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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ALLAN A. TABINGO,

Petitioner,

v.

AMERICAN TRIUMPH LLC AND  
AMERICAN SEAFOODS COMPANY, LLC,

Respondents.

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AMICUS CURIAE BRIEF OF  
THE AMERICAN WATERWAYS OPERATORS, FOSS MARITIME  
COMPANY, TOTE MARITIME ALASKA, INC., AND HARLEY  
MARINE SERVICES, INC.

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**I. Identity and Interest of Amici Curiae**

Amici curiae The American Waterways Operators (AWO), Foss Maritime Company, Tote Maritime Alaska, Inc., and Harley Marine Services, Inc. respectfully ask this Court to affirm the trial court's dismissal of petitioner Allan Tabingo's request for punitive damages.

AWO is the national trade association for the nation's tugboat, towboat, and barge industry. The industry employs over 35,000 American seamen and owns and operates nearly 5,500 tugboats and towboats and more than 31,000 barges throughout the country. AWO represents the largest segment of the U.S. flag domestic fleet. Its 360 members carry more than 780 million tons of domestic cargo every year. The tugboat, towboat, and barge industry employs over 1,400 people in Washington, contributing almost \$50 million in direct taxes to state, local, and federal authorities.

AWO is joined in this amicus brief by three Washington-based marine transportation companies that employ seamen covered by the Jones Act and federal maritime law. Founded in 1889 in Tacoma, Washington, Foss Maritime Company ([www.foss.com](http://www.foss.com)) owns and operates a fleet of tugboats, barges, and other vessels that provide a wide range of marine transportation services around the U.S. and internationally, including ocean and coastal towing, ship assist and tanker escort, and liner barge services. Foss employs more than 550 American mariners on 121 vessels.

Tote Maritime Alaska, Inc. ([www.totemaritime.com](http://www.totemaritime.com)) provides twice-

weekly cargo transportation service between Tacoma and Anchorage, Alaska. Its Roll-On/Roll-Off cargo ships carry vital food, construction materials, vehicles and other necessary supplies to support Alaska's families, businesses, and local economies. In any given year, approximately 154 American mariners work aboard Tote Maritime Alaska's ships.

Harley Marine Services, Inc. ([www.harleymarine.com](http://www.harleymarine.com)) owns and operates a diverse fleet of 122 vessels that provide marine transportation services on the U.S. West Coast, New York Harbor, the Gulf of Mexico, and in Alaska, including transportation of petroleum products and general cargo, ship assist and tanker escort, and rescue towing. Harley Marine employs 586 American mariners on its vessels.

Foss, Harley Marine and Tote Maritime Alaska are leaders in Washington's maritime industry; each has been recognized for its safety standards and environmental stewardship. Along with AWO's members, these companies rely on the predictability and uniformity of federal maritime law and the boundaries of federal maritime legislation to assess and protect against the risks inherent in maritime commerce.

## **II. Argument**

### **A. Question Presented and Short Answer**

The question before this Court is this: Does the Jones Act—which the parties agree does not permit the recovery of punitive damages for injury

to a seaman caused by shipboard negligence<sup>1</sup>—preclude the recovery of punitive damages for the same injury through an unseaworthiness claim? *Miles v. Apex Marine Corp.*<sup>2</sup> supplies the answer. There the U.S. Supreme Court held that the Jones Act defines the remedy for unseaworthiness, and limits it to compensation for “pecuniary loss.” Because punitive damages do not compensate a plaintiff for pecuniary loss, they are not recoverable.

While *Miles* presented an unseaworthiness claim involving a fatality, the same rule applies to an unseaworthiness claim involving a non-fatal injury. True, liability for the personal injury of a seaman predated the Jones Act whereas wrongful death liability did not. But pre-Jones Act personal injury liability sounded exclusively in negligence—unseaworthiness then being but a limited species of negligence claim. The Jones Act undeniably rewrote the law concerning liability for seamen’s injuries, abolishing the unseaworthiness restriction and expanding liability to include all manner of negligence. By enacting the Jones Act, Congress occupied the field, dictating both liability and remedy for a seaman injured by negligence.

Not until after the Jones Act’s passage did the judicially created cause of action for unseaworthiness that Tabingo asserts, in which liability is not based on negligence, have its “humble origin as a dictum in an obscure case in 1922.”<sup>3</sup> In *Miles*, the Supreme Court held that courts are not free “to

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<sup>1</sup> Resp. Br. 12-15; Reply Br. 3.

<sup>2</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990).

<sup>3</sup> *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 496-97 & n.4, 91 S. Ct. 514, 17 L. Ed. 2d 562 (1971).

sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases ... resulting from negligence.”<sup>4</sup> Accordingly, Tabingo may not recover punitive damages in his claim for personal injury, whether under the Jones Act or under a judicially created cause of action for unseaworthiness.

**B. The Jones Act Pre-Dates the Supreme Court’s Creation of the Independent Cause of Action for Unseaworthiness**

Both sides agree that to decide the question before it, the Court must understand the state of the law before the passage of the Jones Act. To do so, they agree, this Court must look to *The Osceola*,<sup>5</sup> the first Supreme Court decision to consider whether a vessel owner is liable to a seaman for injuries resulting from shipboard negligence. Yet neither side discusses the details of this significant case. It is to those details, which bear greatly on the question before the Court, that amici first turn.

**1. In 1903, *The Osceola* Incorporates the Concept of Unseaworthiness as a Limit on Negligence Claims by a Seaman against the Vessel or Its Owner**

*The Osceola* Court addressed whether a vessel (and, indirectly, its owner) was liable to an injured crewmember for “every improvident or negligent order” of the vessel’s master, or captain.<sup>6</sup> In modern terms, the question was whether the owner was vicariously liable for the master’s negligence, in that case the master’s decision to hoist a gangway in a heavy

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<sup>4</sup> *Miles*, 498 U.S. at 32-33.

<sup>5</sup> 189 U.S. 148, 23 S. Ct. 483, 47 L. Ed. 760 (1903).

<sup>6</sup> *Id.* at 159.

wind, which toppled the gangway onto the plaintiff.<sup>7</sup>

The Court began by acknowledging that “statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew.”<sup>8</sup> The Court then surveyed lower court cases and foreign authorities, distinguishing most of these because they imposed liability not for negligence, but for maintenance and cure, “the maritime analogy to land-based industrial insurance paying an injured seaman’s medical expenses (cure) and compensation in lieu of wages (maintenance).”<sup>9</sup>

But a handful of cases could not be distinguished on that basis because they clearly addressed the owner’s tort liability for a seaman’s injuries. All were negligence cases. Only one, *The Noddleburn*,<sup>10</sup> mentioned unseaworthiness, and then only to describe it as a consequence of actionable negligence; a fall from rigging, the court observed, was “directly attributable to the unsound and unseaworthy condition of th[e] rope, resulting from the willful negligence and wanton indifference of the master.”<sup>11</sup>

In all of the other cases, the courts decided the owner’s liability for shipboard negligence without any reference to unseaworthiness. Three

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 172.

<sup>9</sup> *Miller v. Arctic Fisheries Corp.*, 133 Wn. 2d 250, 268, 944 P.2d 2005 (1997).

<sup>10</sup> 28 F. 855 (D. Or. 1886).

<sup>11</sup> *Id.* at 860. In *The Osceola*’s words, because “the accident was occasioned by the master knowingly allowing a rope to remain in an insecure condition, the vessel was consequently unseaworthy.” 189 U.S. at 174.

opinions by the same federal district judge illustrate the point. In *The Julia Fowler*,<sup>12</sup> the judge imposed liability on the owner for the mate's negligence because "[t]he negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seamen, and the deliberate use of . . . methods plainly unsafe, affects both ship and owners with liability for the consequent damage."<sup>13</sup> In *The City of Alexandria*,<sup>14</sup> the judge dismissed the action because the injury resulted from "neglect of the officers or men aboard in the performance of their ordinary duties; a neglect against which the owners could not possibly guard."<sup>15</sup> Finally, in *The Frank and Willie*,<sup>16</sup> the judge found the owner liable when the mate "refused to take the usual precautions" in stacking and offloading heavy cargo and required the injured seaman to "work in this dangerous situation."<sup>17</sup> The court concluded that "[w]hile the mere negligence of officers in looking after the ship's condition may perhaps not make the ship liable," the result was different when "dangers are brought home to the knowledge of the proper officers" because "[e]mployers are required to provide workmen with

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<sup>12</sup> 49 F. 277 (S.D.N.Y. 1892).

<sup>13</sup> *Id.* at 278. The Supreme Judicial Court of Massachusetts, in an opinion by Justice Oliver Wendell Holmes, reached the opposite conclusion on facts "almost precisely similar." *The Osceola*, 189 U.S. at 174 (citing *Kalleck v. Deering*, 37 N.E. 450 (Mass. 1894)).

<sup>14</sup> 17 F. 390 (S.D.N.Y. 1883).

<sup>15</sup> *Id.* at 392. The court found no basis for imposing liability "[w]hen the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew." *Id.* at 396.

<sup>16</sup> 45 F. 494 (S.D.N.Y. 1891).

<sup>17</sup> *Id.* at 496.

reasonably safe conditions for work.”<sup>18</sup>

While none of these cases mentioned a cause of action for unseaworthiness, each referred to injury-causing shipboard hazards that were negligently or willfully created.<sup>19</sup> This afforded *The Osceola* Court an opportunity to limit a vessel owner’s liability to an injured seaman. The Court held that the owner is *not* liable for injury caused by the captain’s negligence unless it results in injury-causing unseaworthy conditions.<sup>20</sup> Thus, unseaworthiness was born as a form of limited owner liability for certain types of shipboard negligence.

2. *The Osceola’s* Incorporation of Unseaworthiness into the Law of Negligence Was Innovation, Not Well-Settled Law

*The Osceola’s* resort to unseaworthiness was the result of innovation, the Court’s first suggestion that a seaman’s personal injury claim against the owner required proof of unseaworthiness. Before *The Osceola*, maritime law was concerned with unseaworthiness only in two unrelated situations.<sup>21</sup>

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<sup>18</sup> *Id.* This anticipates the Supreme Court’s observation seven decades later that late 19th Century courts “treated maritime injury cases on the same footing as cases involving the duty of a shoreside employer to exercise ordinary care to provide his employees with a reasonably safe place to work.” *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 544, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

<sup>19</sup> The other decisions addressed in *The Osceola* are similar. In *The Edith Godden*, the court held the owner liable for failing to exercise “due care and diligence in the proper equipment of the vessel for the contingencies of the voyage.” 23 F. 43, 46 (S.D.N.Y. 1885). In *Olson v. Flavel*, the court simply assumed the vessel was liable and addressed whether the seaman’s contributory fault barred recovery. 34 F. 477 (D. Or. 1888). Finally, in *The A. Heaton*, the court held that the acceptance of maintenance and cure “does not. . . displace or affect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts.” 43 F. 592, 596 (D. Mass. 1890).

<sup>20</sup> *Id.* at 173-75 & 177.

<sup>21</sup> *Mitchell* 362 U.S. at 544.

The first involved mariners suing for their wages. There, seamen were required to prove their vessel's unseaworthiness to excuse desertion or misconduct that otherwise would forfeit their right to wages.<sup>22</sup>

The second involved marine insurance and the carriage of goods by sea.<sup>23</sup> Here, the concept of unseaworthiness arose from ancient cargo doctrines, which allowed cargo owners to recover for cargo damage if the shipowner failed to provide a ship fit to sail and safely carry the cargo.<sup>24</sup> These doctrines imposed an absolute duty on shipowners to insure that cargo was shipped safely.<sup>25</sup> This duty emerged from English law on marine insurance, which assumed that insurers contemplated insuring only against acts of God or enemies of the King, and not against the risks associated with an unseaworthy vessel.<sup>26</sup> There was no corresponding duty owed to seamen.<sup>27</sup>

3. In 1922, a Separate and Independent Unseaworthiness Claim Has Its "Humble Origin as a Dictum in an Obscure Case"

Unseaworthiness re-appeared in another seaman's personal injury case in the Supreme Court's 1922 decision in *Carlisle Packing Co. v. Sandanger*.<sup>28</sup> There, the Court held that a trial court erroneously applied state-law negligence principles rather than admiralty law to a pre-Jones Act injury for

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> George H. Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 MERCER L. REV. 519, 522 (1973).

<sup>25</sup> Francis L. Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 394 (1954).

<sup>26</sup> *Id.* at 394-95.

<sup>27</sup> *Id.* at 391.

<sup>28</sup> 259 U.S. 255 (1922).

shipboard negligence—in that case, the storage of gasoline in the wrong container, with the expected unfortunate consequences when the victim lit a match.<sup>29</sup> But the Court did not reverse, reasoning that the improper gasoline storage had created an unseaworthy condition that was actionable under admiralty law.<sup>30</sup>

In so doing, the Court used language that years later was understood to hint, perhaps, at an unseaworthiness claim for something other than negligence. Specifically, the Court reasoned that the trial court “might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked ‘coal oil’ contained gasoline; . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages.”<sup>31</sup>

Looking back a half-century later in *Usner v. Luckenbach Overseas Corp.*,<sup>32</sup> the Supreme Court identified this passage as the unseaworthiness claim’s “humble origin as a dictum in an obscure case.”<sup>33</sup> This “humble origin” post-dated the Jones Act’s passage by two years.

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<sup>29</sup> *Id.* at 259.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Tabingo reads the phrase “without regard to negligence” in this passage as a holding that the owner was strictly liable for the injury. In fact, the Court made no mention of strict liability and instead relied on the jury’s finding that conditions the Court believed to be unseaworthy had resulted from negligence. *Id.* at 259. Hence, the phrase “without regard to negligence” is best understood to mean, “without regard to a state-law theory of negligence.”

<sup>32</sup> 400 U.S. 494.

<sup>33</sup> *Id.* at 496-97.

C. Passed in 1920 to Expand the Types of Negligence for which an Injured Seaman May Recover, the Jones Act Quickly Occupies the Field of Maritime Personal Injury Liability

Passed in 1920, the Jones Act permits an injured seaman “to bring a civil action at law, with the right of trial by jury, against the employer”; in such an action, “Laws of the United States regulating recovery for personal injury to . . . a railway employee apply.”<sup>34</sup> These “Laws of the United States” are set forth in the Federal Employers’ Liability Act,<sup>35</sup> which imposes liability on a railroad common carrier for an employee’s injury or death due to negligence of the carrier’s officers, agents, or employees.<sup>36</sup> The Jones Act does not require proof of unseaworthiness.<sup>37</sup>

1. The Jones Act “Obliterates” the Unseaworthiness Limitation on a Seaman’s Negligence Claim for Personal Injury

The Supreme Court immediately grasped the effect of the Jones Act: to expand the types of negligence that give rise to liability for a seaman’s injury or death. In its 1928 decision in *Pacific Steamship Co. v. Peterson*,<sup>38</sup> the Court explained that “[U]nseaworthiness . . . embraces certain species of negligence; while the [Jones Act] includes several additional species not

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<sup>34</sup> 46 U.S.C. § 30104(a).

<sup>35</sup> *E.g., Miles*, 498 U.S. at 23-24. FELA is codified at 45 U.S.C. §§ 51-60.

<sup>36</sup> 45 U.S.C. § 51.

<sup>37</sup> Nor does FELA offer any support for inferring such a restriction because FELA expressly imposes liability for negligence generally, as well as for any “defect or insufficiency” of “cars, engines . . . boats, wharves, or other equipment” due to negligence. 45 U.S.C. § 51.

<sup>38</sup> 278 U.S. 130, 49 S. Ct. 75, 73 L. Ed. 220 (1928).

embraced in that term.”<sup>39</sup> In the words of a later Supreme Court opinion, the Jones Act “obliterated all distinctions between the kinds of negligence for which the shipowner is liable.”<sup>40</sup>

In the decade following passage of the Jones Act, the Supreme Court indelibly imprinted the Act with two other defining features discussed below.

2. The Jones Act Limits a Seaman’s Recovery to “Pecuniary Loss or Damage,” Meaning the Measurable Loss of Financial Benefits

The Court established the Jones Act’s first defining feature in its 1924 decision in *Panama Railroad Co. v. Johnson*,<sup>41</sup> which held that the Act incorporated FELA wholesale.<sup>42</sup> This extends, we now know, to “the entire judicially developed doctrine of liability” under FELA,<sup>43</sup> including *Michigan Central Railroad Co. v. Vreeland*,<sup>44</sup> now understood to limit a plaintiff’s recovery to compensation for “pecuniary loss or damage.”<sup>45</sup> Pecuniary loss or damage, the *Vreeland* Court explained, was the “loss of any pecuniary benefit,”<sup>46</sup> meaning the “loss and damage resulting . . . financially by reason of” the harm,<sup>47</sup> so long as it can be “measured by some standard.”<sup>48</sup>

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<sup>39</sup> *Id.* at 138.

<sup>40</sup> *Mitchell*, 362 U.S. at 546-47.

<sup>41</sup> 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924).

<sup>42</sup> *Id.* at 391-92.

<sup>43</sup> *American Dredging Co. v. Miller*, 510 U.S. 443, 456, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)(quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958)).

<sup>44</sup> 227 U.S. 59, 33 S. Ct. 192, 57 L. Ed. 417 (1913).

<sup>45</sup> *Id.* at 71.

<sup>46</sup> *Id.* at 72.

<sup>47</sup> *Id.* at 68.

<sup>48</sup> *Id.* at 71-73.

Stating that *Vreeland* and *Panama Railroad* permit recovery for “pecuniary loss” is different from asserting, as the parties here do, that they permit the recovery of “pecuniary damages.” The latter term erroneously invites metaphysical speculation about whether “punitive” damages are “pecuniary,” whereas the question is whether they compensate for pecuniary “loss.”<sup>49</sup>

Obviously they do not. Rather, punitive damages “aim at punishing reprehensible behavior, teaching the perpetrator not to do it again, and admonishing others never to do it.”<sup>50</sup> Unsurprisingly, therefore, courts have held that the Jones Act precludes the recovery of punitive damages, citing *Vreeland* and *Panama Railroad*.<sup>51</sup>

### 3. The Jones Act Provides the “Paramount and Exclusive” Remedy for Injury to a Seaman

The Jones Act’s second defining feature originated in the Court’s 1930 decision in *Lindgren v. United States*,<sup>52</sup> which held that the Jones Act covers the field, preempting all federal and state law remedies for injury or death to a seaman.<sup>53</sup> The Court reasoned that the Jones Act established a

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<sup>49</sup> See generally Phillip M. Smith, *A Watery Grave for Unseaworthiness Punitive Damages: McBride v. Estis Well Service, L.L.C.*, 76 LA. L. REV. 619, 649 (2015).

<sup>50</sup> David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 LA. L. REV. 463, 464 (2010).

<sup>51</sup> E.g., *Wildman v. Burlington N. R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987). This Court, too, has noted that the Jones Act creates a right to recover “compensatory damages.” E.g., *Williams v. S.S. Mut. Underwriting Ass’n*, 45 Wn. 2d 209, 215-16, 273 P.2d 803 (1954).

<sup>52</sup> 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930).

<sup>53</sup> *Id.* at 44 & 47 (state law preempted) *Kernan*, 355 U.S. at 429-30 (state and federal laws preempted).

“rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go,” a rule that “covers the entire field of liability for injuries to seamen” and “is paramount and exclusive.”<sup>54</sup> Therefore, the Act “is as comprehensive of those instances in which . . . it excludes liability, as of those in which liability is imposed.”<sup>55</sup>

At least as important as this jurisprudential fact of life is the policy underlying it: the need for uniform rules governing admiralty law and maritime commerce. Since the dawn of our Republic, the Supreme Court has acknowledged that this uniformity is grounded in the Constitution itself, thrice proclaiming “the constitutionally based principle that federal admiralty law should be a ‘system of law coextensive with, and operating uniformly in, the whole country.’”<sup>56</sup> To further that policy, the Court has recognized, “the Jones Act establishes a uniform system of seamen’s tort law,”<sup>57</sup> a “uniformity in the exercise of admiralty jurisdiction required by the Constitution.”<sup>58</sup>

This constitutional call for uniformity—and Congress’s exercise of its “superior authority”<sup>59</sup> in admiralty matters in response—are not to be lightly scorned or tampered with. This Court “sail[s] in occupied waters.”<sup>60</sup>

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<sup>54</sup> *Lindgren*, 281 U.S. at 47.

<sup>55</sup> *Id.*

<sup>56</sup> *Miles*, 498 U.S. at 27; (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)); *The Lottawana*, 88 U.S. 558, 575, 22 L. Ed. 654 (1875)).

<sup>57</sup> *Miles*, 498 U.S. at 29.

<sup>58</sup> *Lindgren*, 281 U.S. at 44.

<sup>59</sup> *Miles*, 498 U.S. at 27.

<sup>60</sup> *Id.* at 36.

D. In the 1940s, the Supreme Court Formally Recognizes Unseaworthiness as a Separate and Independent Basis for Imposing Liability on a Vessel Owner, Regardless of Fault, for Unsafe Conditions Causing Injury

In the 1940s, the Court announced the existence of an independent common-law cause of action for unseaworthiness. No longer was unseaworthiness simply an element or category of negligence. It was, the Court announced in *Mabnich v. Southern Steamship Co.*<sup>61</sup> and *Seas Shipping Co. v. Sieracki*,<sup>62</sup> “essentially a species of liability without fault.”<sup>63</sup> This was the state of the law when the Supreme Court decided *Miles v. Apex Marine Corp.*<sup>64</sup> in 1990 which is dispositive of the question before this Court.

E. Applying Long-Recognized Principles regarding the Jones Act’s Paramount Status and Preemptive Effect, *Miles* Holds that the Act Defines the Remedy Available for Unseaworthiness

*Miles* presented Jones Act and unseaworthiness claims for death of a seaman; among the damages sought was compensation for loss of support, services, and society.<sup>65</sup> Initially dismissed by the trial court, the unseaworthiness claim was revived on appeal by the Fifth Circuit, which raised the question the Supreme Court decided: Were damages for loss of support, services, and society available in a claim for unseaworthiness?<sup>66</sup>

The Supreme Court answered no. The Court first recognized that the

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<sup>61</sup> 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).

<sup>62</sup> 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

<sup>63</sup> *Sieracki*, 328 U.S. at 94.

<sup>64</sup> 498 U.S. 19.

<sup>65</sup> *Id.* at 21-22.

<sup>66</sup> *Id.* at 22-23.

Jones Act incorporated FEOLA's limitation on recovery to damages for "pecuniary loss."<sup>67</sup> The Court then held that this limitation applied to claims for unseaworthiness because "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases ... resulting from negligence."<sup>68</sup> This holding, the Court explained, would "restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under [the Death on the High Seas Act], the Jones Act, or general maritime law."<sup>69</sup>

All federal courts of appeals to consider the issue since *Miles* have agreed that the Jones Act precludes a seaman from recovering punitive damages for unseaworthiness.<sup>70</sup> The Ninth Circuit has not addressed the question, but has recognized *Miles's* broad holding that "general maritime law is intended to supplement the statutory remedies created by Congress, not to enhance or replace them."<sup>71</sup> Unless some distinguishing feature or limiting principle is found, *Miles's* holding—that the Jones Act defines the remedy for unseaworthiness—dictates the outcome here.

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<sup>67</sup> *Id.* at 32.

<sup>68</sup> *Id.* at 32-33.

<sup>69</sup> *Id.* at 33.

<sup>70</sup> *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382 (5th Cir. 2014); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993); *In re Amtrak Sunset Ltd. Train Crash*, 121 F.3d 1421, 1427-28 & 1429 (11th Cir. 1997) (Jones Act does not govern claims by non-seamen, who may recover punitive damages for wrongful death, but punitive damages are unavailable in personal injury cases).

<sup>71</sup> *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir. 1994).

Tabingo claims otherwise, citing *Atlantic Sounding Co. v. Townsend*.<sup>72</sup> But Tabingo's reliance on *Townsend* is misplaced. In *Townsend*, a sharply divided Supreme Court held that punitive damages were available in maintenance and cure actions. The five-justice majority distinguished *Miles*: "It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act. . . ." <sup>73</sup> But unlike the unseaworthiness claim in *Miles*, in *Townsend* "both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act," which "does not address maintenance and cure or its remedy."<sup>74</sup> Because the Act did not address maintenance and cure or its remedy, the majority declined to infer Congressional intent to limit that remedy.<sup>75</sup>

Unlike the centuries-old maintenance and cure remedy that pre-dated the Jones Act, Tabingo's strict liability unseaworthiness claim only had its "humble origin as a dictum in an obscure case in 1922,"<sup>76</sup> after the Jones Act's passage. When the Jones Act was enacted, the current strict liability cause of action for unseaworthiness did not exist. A cause of action whose origin post-dated the Jones Act could not be a "well established" basis for

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<sup>72</sup> 557 U.S. 504, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009).

<sup>73</sup> *Id.* at 420.

<sup>74</sup> *Id.*

<sup>75</sup> Maintenance and cure is the "maritime analog to land-based industrial insurance." *Miller*, 133 Wn. 2d at 268. Imposing punitive damages for egregious refusals to provide maintenance and cure is consistent with the practice of imposing additional consequences on land-based insurers for bad faith claims handling and coverage denials. *Cf. Safeco. Ins. Co. v. Butler*, 118 Wn. 2d 383, 823 P.2d 499 (1992).

<sup>76</sup> *Usner*, 400 U.S. at 496-97 & n.4.

recovering punitive damages beforehand. Unlike Congress's silence in the Jones Act regarding the well-recognized liability for maintenance and cure, nothing can be inferred from Congress's "silence" concerning a claim that did not yet exist.

Much, however, can be inferred from Congress's incorporation of FELA at a time when the Supreme Court had already limited the remedy under FELA to compensation for "pecuniary loss or damage." Congress was not silent regarding the remedies available to a seaman for personal injury. By incorporating FELA's "pecuniary loss or damage" limit on damages, Congress said "this much and no more."<sup>77</sup>

**F. Public Policy Grounds Do Not Support the Availability of Punitive Damages in Personal Injury Claims by Seamen Once Congress Has Rejected Them**

Finally, Tabingo asserts that public policy supports the availability of punitive damages in personal injury claims by seamen. He cites the historical status of seamen as wards of admiralty courts and claims that punitive damages would "create[] a strong incentive for vigilance on the part of those best able to protect seamen from injury."<sup>78</sup>

But this rationale applies equally to personal injury cases under the Jones Act. Who better to insure workplace safety than the employer, on whom the Jones Act imposes liability? Yet in passing the Jones Act, Congress rejected punitive damages and instead adopted FELA's more limited

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<sup>77</sup> *Miles*, 498 U.S. at 24.

<sup>78</sup> Pet'r's Br. 28.

“pecuniary loss or damage” remedy. Admiralty courts “should look primarily to these legislative enactments for policy guidance.”<sup>79</sup> Courts “are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.”<sup>80</sup>

In arguing for precisely such an expansion, *Tabingo* cannot plausibly single out unseaworthiness for harsh treatment because it connotes some especially egregious species of misconduct. It does not. Unseaworthiness is now a strict liability scheme under which a seaman may assert that the owner is liable without fault for virtually any shipboard condition claimed to cause injury. “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 ... resulting from negligence.”<sup>81</sup>

As is usual in a seaman’s injury case, *Tabingo*’s claims of liability for negligence under the Jones Act and for unseaworthiness arise from the exact same set of facts. *Tabingo* says he was injured when a hatch cover closed on his hand; his central allegation is that the hydraulics valve controlling the cover “had been broken for approximately two years, and American Seafoods *neglected* to fix it.”<sup>82</sup> The alleged unseaworthy condition goes hand in hand with the “neglect,” i.e., the negligence that fostered it. Why would

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<sup>79</sup> *Miles*, 498 U.S. at 27.

<sup>80</sup> *Id.* at 36.

<sup>81</sup> *Id.* at 32-33.

<sup>82</sup> Pet’r’s Br. 3 (emphasis altered).

Congress rule out punitive damages under the Jones Act but not for unseaworthiness, when the only “difference” between the two claims is one of semantics rather than logic? Tabingo identifies no plausible policy justification for this outcome, much less one that Congress accepted when it enacted the Jones Act.

**III. Conclusion**

The Court should affirm the trial court’s dismissal of Tabingo’s claims for punitive damages. The Jones Act does not permit the recovery of such damages in seamen’s injury claims, whether for negligence or for unseaworthiness.

Dated: December 2, 2016

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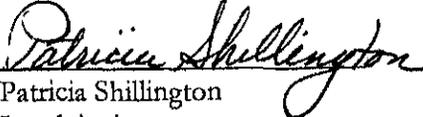
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The following were filed on December 2, 2016 by Patricia Shillington, Legal Assistant to Barbara Holland, Garvey Schubert Barer:

1. Motion for Leave to File Amicus Curiae Brief by The American Waterways Operators, Foss Maritime Company, Tote Maritime Alaska, Inc., and Harley Marine Services, Inc.;
2. Amicus Curiae Brief of The American Waterways Operators, Foss Maritime Company, Tote Maritime Alaska, Inc., and Harley Marine Services, Inc.

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