shipowner guilty of a "very atrocious" failure to provide seamen with proper food. Judge Peters said he handled that situation by threatening

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[9] See *Robertson v. Baldwin*, 165 U.S. 275 (1897) (holding that statutes authorizing the arrest and forced return of deserters were not in conflict with the Thirteenth Amendment).

[10] See WestLaw's SCT database and search "wards" /s "admiralty."

the shipowner with a judicially-created monetary penalty,[11] thereby bringing about an "accommodation" between the seamen and the shipowner. *Id.*

The earliest reported decision in which a seaman was actually awarded punishment money seems to have been *Gould v. Christianson*, 10 F. Cas. 857 (S.D.N.Y. 1836) (No. 5,636). Here, the ship's master's discipline of an inexperienced and clumsy "gentleman's son" (*id.* at 857) who had shipped as an apprentice seamen was held excessive under the circumstances. The court deemed it necessary to "augment the damages beyond a mere remuneration for the bodily injury" in order to deter "coarse and rude usage" of such an apprentice in furtherance of our country's "deep interest in encouraging young men of capacity, ambition, and good character, to seek employment in the merchant marine." *Id.* at 863-64.

A number of other courts also made punitive awards to seamen. In *The Rolph*, 293 F. 269 (N.D.Cal. 1923), *aff'd, 2*99 F. 52 (9th Cir. 1924), the ship's mate severely beat a seaman and the master then callously refused to provide medical care. The court described the mate as a "brutal ... giant,

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[11] The Act of July 20, 1790, 1 Stat. 135, requiring shipowners to provide adequate food and water "during the voyage" and imposing a penalty for "short allowance," did not cover Judge Peters's "atrocious" case, which involved seamen's "[e]xpenses for boarding on shore." 23 F. Cas. at 562 n.2. Judge Peters said the penalty he threatened the shipowner with "would have gone the length of payment equal to that directed [in the statute] for short allowance." *Id.*

weighing in the neighborhood of 285 pounds, all bone and muscle, and with a reputation for ferocity as wide as the seven seas." 293 F. at 269. It noted that the master "brutally refused" the requested medical care "with curses and words of vituperation" (*id.* at 270-72). It emphasized that "[s]ailors on an American ship ... must not be subject to such treatment" because "it is of the utmost importance to the manifest destiny of this republic upon the ocean that the youth of America should be attracted to the sea" (*id.* at 271). To enforce this national policy, the court made a combined compensatory/punitive award of $10,000 (see *id.* at 272). (According to the U.S. Bureau of Labor Statistics, $10,000 in 1923 was worth $124,225 in 2008 dollars.[12])

In *The Margharita*, 140 F. 820 (5th Cir. 1905), a seaman who fell overboard and lost his leg to "a shark or some other marine monster" (*id.* at 821) was denied proper medical care for "nearly four months" (*id.* at 825). During the four-month delay the seaman was in "unspeakable agony ... with the ragged extremity of his cruelly wounded leg incased at times in a box of hot tar and at other times rudely bandaged by the kind, but inexperienced, hands of his shipmates" (*id.* at 828). The trial court held the vessel liable for $1500 in compensatory and punitive damages, stating:

> It is indispensable that in cases of serious injuries to seamen, ... that in order to obtain proper surgical or medical assistance for them, the courts of admiralty, which proceed ever upon the broadest principles of humanity and

[12] See www.bls.gov/data/inflation_calculator.htm.

> justice, should enforce the reasonable rules so frequently announced by the courts .... Such is the duty of the courts, not only to compensate the seaman for his unnecessary and unmerited suffering when the duty of the ship is disregarded, but [also] to emphasize the importance of humane and correct judgment under the circumstances on the part of the [ship's] master.

Id. The Fifth Circuit reversed, not because of any doubt about the propriety of the punitive damages remedy, but on the view that the ship's master had done as well as he could under the circumstances.

Other cases awarding punitive damages to seamen include *The Troop*, 118 F. 769, 770-73 (D.Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904) ("shocking" and "monstrous" refusal of medical care yielded combined compensatory/punitive award of $4000); *Unica v. United States*, 287 F. 177, 180 (S.D.Ala. 1923) (characterizing the ship's master's response to a seaman's need for medical attention as "gross [and] inexcusable ... indifferen[ce]" and awarding $1500 in compensatory and punitive damages); *The City of Carlisle*, 39 F. 807, 811-17 (D.Ore. 1889) (calling the ship's master's treatment of a seriously injured 16-year-old seaman "brutal and indecent," "simply inhuman," and "a grievous wrong" and awarding $1530 in compensatory and punitive damages); *Tomlinson v. Hewett*, 24 F. Cas. 29, 32 (D.Cal. 1872) (No. 14,087) (captain's tricking a seaman with smallpox into going ashore so as to sail off and leave the sick man behind merited avowedly "large" $2500 award); *Brown v. Howard*, 14 Johns. 119 (N.Y. 1817) ("harsh and rigorous, and altogether

unjustifiable" punishment of seaman "merit[ed] severe animadversion" and led to a combined compensatory/punitive award).

See also Pacific Packing & Nav. Co. v. Fielding, 136 F. 577, 579-80 (9th Cir. 1905) ($5000 award against a shipowner that included "smart money ... as a penalty upon the wrongdoer" for ship captain's "wanton or oppressive conduct" in imprisoning a seaman was reversed because the captain was not sued and the defendant shipowner was not vicariously liable for punitive damages); *Latchimacker v. Jacksonville Towing & Wrecking Co.*, 181 F. 276, 278-79 (C.C.S.D. Fla. 1910), *aff'd*, 184 F. 987 (5th Cir. 1910) (remitting $10,000 jury award against a towing company that injured a seaman aboard another vessel to $4826 on the view that the jury's award included "exemplary damages" and that no "wantonness or reckless negligence on the part of the defendant" had been shown); *Sheridan v. Furbur*, 21 F. Cas. 1266, 1269 (S.D.N.Y. 1834) (No. 12,761) (holding that a seaman who had been subjected to "unnecessarily abrupt and severe" discipline was entitled to demand "a punishment in damages corresponding to the wantonness of the wrong," but that the seaman had forfeited his entitlement by admitting that he brought suit only at the instigation of an enemy of the defendant).

See also the dicta in the following cases (presented here in chronological order): *Sampson v. Smith*, 15 Mass. 365, 370 (1819) (stating that "malicious or vindictive" punishment of a seaman would yield "retributive justice [to] apportion the penalty and the damages to the malignity of the [punisher's] motives.") *Elwell v. Martin*, 8 F. Cas. 584, 587-88 (D.Me. 1824) (No. 4,425) (indicating that

"a criminal abuse of power" in punishing a seaman would warrant "vindictive" damages); *Hutson v. Jordan*, 12 F. Cas. 1089, 1092 (D.Me. 1837) (No. 6,959) (suggesting that ship's officers who assault seamen are exposed to "exemplary damages"); *Sherwood v. Hall*, 21 F. Cas. 1292, 1293 (C.C.D. Mass. 1837) (No. 12,777) (dictum that the master of a ship who took on a minor as a seaman, knowing this was against the seaman's father's wishes, could be held to "severe" and perhaps "exemplary damages"); *Thompson v. Oakland*, 23 F. Cas. 1064, 1065 (D.Mass. 1841) (No. 13,971) (dictum that "exemplary damages" will lie for "wanton violation of [a seaman's] contract [of employment]"); *Jay v. Almy*, 13 F. Cas. 387, 389-390 (C.C.D. Mass. 1846) (No. 7,236) (master who wrongly suspected a seaman of fomenting mutiny and imprisoned him was not liable for "smart money or vindictive damages" only because his actions, while exhibiting poor judgment, were not malicious); *The Australia*, 2 F. Cas. 236, 238 (D.Me. 1859) (No. 667) (dictum that "aggravated damage[s]" will lie if a ship leaves a seaman in a foreign port without good cause); *The General Rucker*, 35 F. 152, 155, 158-59 (W.D.Tenn. 1888) (stating that a vessel whose mate "tapped [a seaman] on the head with [a] monkey-wrench," knocking him into the river, was "no doubt" exposed to punitive damages but finding that the mate's conduct was not quite bad enough[13]); *The State of Missouri*, 76 F. 376, 380 (7th Cir. 1896) (stating that a steamboat captain who left port with waterfront laborers aboard and

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[13] The court thought the mate's conduct understandable because "[i]t has not been long since the corporal chastisement of seamen was permitted by law, ... and the officers of steamboats find it hard to give it up, no doubt." 35 F. at 158.

tried to force them to serve as crew members would have been "mulcted in exemplary damages" if sued but holding that the defendant shipowner was not vicariously liable for punitive damages); *The Ludlow*, 280 F. 162, 163-164 (N.D.Fla. 1922) (indicating that a ship's captain who unjustifiably imprisoned a seaman would be liable for "exemplary or punitive" damages but holding that the captain's employer was not vicariously liable for punitive damages).

Other decisions showing that seamen whose rights were seriously abused by their employers were entitled to seek punitive damages include the five cases treated in the concluding paragraph of Section I-B of the Amicus Brief of Sailors' Union of the Pacific.

C. *Baker* Reaffirms Seamen's Rights to Seek Punitive Damages.

The parties awarded punitive damages in *Baker* were "commercial fishermen, Native Alaskans, and landowners" (128 S.Ct. at 2613); the Court had no occasion to directly address seamen's rights. However, it is hard to fathom how seamen, who by long tradition are admiralty's most favored litigants,[14] could somehow be worse off under federal maritime law than fishermen and landowners.

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[14] See, e.g., *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932) (stating that seamen are "a favored class"); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (stating that seamen have "heightened legal protections [that are] unavailable to other maritime workers"); *id.* at 379 (emphasizing "admiralty law's favored treatment of seamen") (Stevens, J., concurring).

In citing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), as the basis for the fishermen's cause of action for loss-of-livelihood damages, 128 S.Ct. at 2630 n. 21, the *Baker* Court lent indirect emphasis to the view that it makes no sense for seamen to lack a remedy available to commercial fishermen. The *Oppen* court based its recognition of the fishermen's cause of action on the view that fishermen "have been treated as ***seamen***" and are thus allowed to invoke "the familiar principle that ***seamen are the favorites of admiralty*** and their economic interests entitled to the fullest possible legal protection." 501 F.2d at 561, 567 (emphasis added).

II. PETITIONERS ARE URGING A GROTESQUE DISTORTION OF *MILES V. APEX MARINE*.

Petitioners' invitation to abolish seamen's rights to seek punitive damages is based solely on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Nothing in *Miles* even hints this would be a good idea.

A. The Holdings and Reasoning of *Miles*.

1. Facts and holding: punitive damages were not at stake.

Mercedel Miles was the mother of a seaman named Ludwick Torregano who died from 62 stab wounds inflicted by a fellow crew member on the vessel *M/V Archon*. Miles pleaded two causes of action against the *Archon*'s owner and operators, asserting their liability for unseaworthiness under the general maritime law and for negligence under the Jones Act, 46 U.S.C. § 30104. She asserted two

types of fatal-injury remedies,[15] under which she sought five categories of compensatory damages: (a) a wrongful death remedy that in Miles's view should allow her to recover damages for loss of support, loss of services, and loss of society (sometimes called loss of companionship or loss of consortium[16]); and (b) a survival remedy that Miles argued should allow Torregano's estate to recover damages for his pain and suffering and for his lost future earnings.

Miles also sought punitive damages. The trial court struck the punitive damages claim. Miles did not sue the vicious stabber,[17] but only his employers (the ship's operators), and the trial court held that the facts did not support holding the employers vicariously liable for punitive damages. The Fifth Circuit affirmed this ruling. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989). The punitive damages issue dropped out of the case at that point. This Court was not concerned with the issue, and it mentioned punitive damages only in the course of reciting the case's procedural history. 498 U.S. at 22.

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[15] The distinction between the two types of fatal-injury remedies is fundamental. Wrongful death actions seek to redress the victim's family's losses. Survival actions seek to recover on behalf of the victim's estate "whatever ... the deceased ... would have ... been able to sue [for] at the moment of ... death—for example, for his pain and suffering, loss of wages, and medical expenses between the time of injury and death." Dan B. Dobbs, THE LAW OF TORTS 804 (Hornbook ed. 2000).

[16] 882 F.2d at 812.

[17] She tried to, but he "was outside the jurisdiction of the district court and could not be served." *Miles v. Melrose*, 882 F.2d 976, 981 (5th Cir. 1989).

Respecting Miles's five compensatory damages claims, the trial court decided against the wrongful death claim for loss of society and against the survival claim for lost future earnings. It upheld the other three claims. The Fifth Circuit agreed on these points and affirmed an award of $7800 for Miles's loss of support and services and $140,000 for Torregano's pain and suffering. 498 U.S. at 22. This Court granted plaintiff's petition for certiorari to decide "whether the parent of a seaman who died from injuries aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death." 498 U.S. at 21.

The *Miles* Court answered both questions no, affirming the Fifth Circuit's decision that Miles's wrongful death remedy did not include damages for loss of society (498 U.S. at 32-33) and that her survival remedy did not include damages for Torregano's lost future earnings (*id.* at 36). Understanding these holdings requires a look at the legal background.

2. The plaintiff's two causes of action.

This Court was not concerned with the *Miles* defendants' liability *vel non*, but a quick look at this matter may enhance understanding of the decision.

The defendants' liability under the unseaworthiness cause of action was unproblematic. A shipowner is strictly liable for unseaworthiness when an operationally defective ship hurts a seaman, and the Fifth Circuit ruled that the vicious stabber's "extraordinarily violent disposition demonstrated

that he was unfit and therefore that the *Archon* was unseaworthy as a matter of law." 498 U.S. at 22.

The defendants' liability under the cause of action for Jones Act negligence was only slightly less obvious. The evidence showed that the defendants should long since have known that the stabber was a dangerous man. See 882 F.2d at 984.

3. The plaintiff's two fatal-injury remedies.

All of the issues addressed in *Miles* involved the categories of compensatory damages available in maritime wrongful death and survival actions. Potentially, the sources of these remedies were the Jones Act, 46 U.S.C. § 30104, and the holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), that general maritime law includes a wrongful death remedy and (arguably[18]) a survival remedy.

The Jones Act was enacted in 1920 to fill a gap in federal maritime law's fabric of protections for seamen. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1970). The gap stemmed from *The Osceola*, 189 U.S. 158 (1903). In that case the question was whether a seaman injured at work on a vessel had a cause of action for the negligence of the vessel's master in bringing about the injury. The Court held no, noting that injured seamen were entitled to maintenance (room and board) and cure (medical care) and could sue in tort for unseaworthiness, but

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[18] The *Miles* Court "decline[d] to address the issue" whether *Moragne* created a survival remedy. 498 U.S. at 34.

holding that they had no action against their employers for workplace negligence. *Id.* at 175.

The Jones Act fills the *Osceola* gap by incorporating by reference the provisions of the 1908 Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. FELA sketches out a negligence cause of action for railway workers and their families. It includes a wrongful death remedy, 45 U.S.C. § 51, and a survival remedy, 45 U.S.C. § 59.

The portion of *Miles* concluding that Miles's wrongful death remedy would not redress loss of society, 498 U.S. at 32-33, proceeded in three steps. The Court first looked to a pre-Jones Act decision, *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), which gave a narrow construction to the FELA wrongful death provision. The provision (45 U.S.C. § 51) says nothing about the categories of damages available, but the *Vreeland* Court reasoned that earlier and contemporaneous wrongful death statutes were generally confined to "pecuniary loss," that loss-of-society damages were not pecuniary because they "cannot be measured or recompensed by money," and that in enacting FELA the 1908 Congress must have meant to follow the prevailing view. 227 U.S. at 70-71.

In its second step, the *Miles* Court concluded that *Vreeland* precludes recovery for loss of society in wrongful death actions under the Jones Act, explaining:

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA

> unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. There is no recovery for loss of society in a Jones Act wrongful death action.

498 U.S. at 32 (citation omitted).

The *Miles* Court's third step determined that the Jones Act preclusion of loss of society damages also controlled the plaintiff's general maritime (*Moragne*-based) wrongful death action. The Court explained:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It 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. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

498 U.S. at 32-33.

Turning to the issue of whether Miles's survival action allowed recovery for Torregano's lost future income, the Court's reasoning was similar. Taking it as settled that the Jones Act/FELA survival remedy (45 U.S.C. § 59) does not allow such damages, the Court stated that "[b]ecause Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law." 498 U.S. at 36.

B. Petitioners' Imaginary *Miles*.

The *Miles* opinion does not touch upon any issues other than the types of compensatory damages available in maritime fatal-injury litigation. Petitioners' Brief (at 19) concedes that "punitive damages are non-compensatory." So how do petitioners set about transmogrifying a decision addressing compensatory damages in fatal injury cases into one controlling punitive damages in personal injury cases? Petitioners' technique is a two-part assertion—it pervades Petitioners' Brief—that "[p]unitive damages are non-pecuniary damages" (at 4) and that "*Miles* holds that seamen may not recover non-pecuniary damages" (at 16). This is the petitioners' linchpin assertion, and both parts of it are wrong.

1. Punitive damages are pecuniary.

In ordinary English, "pecuniary" means "consisting of or pertaining to money" or "requiring

the payment of money."[19] BLACK'S LAW DICTIONARY (8th ed. 2004) defines "pecuniary damages" as "damages that can be estimated and monetarily compensated" and "nonpecuniary damages" as "damages that cannot be measured in money." By any of these definitions, punitive damages are pecuniary. They are awarded as money, can be estimated, and—as recently exhaustively analyzed by this Court in *Baker*—are awarded as "***measured*** retribution." 128 S.Ct. at 2633 (emphasis supplied).

Petitioners' argument not only proposes an odd definition of the term "nonpecuniary." It also entails the implausible suggestion that the *Miles* Court would have characterized punitive damages that way. This seems plainly not so. In her opinion for the Court in *Miles*, Justice O'Connor used the term "nonpecuniary" just twice, at each instance tying it tightly to the issue of compensatory damages for loss of society.[20] And not much more than a year before writing *Miles*, Justice O'Connor repeatedly referred to punitive damages as "pecuniary punishment." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295-97 (1989) (O'Connor, J., concurring in part and dissenting in part). *See also Austin v. United States*, 509 U.S. 602, 614 n.7 (1993) (Court's opinion joined by Justice O'Connor characterizing a civil forfeiture as "pecuniary punishment").

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[19] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 965 (1981).

[20] See 498 U.S. at 30 ("nonpecuniary loss of society suffered as the result of the death"); *id.* at 31 ("non-pecuniary loss, such as loss of society").

The pecuniary-nonpecuniary distinction came into *Miles* from *Vreeland*. The *Vreeland* Court was no more concerned with punitive damages than the *Miles* Court, but it seems equally clear that the *Vreeland* Court would not have characterized punitive damages as nonpecuniary. At the time *Vreeland* was decided, it seems to have been generally thought that punitive damages are properly conceptualized as pecuniary rather than the reverse. For example, in *Louisville, Evansville, & St. Louis Railroad Co. v. Clarke*, 152 U.S. 230, 239 (1894), the Court described an ancient German remedy (called a "weregild") as a privately-initiated proceeding designed to give the victim of a crime "a pecuniary satisfaction" while effecting "the punishment of public crimes." This sounds very like a modern action for punitive damages. Moreover, in the pre-*Vreeland* jurisprudence this Court routinely referred to civil and criminal fines and penalties of all kinds as "pecuniary punishment."[21]

The pecuniary-nonpecuniary distinction is a useful tool for classifying subtypes of compensatory damages; classifying loss of society and pain and suffering as nonpecuniary is a signal that their

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[21] See *Oklahoma ex rel. West v. Gulf, C. & S.F.R. Co.*, 220 U.S. 290, 299 (1911); *Schick v. United States*, 195 U.S. 65, 77 (1904); *Carter v. McLaughry*, 183 U.S. 365, 393 (1902); *Keck v. United States*, 172 U.S. 434, 448 (1899); *Stone v. United States*, 167 U.S. 178, 186 (1897); *The Bayonne*, 159 U.S. 687, 688 (1895); *Huntington v. Attril*, 146 U.S. 657, 681 (1892); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 299 (1888); *Coffey v. United States*, 116 U.S. 436, 444 (1886); *Ex parte Garland*, 71 U.S. 333, 342 (1866); *Norris v. Crocker*, 54 U.S. 429, 437 (1851); *United States v. Carr*, 49 U.S. 1, 8-9 (1850).

assessment entails special difficulties and may require special restrictions. But the pecuniary-nonpecuniary distinction can do no useful work in the completely different realm of punitive damages; "[i]t would be an abdication of judicial responsibility to preclude recovery of punitive damages merely because they are 'nonpecuniary.'"[22]

None of the authorities petitioners cite for the proposition that punitive damages are nonpecuniary makes any effort to justify the appellation; each merely proclaims it, seeming eager to succumb to word magic. All of the explicit judicial statements that punitive damages are nonpecuniary can be traced to a terse *ipse dixit* in *Kopczynski v. The Jacqueline*, 742 F.2d 555, 561 (9th Cir. 1984).

Petitioners' Brief's citation (at 4, 7, 19, 25) of *Barnes v. Gorman*, 536 U.S. 181 (2002), is puzzling. The Court did not say that punitive damages are nonpecuniary; instead it affirmed the truism that "[p]unitive damages are not compensatory" (*id.* at 189), which helps to show how inapt the nonpecuniary term is in the punitive damages context.

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[22] Robert Force, *The Curse of* Miles v. Apex Marine Corp*.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 793 (1995). See *also Portwood v. Copper Valley Elec. Ass'n*, 785 P.2d 541, 543 (Alaska 1990) ("Because punitive damages are not compensatory they are not subject to the pecuniary loss limitation."); Robertson, *supra* note 5, at 164 (deploring the "mind-numbing [effect of] the 'nonpecuniary' tag").

2. *Miles* does not rule out all nonpecuniary damages for seamen.

Even in the compensatory damages context, the pecuniary-nonpecuniary distinction has limited utility. The *Miles* Court used the distinction as a tool for deciding the loss of society issue, and only for that. Miles's claim for Torregano's future earnings was indisputably a pecuniary-loss claim, yet the Court rejected it.

On the other hand, the Court gave three clear indications that it approved of Jones Act plaintiffs' recovering for pain and suffering, although this is a paradigmatic nonpecuniary item. (a) The Court said that "[t]he Jones Act, through its incorporation of FELA, provides that a seaman's right of action for injuries due to negligence survives to the seaman's personal representative." 498 U.S. at 33 (citation omitted). Injured seamen invariably seek pain and suffering damages. (b) The Court (*id.* at 35) cited *St. Louis, Iron Mountain, & Southern Railway Co. v. Craft*, 237 U.S. 648 (1915), for the proposition that the FELA survival remedy, 45 U.S.C. § 59, allows recovery for "losses suffered during the decedent's lifetime." In *Craft*, 237 U.S. at 661, the Court affirmed a $5000 survival award for the deceased's pain and suffering. (In 2008 dollars, the *Craft* award was worth about $105,161.[23]) (c) And (498 U.S. at 22) the *Miles* Court noted with no hint of disapproval that the Fifth Circuit had awarded "$140,000 for Torregano's pain and suffering."

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[23] See *supra* note 12.

C. *Baker*'s Analysis of Statutory Preemption Demolishes Petitioners' Interpretation of *Miles*.

In *Baker*, defendant Exxon argued strenuously that the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq*., preempted the general maritime punitive damages remedy. This Court unanimously rejected Exxon's preemption argument. The Court's explanation (128 S.Ct. at 2619) comprised the six steps quoted below. The italicized statement following each of the quoted steps brings the *Baker* reasoning to bear on the present case.

> [1] Exxon ... admit[s] that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms.
>
> [*Correspondingly, Petitioners' Brief concedes at pp. 7-8 that seamen are entitled to sue for unpaid maintenance and cure and for "compensatory damages for the failure to pay maintenance and cure."*]
>
> [2] This concession ... leaves Exxon with the ... untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss.
>
> [*A fortiori, petitioners' position that the Jones Act somehow preempts punitive but not compensatory damages is equally untenable.*]

> [3] But nothing in the statutory text [of the CWA] points to fragmenting the recovery scheme this way ...
>
> [*The Jones Act likewise says nothing about maintenance and cure and nothing about punitive damages.*]
>
> [4] [A]nd we have rejected similar attempts to sever remedies from their causes of action. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-256 (1984).[24]
>
> [*In arguing that the Jones Act does not impair the maintenance and cure cause of action but does cut into maintenance and cure remedies, petitioners seek* ***precisely*** *the kind of severance that* Silkwood *and* Baker *condemned.*]
>
> [5] All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies....
>
> [*There can be no serious contention that the Jones Act occupied the field of seamen's remedies. "The* ***only*** *purpose of the Jones Act was to remove the bar created by The Osceola, so that seamen*

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[24] In the course of holding that federal statutes regulating nuclear safety did not preempt a state-law action for punitive damages, the *Silkwood* Court stressed the venerability of the punitive damages remedy and said that the remedy should subsist absent "irreconcilable conflict" with federal law or "frustrat[ion] [of] the objectives of the federal law." 464 U.S. at 256.

would have the same rights to recover for negligence as other tort victims."[25] *"[A] remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts."*[26]]

[6] [N]or for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.

[*Petitioners do not suggest any way in which the Jones Act remedial scheme could be frustrated by allowing punitive damages against employers who flout the maintenance and cure obligation.*]

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[25] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (emphasis added; citation and internal quotation marks omitted).

[26] *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283-84 (1980).

D. Other Aspects of Baker Also Show that *Miles* Does Not Diminish the Maritime Punitive Damages Remedy.

Miles played no significant part in *Baker*.[27] There was no suggestion by any member of the *Baker* Court that *Miles* impaired or questioned the general maritime punitive damages remedy. This further shows that petitioners are wrong in claiming that *Miles* impedes the recovery of punitive damages at maritime law. If *Miles* did have that meaning, *Baker* would have been decided, or at least analyzed, differently.

E. Petitioners' Interpretation of *Miles* is Inconsistent With All of This Court's Jurisprudence Treating Congressional Preemption of Federal Common Law.

This Court has consistently striven to harmonize Congress's contributions to maritime law with the underlying maritime common law. For

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[27] The *Baker* majority opinion indicates that *Miles* had only peripheral relevance and did not impede the Court's authority to deal with "a perceived defect in [the maritime] common law [punitive damages] remedy" by creating a new ratio-based ceiling on maritime punitive damages. 128 S.Ct. at 2629-30 & n. 21. Justice Stevens's opinion—disagreeing with the new ratio-based ceiling—says there is no "question that the Court possesses the power to craft the rule it announces today" (*id.* at 2638) but that the wiser *Miles*-driven approach would have heeded "that Congress has affirmatively chosen *not* to restrict the availability" of the punitive damages remedy (*id.* at 2635; emphasis in original).

example, in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 817-19 (2001), this Court found nothing in the Jones Act, Death on the High Seas Act (DOHSA) , or the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et seq.*, that impaired the validity of an action under maritime common law for wrongful death damages suffered by the mother of a negligently-killed shipyard worker. Focusing on the Jones Act, the Court stated: "[E]ven as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes." *Id.* at 818 (citing *Miles*).

Similarly, in *The Arizona v. Anelich*, 298 U.S. 110 (1936), the Court refused to interpret the Jones Act in accordance with FELA decisions applying the assumption of risk defense against workers. Instead, the Court rejected the defense, explaining that the Jones Act must "be interpreted in harmony with the established doctrine of maritime law of which it is an integral part." *Id.* at 123.

See also City of Milwaukee v. Cement Div., National Gypsum Co., 515 U.S. 189, 194 (1995) (holding that a statute authorizing postjudgment interest did not cast any negative light on the general maritime law's prejudgment interest remedy); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 282-84 (1980) (holding that nothing in the Jones Act or DOHSA stood in the way of a general maritime action by the wife of a harbor worker nonfatally injured aboard a ship in state territorial waters); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260-63 (1979) (holding that the 1972 amendments to the LHWCA must be interpreted consistently with the general

maritime rule of joint and several liability); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 n.15, 625 (1978) (indicating that DOHSA impairs general maritime wrongful death remedies only when the statute "speak[s] directly to [the] question"); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393-403 (1970) (determining that nothing in the Jones Act, LHWCA, or DOHSA impeded the Court's creation of a maritime wrongful death remedy); *Cox v. Roth*, 348 U.S. 207, 209 (1955) (holding that whether a Jones Act suit survives the death of the tortfeasor should be decided under the general maritime law rather than by "literal application of the words of the F.E.L.A."); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247-248 (1942) (holding that neither statutes protecting seamen against unfavorable compromises of wage claims nor statutes protecting LHWCA workers against unfavorable compromises of workers' compensation claims impaired a general maritime doctrine protecting seamen against unfavorable compromises of maintenance and cure and Jones Act claims); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 374-77 (1932) (holding that the Jones Act does not impinge upon the rights of seamen to sue for damages for nonpayment of maintenance and cure); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-39 (1928) (holding that the Jones Act "was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages.").

Outside the maritime-law field, federal courts' common-law-making authority is constrained by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), but sizeable bodies of federal common law subsist. Here, too, there is a presumption that "where a [federal] common-law principle is well established ..., the

courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"[28]

Because the Jones Act incorporates FELA, FELA cases have almost direct bearing on seamen's cases. It is thus particularly significant that this Court has consistently sought to interpret FELA so as to bring it into harmony with the underlying common law. *See, e.g., Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 168-69 (2007); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337-38 (1988).

The governing principle is all of the foregoing cases is this:

> Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). Note that in *Garris*, *supra*, this Court had no doubt that *Miles* was fully compatible with this principle. Petitioners' invitation to distort *Miles* into a stark

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[28] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted); see also *United States v. Texas*, 507 U.S. 529, 534 (1993); *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967).

outlier from this entire body of jurisprudence should be declined.

III. THE JONES ACT DOES NOT IMPEDE SEAMEN'S ACCESS TO PUNITIVE DAMAGES.

The assertion that the Jones Act disallows punitive damages is at the heart of petitioners' case. The assertion is wrong.

A. Jones Act Plaintiffs Have the Right to Seek Punitive Damages.

1. The Jones Act did not take away any rights of seamen.

In more than a dozen cases, this Court has affirmed that the Jones Act did not take anything away from seamen. See, e.g., *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) ("[T]he Jones Act ... was remedial [legislation], for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it."); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942) (citations omitted) ("[The Jones Act] is to be liberally construed to carry out its full purpose, which was to enlarge admiralty's protection to its wards."); *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932) ("Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class [citation omitted]."); *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928) ("[The Jones Act] was not intended to restrict in any

way the long-established right of a seaman to maintenance, cure, and wages").[29]

2. It follows that the pre-Jones Act punitive damages cases remain good law.

Almost all of the cases treated *supra* Section I-B—demonstrating that pre-Jones Act seamen could sue for punitive damages—could today be maintained as Jones Act suits.[30] The subsection just

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[29] See also *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283-84 (1980); *Cox v. Roth*, 348 U.S. 207, 209 (1955); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *Beadle v. Spencer,* 298 U.S. 124, 129-30 (1936); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 377-78 (1932); *Jamison v. Encarnacion,* 281 U.S. 635, 640-41 (1930).

[30] The Jones Act would not apply in *Latchimacker* because the defendant was not the injured seaman's employer. And it would not apply in *Thompson*, which was an action for breach of contract. The seamen's actions in the rest of the cases treated in Section I-B were based on the law of maintenance and cure, intentional tort law, or unseaworthiness. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 374-76 (1932), held that seamen have the option of bringing an action for wrongful refusal of maintenance and cure under the Jones Act or under the general maritime law. *Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930), held that intentional torts are actionable under the Jones Act. Liability for unseaworthiness and for Jones Act negligence are often based on identical facts. See, e.g., *Miles v. Melrose*, 882 F.2d 976, 983-984 (5th Cir.

above shows that if those cases arose today, the plaintiffs would still have the right to sue for punitive damages. This Court has never suggested anything to the contrary.[31]

B. FELA Does Not Impair Maritime Punitive Damages.

Petitioners' Brief (at 14-15, 19-20) bases its contention that Jones Act plaintiffs cannot seek punitive damages on the assertion that FELA plaintiffs cannot. The argument is wrong for two reasons. First, this Court has made it clear that FELA restrictions on plaintiffs' rights cannot displace maritime law's protections of seamen. See *Cox v. Roth*, 348 U.S. 207, 209-210 (1955) (holding that a doctrine that FELA actions do not survive the death of the tortfeasor cannot apply in Jones Act cases); *The Arizona v. Anelich*, 298 U.S. 110, 119-124

1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

[31] William E. Aiken, Jr., Annotation, *Recovery of Punitive Damages in Actions Under Jones Act or Federal Employers' Liability Act*, 10 A.L.R.FED. 511, § 2[a] (1972), states that "the generally accepted view" is that punitive damages are recoverable in Jones Act cases. Cases supporting this view include *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1145-48 (6th Cir. 1969); *Kwak Hyung Rok v. Continental Seafoods, Inc.*, 462 F.Supp. 894, 899 (S.D.Ala. 1978), *aff'd without op.*, 614 F.2d 292 (5th Cir. 1980); *Mpiliris v. Hellenic Lines, Ltd.*, 323 F.Supp. 865, 894 (S.D.Tex. 1970), *aff'd without op.*, 440 F.2d 1163 (5th Cir. 1971); *Gunnip v. Warner Co.*, 43 F.R.D. 365, 368 (E.D.Pa. 1968); *Baptiste v. Superior Court*, 164 Cal.Rptr. 789, 795-98 (Cal. App. 1980), *cert. denied*, 449 U.S. 1124 (1981).

(1936) (holding that an assumed risk defense then available to FELA defendants did not apply in Jones Act cases); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 376-377 (1932) (holding that the Jones Act imposes broader duties on employers to care for "sick or disabled employees" than FELA).

Second, on the better view of the law FELA plaintiffs can seek punitive damages. The Senate Judiciary Committee's Report on the 1910 amendments to FELA, 45 Cong.Rec. 4048 (1910), states that when Congress enacted FELA, it meant "to extend and enlarge" the workers' remedies and not to "limit or take away ... any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred by the Act." It follows that if pre-FELA railroad workers could sue their employers for punitive damages, FELA workers can too.

In the pre-FELA jurisprudence, railroad workers so rarely won suits against employers that the issue of punitive damages never came up. However, in *Denver & Rio Grande Railway Co. v. Harris*, 122 U.S. 597 (1887), this Court upheld a punitive damages award against a railroad for shooting a rival railroad's worker. And in *Harris v. Louisville, New Orleans, & Texas Railroad Co.*, 35 F. 116 (C.C.W.D. Tenn. 1888), the court awarded punitive damages to a job applicant who was accused of theft and imprisoned by the railroad. So there is no reason to think that railroad workers would not have been eligible for punitive damages in suits against their employers had they ever managed to win a case.

Moreover, railroads in pre-FELA cases were frequently held exposed to punitive damages. *Lake Shore*, *supra* Section I-A-2, was a punitive damages action by a mistreated railway passenger that ultimately failed on no-vicarious-liability grounds. Mistreated passengers were awarded punitive damages against railroads in *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489 (1875); *Railroad Co. v. Brown*, 84 U.S. 445 (1873); *Cowens v. Winters*, 96 F. 929 (6th Cir. 1899); *Fell v. Northern Pac. R. Co.*, 44 F. 248 (C.C.D. N.D. 1890); *Gallena v. Hot Springs Railroad*, 13 F. 116 (C.C.E.D. Ark. 1882); and *Brown v. Memphis & C.R. Co.*, 7 F. 51 (C.C.W.D. Tenn. 1881).

Railroads' exposure to punitive damages was not limited to passenger-abuse cases. In *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885), and *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889), this Court upheld punitive damages awards against railroads for killing a mule and three pigs. In *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, 62 U.S. 202, 214 (1858), this Court said that the railroad would have been cast with punitive damages for defaming a depot builder if "criminal indifference to civil obligations" had been shown.

William E. Aiken, Jr., Annotation, *Recovery of Punitive Damages in Actions Under Jones Act or Federal Employers' Liability Act*, 10 A.L.R.FED. 511, § 2[a] (1972), concludes that under the majority view FELA plaintiffs can sue for punitive damages. Authorities supporting this view include *Ennis v. Yazoo & M.V.R. Co.*, 79 So. 73 (Miss. 1918); *Alabama Northern Railroad Co. v. Methvin*, 64 So. 175, 176 (Ala.App. 1913); and the district court's thorough and

careful opinion in *Kozar v. Chesapeake & Ohio Railway Co.*, 320 F.Supp. 335 (W.D.Mich. 1970). *Kozar* was reversed by the Sixth Circuit, 449 F.2d 1238 (6th Cir. 1971), and that opinion is the shaky foundation of the proposition that FELA plaintiffs cannot seek punitive damages. The Sixth Circuit's *Kozar* opinion is extremely implausible in two respects. It side-steps FELA's legislative history by claiming that punitive damages are not a "remedy" (449 F.2d at 1240). And it performs a feat of judicial legerdemain on the *Vreeland* line of cases, flipping the ***pecuniary***-loss limitation on wrongful death damages into a broad new rule that all "damages recoverable under [FELA] are ***compensatory*** only" (*id.* at 1241; emphasis supplied).

IV. DOHSA HAS NO BEARING ON THIS CASE.

The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308, provides a wrongful death remedy covering fatal accidents "on the high seas beyond 3 nautical miles from the shore of the United States" (46 U.S.C. § 30302). DOHSA does not mention seamen or punitive damages, it does not apply to matters arising in territorial waters, and it has nothing to say about nonfatal accidents. Respondent's accident occurred inside the 3-mile line, and it was not fatal.

V. SEAMEN NEED AND DESERVE THE PROTECTION OF PUNITIVE DAMAGES.

As this Court explained in *Baker*, punitive damages are justified to punish reprehensible conduct, and to teach the defendant not to do it again and others not to do it at all. *See* 128 S.Ct. at 2621.

Exxon was subjected to punitive damages in *Baker* because its conduct created a reprehensible threat to marine safety. Seamen are uniquely vulnerable to such threats; that is why they have the special protections that federal maritime law has always afforded them. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). If seamen had been injured in the *Exxon Valdez* accident, they would have needed and deserved the punitive damages remedy, at least as much so as any other marine interest.

CONCLUSION

The Eleventh Circuit's decision should be affirmed.

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