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 *AMICUS CURIAE* SAILORS' UNION OF THE PACIFIC IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

This brief is filed in support of Respondent by the Sailors' Union of the Pacific ("SUP"). The SUP was formed in 1891 by Andrew Furuseth – the "Emancipator of Seamen"[2] – from an amalgamation of the Coast Seamen's Union (organized in 1885) and the Steamship Sailors' Union (established in 1886). It represents unlicensed sailors serving in the deck, engine, and steward's departments of U.S.-flag merchant vessels trading all over the world. It is headquartered in San Francisco, maintains branches in Wilmington, California, Seattle, Washington, Honolulu, Hawaii and Norfolk, Virginia, and has been championing the rights and interests of seamen for over 120 years. The SUP's interest in this case lies in clarifying and confirming the long-standing principle that punitive damages may be levied against shipowners who flout their obligation to provide ill and

[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of Court. Pursuant to Rule 37.6, *Amicus* confirms that no counsel for a party authored any part of this brief, no party or counsel for a party made a contribution intended to fund the preparation or submission of this brief, and no person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation.

[2] It was Furuseth who famously remarked: "You can put me in jail, but you cannot give me narrower quarters than as a seaman I have always had. You cannot make me lonelier than I have always been."

injured seamen with maintenance (living expenses) and cure (medical care).

SUMMARY OF ARGUMENT

Last term, in *Exxon Shipping Co. v. Baker*, this Court confirmed that maritime law provides a judge-made remedy for punitive damages whenever "a defendant's conduct is 'outrageous,' owing to 'gross negligence,' 'willful, wanton and reckless indifference for the rights of others,' or behavior even more deplorable." The Brief of *Amicus Curiae* American Association for Justice ("AAJ") demonstrates that seamen are particularly entitled to assert that remedy. The SUP submits that this entitlement may be at its very strongest in the maintenance and cure context.

Maintenance and cure invest seamen – the traditional favorites of admiralty – with some of the oldest, strictest, and most pervasive rights in all of American law. These rights were fashioned to protect ill and injured seamen and to forestall wasteful litigation. The threat of punitive damages reinforces these goals by deterring serious wrongdoing on the part of unscrupulous shipowners and attracting skilled attorneys to the side of needy seamen. The seaman's right to seek punitive damages against shipowners who flout their obligation to pay maintenance and cure was thus well settled by the time the Jones Act was passed. The Act did not repeal that

well-settled right. It was adopted to expand and enhance the legal protections due seamen not narrow them.

If a majority of this Court did not expressly levy punitive damages against the unscrupulous shipowner in *Vaughan v. Atkinson*, it was only because the mistreated seaman did not request them. The doctrinal justification for the exception *Vaughan* carved out of the "American Rule" – when it made callous shipowners liable for a disabled seaman's attorney's fees – is difficult to understand unless the intent was to *punish* the "wanton and intentional disregard" of the right to maintenance and cure.

Petitioners' contention that *Miles v. Apex Marine Corp.*, denudes seamen of the right to seek punitive damages stretches and distorts that narrow decision in three unsupportable ways – from the context of wrongful death to the claims of living seamen, from the realm of tort to the altogether different territory of maintenance and cure, and from the salve of compensatory damages to the scourge of exemplary awards. Properly interpreted, *Miles* neither decides, says, nor implies *anything* about punitive damages. As this Court explained in *Exxon Shipping v Baker* – when it dismissed a *Miles*-based argument virtually identical to the one petitioners urge here – to hold otherwise would frustrate the objectives of maritime law by "fragmenting" the established recovery scheme and severing remedies from their causes of action.

Petitioners' fall-back claim that punitive damages cannot lie in a maintenance and cure action because they are not ordinarily available "in contract" is equally wrong. The obligation to pay maintenance and cure is *sui generis*, was created long before the courts started distinguishing between tort and contract, and is implied in law as an inherent "incident" of the shipowner-seaman relationship without regard to the promises of either party.

The arguments of *Amicus Curiae* Cruise Line International Association ("Cruise Lines") are likewise unconvincing. The suggestions that punitive damages are somehow undesirable or unnecessary are not only naive and self-serving but utterly unsubstantiated. The request that this Court re-write federal maritime law to prevent "transoceanic forum shopping" elevates forum over substance, ignores the choice-of-law and *forum nonconveniens* doctrines that already stand guard at the gate, and forgets that Congress ratified the International Shipowners' Liability Convention to raise world maintenance and cure standards to the American level. The attempt to veil the punitive holding in *Vaughan v. Atkinson* with a semantic quibble about degrees of reprehensibility was betrayed by the *Baker* Court's confirmation that maritime punitive damages can attach to a wide spectrum of deplorable behavior ranging from overt malice to gross negligence. And the Cruise Lines' remaining cavils – such as the overwrought contention that the "very assertion of a defense will provide the 'willfulness' upon which a crewmember will seek

to base a punitive damage award" – are absurd and barely merit a reply.

Whatever petitioners or the Cruise Lines might contend, seaman have always had the right to sue their employers for punitive damages – especially when those employers flout the ancient obligation to pay maintenance and cure.

ARGUMENT

I. Seamen Are Entitled to Seek Punitive Damages Against Employers Who Wantonly Disregard the Maintenance and Cure Obligation

A. Maintenance and Cure Law Aims at Protecting Seamen While Avoiding Litigation

The responsibility to provide sick and injured seamen with maintenance and cure is an "ancient duty" that "has been imposed upon the shipowners by all maritime nations." *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 665, 667 (1943). Sometimes described as "unbeatable,"[3] a seaman's rights to maintenance and cure are "among the most pervasive" in American law.[4] This Court has often emphasized that

[3] *Bay Dredging & Contracting Co. v. Porter,* 153 F.2d 827, 833 (1st Cir. 1946).

[4] See *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 730 (1943); see also, *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S.

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"the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficent purposes."[5]

The remedy is designed to ensure that sick and injured seamen get prompt and unstinting benefits for humanitarian reasons and to secure their rehabilitation and return to service.[6] The "litigiousness which has made the landman's remedy so often a promise to the ear to be broken to the hope" is anathema. *Farrell v. United States*, 336 U.S. 511, 516 (1949):

> It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and mastered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations.

Id. "The employer has a duty to promptly investigate any claim and should resolve doubts in favor of paying the seaman his due."[7]

36, 41-42 (1943); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).

[5] *Aguilar*, 318 U.S. at 735; see also *Warren v. United States*, 340 U.S. 523, 530 (1951).

[6] Justice Story elaborated these points in *Harden v. Gordon*, 11 F. Cas. 480, 482-483 (C.C.D.Me. 1823) (No. 6,047).

[7] Thomas J. Schoenbaum, *Admiralty and Maritime Law* 307 (4th Hornbook ed. 2004).

Litigation sometimes ensues nevertheless.[8] When shipowners fail to discharge their pervasive duty, seamen can sue for the value of unpaid maintenance and cure. *The Osceola*, 189 U.S. 158, 169-173 (1903). If the shipowner's failure was negligent, the seaman can also sue for any resulting injuries "such as the aggravation of the seaman's condition, determined by the usual principles applied in tort cases to measure compensatory damages."[9] See *The Iroquois*, 194 U.S. 240 (1904). And if the "shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault,"[10] there is a "line of authority for awarding punitive damages."[11] See subsections I.B and I.D *infra*.

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[8] AMERICAN MARITIME CASES (AMC) has reported about 1115 maintenance and cure cases since its inception in 1923. See the AMC five-year digests for 1923-27 through 2003-07, at *Articles and Wages* ## 143, 144, 161; *Illness* # 112; and *Personal Injury* ## 118, 138, 141.

[9] *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987), *abrogated on other grounds by Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (*en banc*).

[10] *Id.*

[11] David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 149 (1997) ("Robertson").

B. Well Before the Jones Act Was Passed in 1920, the Availability of the Punitive Damages Remedy in Maintenance and Cure Cases Was Settled Law

Understanding the relevant jurisprudence requires remembering 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. Long before and contemporaneously with the enactment of the 1920 Jones Act, courts thus regarded the availability of damages that were both compensatory and punitive for egregious failures to pay maintenance and cure as an undebatable proposition.

Punitive damages were assessed against shipowners who flouted their maintenance and cure obligations in *The Rolph*, 293 F. 269, 272 (N.D.Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924); *Unica v. United States*, 287 F. 177, 180 (S.D.Ala. 1923); *The Margharita*, 140 F. 820, 828 (5th Cir. 1905); *The Troop*, 118 F. 769, 772 (D.Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904); *The City of Carlisle*, 39 F. 807, 817 (D.Ore. 1889); and *Tomlinson v. Hewett*, 24 F. Cas. 29, 32 (D.Cal. 1872) (No. 14,087). (These cases are discussed in Section I.B of the AAJ's *Amicus* Brief).[12]

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[12] See also Robertson, *supra* note 9, at 86-116.

Other courts indicated that punitive damages would lie for seriously blameworthy violations of the maintenance and cure obligation. In *The Scotland*, 42 F. 925, 927 (S.D.N.Y. 1890), Judge Addison Brown (who had a large reputation as an admiralty expert[13]) made a generous damages award for a ship's improper medical treatment of an injured seaman and said that he would have added "punitive damages" if he had not been persuaded of the captain's "inherent kindness." In *The Vigilant*, 30 F. 288, 288 (S.D.N.Y. 1887), after awarding compensatory damages because a ship had neglected a seaman's medical needs, Judge Brown observed that he would have been "bound to add considerably" more had he not been "entirely satisfied of the master's good faith in his conduct, as well as of his intent to treat the seaman kindly and justly." In *The Svealand*, 136 F. 109 (4th Cir. 1905), a shipowner eventually paid all of a disabled seaman's medical expenses but had neglected his medical needs aboard ship. Awarding another $500 for pain and suffering because of "the apparently aggravated character of the injury" the court stated that it would have entered an even higher award if the shipowner's medical outlays had not already been so "considerable." *Id.* at 113. See also *Nevitt v. Clarke*, 18 F. Cas. 29, 31 (S.D.N.Y. 1846) (No. 10,138) (dictum that "vindictive damages" would lie for "wanton and unjustifiable" violations of seamen's rights); *The Childe Harold*, 5 F. Cas. 619, 620 (S.D.N.Y. 1846) (No.

[13] See *id.* at 109-110 & n.194.

2,676) (stating that "punitive and compensatory" damages would be appropriate if the ship had fed rotted food to the crew).

C. The Jones Act Did Not Strip Seamen of Any Pre-existing Remedies

"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). Far from evincing an intent to preempt, supercede, or repeal the availability of punitive damages in maintenance and cure cases, the Jones Act was designed to expand and enhance seamen's common law rights.[14] (This point is

[14] See *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936) (stating that the 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.***") (emphasis supplied); *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001) (stating that "general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes."); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) ("Congress enacted the Jones Act in 1920 to remove the bar to suit for negligence articulated in *The Osceola*, thereby completing the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.' ") (citing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 328-329 (2d ed. 1975), and David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79 (1985)); *McDermott International, Inc.*

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fully developed in Section III.A.1 of the AAJ's *Amicus* Brief.)

D. *Vaughan v. Atkinson* Supports the Availability of Punitive Damages in Maintenance and Cure Actions

When Clifford Vaughan fell ill with tuberculosis, his employer's refusal to provide maintenance was "callous, . . . recalcitran[t], . . . willful and persistent." *Vaughan v. Atkinson*, 369 U.S. 527, 530-531 (1962). Sick as he was, Vaughan had to find work ashore as a taxidriver. When he brought suit, the district court held that: 1) He could only claim unpaid maintenance – no compensatory damages and no attorneys' fees – and; 2) The employer was entitled to a credit for the taxicab earnings. *Id.* at 528. The Fourth Circuit affirmed. *Id.*

This Court reversed the Fourth Circuit, annulled the credit, and made the shipowner responsible for

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v. Wilander, 498 U.S. 337, 342 (1991) (quoting Gilmore & Black 328-329 for the proposition that "[t]he only purpose of the Jones Act was to remove the bar created by *The Osceola*, so that seamen would have the same rights to recover for negligence as other tort victims."). See also *American Export Lines, Inc. v. Alvez*, 416 U.S. 274, 282-283 (1980); *Cox v. Roth*, 348 U.S. 207, 209 (1955); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 240 n.2, 248 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *Beadle v. Spencer*, 298 U.S. 124, 130 (1936); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 375-376 (1932); *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932); *James v. Encarnacion*, 281 U.S. 635, 640 (1930).

the seaman's attorneys' fees. Justices Stewart and Harlan dissented – but *only* on the credit issue. They agreed with the majority's attorneys' fees decision arguing merely that it needed a firmer doctrinal justification:[15]

> [The majority cites] nothing to [justify] a departure from the well-established ["American Rule"] that counsel fees may not be recovered as compensatory damages. However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be ***entitled to exemplary damages in accord with traditional concepts of the law of damages***. While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made. See *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 [1851].[16]

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[15] The majority's explanation of the doctrinal basis for the fee award is analyzed in David W. Robertson, *Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. MAR. L. & COM. 507, 552-553 (1996).

[16] The relevant passage in *Day* 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. . . . [T]he degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also,

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369 U.S. at 540 (emphasis supplied, paragraph break and some citations omitted).

The *Vaughan* majority did not respond to Justices Stewart's and Harlan's views on the fee-award, but its opinion bristles with indignation on behalf of the mistreated seaman.[17] It thus seems likely that the only reason the majority did not expressly award punitive damages was that Vaughan had not asked for them. Agreed Gilmore and Black:

> It will be noted that the [*Vaughan*] Justices were, in effect, unanimous on the damage recovery. The dissenting Justices felt that the exemplary or punitive damages, if plaintiff was found entitled to them, should be awarded as such; the majority Justices, perhaps because of their narrow interpretation of the grant of certiorari and in order to

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that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel-fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."

[17] The Court called the employer's conduct "callous," "recalcitran[t]," "willful and persistent," and said "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." 369 U.S. at 530-531. It disparaged the idea of allowing a credit for Vaughan's taxicab earnings, stating that this would create "a sorry day for seamen" and put "a dreadful weapon in the hands of unconscionable employers." *Id.* at 533.

> avoid further proceedings, awarded what were essentially punitive damages under the name of counsel fees.[18]

The First Circuit expressed the same view in *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051 (1st Cir. 1973), noting that Justices Stewart and Harlan, although dissenting on another point, were "seemingly in agreement with the majority's fundamental premise" that punitive damages were appropriate.[19] Many lower courts have cited *Vaughan* as authority for awarding punitive damages against callous and recalcitrant shipowners.[20]

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[18] Gilmore & Black, *supra* note 14, at 313 (footnotes omitted).

[19] Petitioners (at 11) proclaim that "*Robinson* never addresses why it finds so much comfort in the [*Vaughan*] dissent." This is dramatically wrong. Indeed, the major importance of *Robinson* is the court's careful attention to the indications that the *Vaughan* Justices were split on the credit issue but generally agreed on the damages point.

[20] See, e.g., *Hines v. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987); *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 88 (5th Cir. 1984); *Holmes v. J. Ray McDermott & Company*, 734 F.2d 1110, 1118 (5th Cir. 1984); *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981); *Trident Marine, Inc. v. M/V Atticos*, 1995 WL 91125 at * 1 (E.D.La., March 1, 1995); *Ridenour v. Holland America Line Westours, Inc.*, 806 F. Supp. 910, 912-913 (W.D.Wash. 1992); *Cheramie v. Garland*, 1989 WL 133098 at * 5 (E.D.La., October 20, 1989); *In re Den Norske Amerikalinje A*/S, 276 F. Supp. 163, 173-174 (N.D. Ohio 1967), *rev'd on other grounds sub nom. United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969); *Weason v. Harville*, 706 P.2d 306, 309-310 (Alaska 1985). Note that the foregoing cases from the Fifth and Ninth Circuits have been overruled or undermined by *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir.

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E. The Two Fundamental Policies of Maintenance and Cure Law Require an Effective Penalty

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36-37 (1990), this Court cited the "strong policy arguments" of Richard Posner for allowing compensation for a fatal accident victim's lost future income. Judge Posner has also presented strong policy arguments for punitive damages in virtually all cases of serious wrongdoing. William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 47-48, 160-163, 184-185, 302-307 (1987). The need for a punitive remedy to deter serious wrongdoing is especially apparent in the maintenance and cure context (see *supra* Section I.A). As the Alaska Supreme Court explained:

> When a shipowner refuses to pay maintenance and cure the seaman's only alternative is a lawsuit, which is a lengthy and expensive process. During this time, the seaman may have no funds to effect his recovery, and thus may be forced to work when he should be resting. In addition, the shipowner might use a refusal to pay maintenance as a bargaining tool, forcing an impoverished

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1995) (*en banc*), or *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), and the Alaska decision was overruled by *Stone v. International Marine Carriers, Inc.*, 918 P.2d 551 (Alaska 1996). The cases in this footnote are not cited for their technical validity as authorities but as evidencing the widespread view that *Vaughan* supported punitive damages.

> seaman to accept a low amount or face a lengthy court battle. Thus, the availability of punitive damages will act as a deterrent to the unscrupulous employer, and will result in more speedy resolution of maintenance and cure claims.[21]

Depriving sick and injured seamen of their traditional punitive damages remedy would have ***two*** undesirable consequences: Unscrupulous shipowners would not only be encouraged to take advantage of unrepresented or poorly represented seamen, but seamen with no Jones Act or unseaworthiness claims, and nothing to litigate save an unvarnished cause of action for maintenance and cure, would have a harder time finding a lawyer. This Court has frequently recognized that punitive damages may be necessary "when the value of injury and the corresponding compensatory award are small (providing low incentives to sue)." *Baker*, 128 S.Ct. at 2622. See also *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885) (reasoning that punitive damages in small-injury cases are desirable because otherwise "no effort would be made by the sufferer to obtain redress"); *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 35 (1889) (same); *cf. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 16-17 (1991) (discussing *Humes* and *Beckwith*).

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[21] *Weason*, *supra* note 18, 706 P.2d at 310.

The Cruise Lines explain why attorneys' fees awards do not answer either of these problems. Fee awards do not constitute a sufficient deterrent because they are "blind to the conduct" of the defendant (Merits Brief at 7-8) and cannot be scaled to punish and deter "reprehensibility" (*id.* at 22). Nor will awards "based solely on the reasonable amount of time spent by the plaintiff's attorney multiplied by the reasonable hourly rate of such attorney" (*id.* at 22-23) attract high-quality lawyers to the seamen's side; such awards only take "the amount involved and the results obtained"[22] into account and are likely to be too small an inducement in pure maintenance and cure cases.

And there is another problem with relying on attorneys' fees as the only penalty for flouting maintenance and cure. Those who tout that approach sometimes try to root it in the courts' inherent authority to punish litigation abuses. ***This means that the attorneys' fees penalty "may not be used to sanction pre-litigation conduct."*** *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1503 (5th Cir. 1995) (*en banc*) (emphasis supplied).

> If attorneys' fees are awardable only for abuse of the litigation process, then the unscrupulous employer need have no fear of behaving with full recalcitrance right up to

[22] *Glynn*, *supra* note 18, 57 F.3d at 1501 n.8 (citation omitted).

> the point when the seaman has to go to court. Conversely, an attorney advising a seaman will need to file a lawsuit as quickly as possible in order to get the potential penalty clock started. These are perverse incentives.[23]

They fly in the teeth of the fundamental policies set forth in Section I.A *supra*.

Petitioners' Brief (at 29-30) asserts that employers generally want to "do the right thing" and that there is no "empirical evidence" that an attorneys' fees penalty is insufficient. These are naive and implausible claims. We all know that Justice Holmes's "bad man's counterparts turn up from time to time." *Baker*, 128 S.Ct. at 2627. Modern seamen will thus continue to require protection "from the harsh consequences of arbitrary and unscrupulous actions of their employers, to which, ***as a class, they are peculiarly exposed***."[24] In *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 416 (2d Cir. 1978), and *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987), the courts indicated that attorneys' fees awards are not always enough to dissuade employers from arbitrary and unscrupulous actions. See

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[23] David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 306 (2000).

[24] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982) quoting *Collie v. Ferguson*, 281 U.S. 52, 55 (1930) (emphasis supplied).

also *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975) (discussing the risk that a shipowner might deny "vitally necessary maintenance and cure" on the "poorly founded [belief] that the seaman's injury is permanent and incurable.").

There is evidence that these courts were right. The Ninth and Fifth Circuits removed punitive damages from the quiver of maintenance and cure remedies in *Guevara, supra*, and *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995). In the wake of those decisions, some employers became notably more resistant to maintenance and cure claims. (The Cruise Lines' Merits Brief at 28-30 indicates that some employers would like to get even more aggressive.) See, e.g., *Weeks Marine, Inc. v. Bowman*, 2006 WL 2178514 at * 2 (E.D.La., May 23, 2006) (deploring "Weeks's consistently unreasonable and recalcitrant conduct throughout this entire case"); *Weeks Marine, Inc. v. Bowman*, 2004 WL 2609967 at * 3-5 (E.D.La., Nov. 17, 2004) (stating that Weeks's Risk Manager had "credibility problems" and that his conduct in the matter had been "egregiously at fault," "arbitrary and capricious"); *Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1261 (W.D.Wash. 1998) (finding that the "defendant did not follow its own company procedures when it failed to investigate" plaintiff's maintenance and cure claim and that defendant's refusal to pay was "willful and persistent"); *Charpentier v. Blue Streak Offshore, Inc.*, 1997 WL 426093 at * 5-6, 9 (E.D.La., July 29, 1997) (detailing lengthy course of "callous" mistreatment of

seaman, causing him severe economic dislocation and "uncertainty and prolonged mental anguish"); *Spell v. American Oilfield Divers, Inc.*, 722 So.2d 399, 405 (La.App. 1998) (finding that the employer's handling of the maintenance and cure claim was "recalcitrant" and "egregious fault" and noting that the employer's "claims adjuster admitted that the [employer's] attorney told him to ignore" medical information favoring the seaman's claim).

It thus appears that the threat of punitive damages is needed to dissuade unscrupulous shipowners from aggressive overreaching. It may also be needed to encourage the conscientious consideration of "close or unclear cases." See the Cruise Lines' Cert. Brief at 15. Expanding employers' comfort zone for resolving doubts against ill and injured seamen would run completely counter to the policies at the heart of maintenance and cure.

> Punitive damages are meant as a threat to discourage egregious misconduct. If the threat is well-designed, such damages should not have to be actually awarded very often. We want the threat to ***work***.[25]

If that salutary threat had been part of the law governing the cases catalogued in the preceding paragraph, at least some of the worst abuses shown there would probably have been deterred, the seamen

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[25] Robertson, *supra* note 11, at 162-163 (emphasis in original).

would have been better protected, and protracted and expensive litigation could have been avoided.

F. *Baker* Supports the Decision Below

Because seamen are "emphatically the wards of the Admiralty,"[26] courts have always been assiduous in protecting their rights.[27] This – along with the fact that 19th-century courts often awarded punitive damages against shipowners who flouted their maintenance and cure duties (see *supra* Section I.B) – confirms that if punitive damages are ever justified under general maritime law, and they are, that justification is at its ***strongest*** in the maintenance and cure context.[28] *Baker*'s recognition that commercial fishermen may recover maritime punitive damages lends powerful support to this proposition.[29]

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[26] *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 620 (1827). This Court has referred to seamen as the "wards of admiralty" in at least 23 decisions. See WestLaw's SCT data base and search "wards" /s "admiralty."

[27] See David W. Robertson, Steven F. Friedell, & Michael F. Sturley, *Admiralty and Maritime Law in the United States* 163-164 (2d ed. 2008) (noting that "nineteenth-century seamen led miserable lives" and that "[t]he main protectors of seamen have been the federal admiralty courts.").

[28] See *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421, 1429 (11th Cir. 1997) (instancing "willful failure to furnish maintenance and cure" as the clearest case for maritime punitive damages). See also Robertson, *supra* note 11, at 163.

[29] In this connection, it will be remembered that *Baker* cited *Union Oil Co. v. Oppen,* 501 F.2d 558 (C.A.9, 1974) for the principle

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II. Petitioners' and the Cruise Lines' Arguments Are Insupportable

A. Petitioners' Contention That the Jones Act Precludes Respondent's Access to Punitive Damages is Refuted by *Pacific S.S. Co. v. Peterson*

Petitioners' Brief (at 7, 16-20, 25, 28) makes the sweeping contention that Congress stripped seamen of their right to punitive damages when it passed the Jones Act (currently codified as 46 U.S.C. § 30104). As we saw in subsections I.B and I.C *supra*, this is simply wrong. That Act does not address punitive damages. In *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138-139 (1928), this Court explicitly held that the Jones Act "was not intended to restrict ***in any way*** the long-established right of a seaman to maintenance, cure and wages" (emphasis added). As we will explain (in Section II.B.3 *infra*), the remedy of punitive damages cannot be severed from that long-established right.

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that commercial fishermen are excepted from the general rule that the maritime law does "not compensate purely economic harms, unaccompanied by injury to person or property." 128 S.Ct. at 2630 n.1. *Oppen,* in turn, justified this exception on the grounds that "fishermen have been treated as seamen for purposes of enforcing their rights against the fishing vessel and its owner", 501 F.2d at 561, and "***seamen*** are the favorites of admiralty and their economic interests entitled to the fullest possible protection." *Id.* at 567 (emphasis added).

Petitioners' argument that *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), cut into *Peterson* is egregiously wrong. The *Miles* Court actually cited *Peterson* for the proposition that "[t]he Jones Act evinces no general hostility to recovery under maritime law." *Id.* at 29. In light of *Peterson* – and in light of the *Miles* Court's treatment of *Peterson* – there is no rational way to read the Jones Act as cutting back on the judge-made law of maintenance and cure. Even petitioners' *amici* seem to agree. See the Cruise Lines' Merits Brief at 31 (quoting this Court's statements in *Baker* that the punitive damages remedy "is itself entirely a judicial creation" and that the Court "may not slough off [its] responsibility for common law remedies because Congress has not made a first move. . . .").

B. Petitioners' Contention that *Miles v. Apex Marine* Destroyed Respondent's Punitive Damages Remedy Is Wrong for Multiple Reasons

1. *Miles* dealt solely with compensatory damages issues in tort actions by the families of seamen killed on the job[30]

The Jones Act incorporates the provisions of the 1908 Federal Employers' Liability Act (FELA), 45

[30] This point is more fully developed in Sections II.A and II.B of the AAJ's *Amicus* Brief.

U.S.C. §§ 51-60. In *Miles*, this Court held that pre-Jones Act judicial gloss on the FELA wrongful death provision (45 U.S.C. § 51) – holding that loss-of-society damages were not recoverable – controls Jones Act wrongful death cases. 498 U.S. at 32. The Court further held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Id.* at 33. The "general maritime action" involved in *Miles* was a tort claim for unseaworthiness. In deciding that cause of action, the *Miles* Court neither decided, said, nor implied *anything* about punitive damages.

2. Petitioners' *Miles* argument makes three giant leaps

If *Miles* is to do any work for petitioner, it must first be expanded from the context of fatal-injury litigation to encompass actions by living seamen. The *Miles* opinion speaks loudly against this expansion. In its opening words (498 U.S. at 21) the Court stated:

> We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earning survives his death.

In its closing words (*id.* at 36) it stated:

> We hold that there is a general maritime cause of action for the wrongful death of a

> seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings.

In between, announcing the policy justification for its loss-of-society holding (*id.* at 33), the Court stated:

> Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

Nothing in the Court's opinion speaks to personal injury litigation.

The second expansion petitioners need is from tort to maintenance and cure. As Section II.D *infra* shows, "[m]aintenance and cure actions are not actions in tort."[31] In *Miles*, the deceased seaman's mother was suing in tort for negligence and unseaworthiness. The right to maintenance and cure was not involved, and the Court said nothing about it.

Recognizing these points, petitioners (at 22-23) try to enlist *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932), for the proposition (at 20, subtitle III.A) that "the Jones Act and maintenance and cure overlap." This effort is doomed; this Court has twice explained that the two causes of action do ***not*** overlap. *Garrett v. Moore-McCormack Co.*, 317 U.S.

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[31] Robertson, Friedell & Sturley, *supra* note 25, at 176.

239, 248 n.2 (1942) ("These rights are independent and cumulative."); *Peterson*, 278 U.S. at 138 ("[T]he right to maintenance, cure and wages . . . is independent of the right to . . . compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative."). *Cortes* does not say much less hold anything to the contrary.[32]

Petitioners (at 2 and 24 n.5) next try to enlist 46 U.S.C. § 30105 to establish overlap between Jones Act actions and maintenance and cure actions. This argument is verbal sleight-of-hand. The original Jones Act is currently set forth in 46 U.S.C. § 30104. Section 30105 reiterates a 1982 statute preventing foreign oil and gas workers from invoking *any* of the U.S. laws protecting seamen.[33] Maintenance and cure are mentioned only in that context.[34]

Petitioners' third leap tries to take *Miles* from the realm of compensatory damages to the province of punitive damages. The implausibility of this leap is treated in Section II.B of the AAJ's *Amicus* Brief.

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[32] See the explanation of *Cortes* in Robertson, *supra* note 11, at 151-152.

[33] See generally David W. Robertson & Chari Lynn Kelly, *Protecting U.S. Oil Companies from Lawsuits Brought by Foreign Oil and Gas Workers: A Report on the Effects of the 1982 Amendment to the Jones Act*, 21 REV. LITIG. 309 (2002).

[34] See Robertson, *supra note* 11, at 148-149 n.437.

3. *Baker* refutes petitioners' *Miles* argument

Although petitioners concede (at 7-8) that *Miles* does not impair the basic cause of action for maintenance and cure, it pretends that *Miles* somehow cuts into the remedies whereby that cause of action is enforced. In *Baker*, this Court rejected a virtually identical argument. After conceding that the Clean Water Act (CWA) "does not displace compensatory damages for consequences of water pollution, even those for economic harms", 128 S.Ct. at 2619, Exxon (the shipowner in that case) argued strenuously that the CWA had nonetheless preempted any recourse to punitive damages. Retorted this Court:

> [Exxon's] concession [that the CWA does not displace compensatory remedies] leaves Exxon with [an] untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme that way, and ***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).

Id. (emphasis supplied). In *Silkwood*, the Court held that a state-law punitive damages remedy could coexist with federal statutes regulating nuclear safety because the state-law remedy would neither create an "irreconcilable conflict" with nor "frustrate the objectives of the federal law." 464 U.S. at 256. Petitioners

make no effort to show that the maritime punitive damages remedy conflicts with or frustrates the objectives of any federal law.

C. Petitioners' Principal Lower-Court Authorities Distort *Vaughan*

Taking the view that since the Stewart-Harlan opinion was labeled a dissent the majority must be read as opposing (or at least as providing no support for) punitive damages, the Fifth and Ninth Circuits rejected *Vaughan*'s authority. See *Guevara*, 59 F.3d at 150; *Glynn*, 57 F.3d at 1503-1504 & n.12. The *Guevara* court admitted that this was a "revisionist" view of *Vaughan*.[35] As we saw in subsection I.D *supra*, it was also erroneous. (For a penetrating analysis of *Guevara*, see David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 294-309 (2000).)[36]

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[35] The panel decision in *Guevara*, 34 F.3d 1279 (5th Cir. 1994), followed prior authority and upheld the seaman's punitive award. Judge Garwood concurred, urging a change in the law and arguing for what he acknowledged was a "revisionist view" of *Vaughan*. *Id.* at 1289 n.11 (quoting 6 MOORE'S FEDERAL PRACTICE § 54.78[3] at 54-506 (2d ed. 1986)). Judge Garwood was subsequently able to persuade the *en banc* court to adopt his views. See 59 F.3d at 1500 (acknowledging the sway of "Judge Garwood's well-considered concurrence to the panel opinion").

[36] Petitioners (at 10 n.3) try to get rid of *Vaughan* by citing seven decisions of this Court as showing that *Vaughan* "represents one of the exceptions to the America [sic] Rule, nothing

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D. Petitioners' Suggestion That Maintenance and Cure Actions Are Claims for Breach of Contract Is Mistaken

Petitioners (at 25-26) suggest that punitive damages cannot lie in maintenance and cure actions because of the general rule that punitive damages are unavailable in contract. But the claim for maintenance and cure cannot be pigeon-holed in this fashion; it is *sui generis*, neither tort nor contract. Indeed, "the seaman's right [to maintenance and cure] was firmly established in the maritime law long before recognition of the distinction between tort and contract." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42 (1943). It is "annexed by law to [the shipowner-seaman] relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 372 (1932).

E. The Cruise Lines' Policy Arguments Are Unconvincing

The Cruise Lines' suggestion (Merits Brief at 5 & n.7 and 27-28 & n.20) that punitive damages awards

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more." Petitioners' characterization distorts these decisions. As is explained in 31 J. MAR. L. & COM. at 300, these decisions were "non-admiralty cases that simply cited *Vaughan* in support of the availability of attorney's fees to penalize bad-faith abuses of the litigation process; none even intimates that is ***all*** the case stands for" (emphasis in original).

are *prima facie* undesirable is refuted by this Court's statement in *Baker* that "recent studies tend to undercut much of [the] criticism [of] American punitive damages." 128 S.Ct. at 2624. It is also refuted by the *Baker* holding itself; if punitive damages were *prima facie* undesirable, this Court would not have upheld them in the Alaska oil spill case.

The Cruise Lines next ask the Court (Merits Brief at 26) to strip seamen of their traditional punitive damage rights to stave off "[t]he threat of transoceanic forum shopping" by making U.S. law less attractive to foreign seamen. This request is misplaced for several reasons. First of all, it overlooks the fact that this Court's "*Lauritzen-Rhoditis* choice-of-law factors" already stand in the way of such forum shopping.[37] Second, it violates the spirit of the Shipowners' Liability Convention, 54 Stat. 1693, T.S. No. 951, 1939 WL 39333, which was ratified to "rais[e] the [maintenance and cure] standards of [other] nations to the American level." *Warren v. United*

[37] In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court "listed seven factors to be considered in determining" whether U.S. law may be applied to claims brought in the U.S. by foreign seamen: "(1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum." *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 308 (1970), *rehearing denied*, 400 U.S. 856 (1970).

States, 340 U.S. 523, 527 (1951). But most importantly, it forgets that forum-shopping should be not be stemmed obliquely, by distorting substantive law, but directly and forthrightly, as Congress did in 46 U.S.C. § 30105 when it prohibited foreign oil and gas workers from invoking U.S. law's seamen's doctrines, and as this Court did in *Sinochem Int'l Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), when it fortified the federal courts' authority to dismiss cases for *forum non conveniens*.

F. The Cruise Lines' Dismissal of *Vaughan* Is Mere Semantics

The Cruise Lines (Merits Brief at 16) center their anti-*Vaughan* argument on the *Vaughan* Court's description of the shipowner's employer's conduct, contending that "the words 'callous,' 'recalcitrant,' 'willful and persistent' . . . fall short of describing the odious behavior punitive damages are designed to deter and punish." *Baker* refutes this semantic argument by pointing out that punitive damages are awarded for a range of conduct "from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions." 128 S.Ct. at 2633. As Justice Stevens suggested, the ultimate question is not how the conduct can be labeled but whether it deserves "moral condemnation." *Id.* at 2638 (internal quotation marks and citation omitted).

Contending "that its conduct was not sufficiently heinous to merit an award of punitive damages," the defendant in *Kraljic v. Berman Enterprises, Inc.*, 575 F.2d 412, 416 (2d Cir. 1978), made an argument similar to the Cruise Lines'. The Second Circuit rejected that argument out of hand, stating:

> We refuse to draw any distinction in degree between the pejorative adjectives employed to describe defendant's behavior in maintenance and cure cases awarding counsel fees and those used in normal punitive damages cases. There was no real difference between the type of behavior described by the majority in [*Vaughan*] to justify the award of counsel fees and by the minority to support a finding of punitive damages not limited to counsel fees. A finding of a wanton and intentional disregard of a seaman's rights would be necessary to trigger either type of award no matter what judicial epithet is employed to describe the conduct.

Id. In *Baker*, this Court likewise indicated that it was "skeptical" of "verbal formulations" purporting to address degrees of reprehensibility. 128 S.Ct. at 2628. The Cruise Lines do not acknowledge the debunking of "pejorative adjectives" and "judicial

epithet[s]" in *Kraljic*[38] and fail to mention *Baker* altogether.[39]

G. The Cruise Lines Make Several Other Unconvincing Semantic Arguments

The Cruise Lines sink further into mere semantics when they claim (Merits Brief at 23-24) that the courts "diluted" the *Vaughan* blameworthiness standard in three cases. The Cruise Lines look only at those courts' statements of the blameworthiness requirement and pay no attention to the actual conduct involved.

Looking at the kinds of employer misconduct that have actually invited punishment might have

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[38] Nor do the Cruise Lines address a closely related point made by the *Kraljic* court: Actions for compensatory damages for breach of the maintenance and cure obligation require proof of negligence, nothing more. Yet the *Vaughan* Court's counsel-fees award "emphas[ized] the malice of the shipowner." 575 F.2d at 413. Those who argue that the *Vaughan* award was compensatory damages have no answer for this incongruity. See David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 J. MAR. L. & COM. 293, 306-307 (2000).

[39] Professors Gilmore and Black dismiss the idea that Justices Stewart and Harlan had a different blameworthiness standard in mind for punitive damages than the majority did for attorneys' fees, stating that "all the [*Vaughan*] Justices were seemingly in agreement that the punitive damages were recoverable . . . provided that the defendant's behavior could be characterized as 'callous', 'willful', 'wanton', 'intentional', and so on." Gilmore & Black, *supra* note 15, at 313.

assuaged the Cruise Lines' fear of being sanctioned for such innocuous "mistakes" as "choosing foreign over domestic benefit schemes." Merits Brief at 4. See, e.g., *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118-1119 (5th Cir. 1984) (upholding $11,150 punitive award on determining that the employer's compensation supervisor withheld benefits because he was "disgruntle[d]" by a perceived lack of "courtesy" on the part of the seaman's doctor).

The Cruise Lines' professed fear of punitive liability for "mistakes in choosing foreign over domestic benefit schemes" is exceeded in implausibility only by their claim that an employer's "very assertion of a defense will provide the 'willfulness' upon which a crewmember will seek to base a punitive damage award." Merits Brief at 9-10. These suggestions are absurd, and the Brief provides no instances or authorities to support them.

CONCLUSION

The Eleventh Circuit's decision should be affirmed.

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Respectfully submitted,

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