No. 08-214

In The Supreme Court of the United States

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

Petitioners,

vs.

EDGAR L. TOWNSEND,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cruise Lines International Association ("CLIA"), based in Fort Lauderdale, Florida with a satellite office in Washington D.C., is the world's largest cruise line non-profit trade association. CLIA's 24 cruise line members represent 97 percent of the cruise capacity operating in North America. CLIA's Executive Partners include over 80 strategic business allies, providing a wide array of services to the cruise industry. In addition, CLIA has nearly 16,000 travel agent professionals as members.

CLIA's member lines operate over 150 ships, the largest of which carries over 1,200 crewmembers. In fact, the cruise industry is the largest employer of maritime workers of any industry operating in the U.S. CLIA's members in 2007 collectively employed over 140,000 crewmembers, a number that continues to grow each year.

CLIA exists, in part, to promote all measures that foster a safe, secure, and healthy cruise experience for both passengers and crew. Ensuring the

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[1] The parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation, or submission.

health and safety of crewmembers is of utmost importance because vessel operations worldwide are dependent on the valuable services provided by many skilled employees recruited worldwide. When crewmembers are injured or become ill while in service, CLIA's cruise line members are committed to promptly providing any and all benefits dictated by the circumstances, the relevant contractual obligations (such as those contained in collective bargaining agreements), and applicable law.

Despite the cruise lines' best efforts at promoting the health and safety of its crewmembers, injuries, illnesses, and disabilities are unfortunately inevitable. The approximately 140,000 crewmembers employed by CLIA's cruise line members hail from all over the world[2] and are employed in countless capacities, from entertainers to engine room oilers. The diversity of the workforce alone presents myriad circumstances in which potential payment of maintenance and cure, or some other form of benefits or remuneration dictated by foreign law, is triggered.

Many of the situations involve foreign crew with union contracts or government-mandated systems to which all shipowners hiring crew from those nations must adhere. Their prescribed remedies are often different than maintenance (a daily living allowance), cure (payment of "curative" medical bills),

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[2] Over 90% of the crewmembers employed by CLIA's member lines are foreign seamen.

and unearned wages applicable under U.S. law. In some nations, such as the U.K., there is no such concept as maintenance or cure. In many nations socialized medical benefits and wages for a specified period after incapacity is the norm. Other countries have a system of "sick wages" which continues the contractual wages while the crewman is recuperating, up to a maximum period. The remedies applicable abroad sometimes result in the crewman receiving greater benefits in sick wages than total benefits payable under U.S. law.

An employer's analysis of what benefits to pay each crewman in the cruise industry is often complicated by these various factors, as well as those at play in any traditional benefits analysis. Maintenance and cure are forfeited if the medical need arose from willful misconduct.[3] It can be waived if a prior material medical fact was undisclosed or misrepresented during a required pre-sign on or periodic medical fitness exam.[4]

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[3] For example, maintenance and cure may not be owed in the case of willful misconduct such as "gross inebriation" (*Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1942)); fighting where the plaintiff was the aggressor (*Gulledge v. United States*, 337 F.Supp. 1108 (E.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973)); self-inflicted injuries (*Discovery Sun Partnership, Ltd. v. Kapsomenakis*, 2000 AMC 2402 (S.D.Fla. 2000)); and venereal disease (*Ressler v. State Marine Lines, Inc.*, 517 F.2d 579 (2d Cir. 1975), *cert denied*, 423 U.S. 894 (1975).

[4] *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166 (5th Cir. 2005), *cert denied*, 127 S.Ct. 382 (2006)).

Exposing maritime employers such as cruise lines to punitive damages for making such complicated decisions only further frustrates the otherwise orderly administration of benefits for a huge multinational work force. The disparity between the remedies afforded in most countries for routine situations involving work benefits, and those afforded in the U.S. were punitive damages allowed, would likely lead to a flood of litigation in the Eleventh Circuit by foreign crewmembers shopping for a more generous recovery than available in any other country.

Case law governing the rights and obligations of maritime employers and crewmembers emanating from the Eleventh Circuit greatly impacts CLIA's cruise line members. Florida, which sits in the Eleventh Circuit, remains the center of cruising in the United States, accounting for nearly 54 percent of all U.S. embarkations. Several major cruise lines are headquartered in Miami, Florida. Embarkations from Port Canaveral and Tampa, Florida are increasing. Florida will remain a stronghold in the cruise line industry given the popularity of the nearby Caribbean as a cruise destination.

The Ninth Circuit is also extremely influential in the cruise industry.[5] Although Florida remains the

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[5] As set forth by Petitioners in their Petition for Writ of Certiorari, the Second, Third, Fifth, and Ninth Circuits follow the majority opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962) and allow only attorneys' fees for a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure. The

(Continued on following page)

center of cruising in the United States, California's four cruise ports account for approximately 14.5 percent of all U.S. cruise embarkations. Cruise ship operations in Hawaii are increasing, and Alaska and Hawaii remain top U.S. ports of call. Accordingly, the law of the Ninth Circuit, in which California, Hawaii, and Alaska all sit, significantly impacts the cruise line industry.

The lack of a uniform rule among these circuits, let alone others, as to the consequences for alleged willful or arbitrary failure to pay "maintenance and cure" benefits has a significant, negative impact on CLIA's cruise line members who sail throughout the various jurisdictions. As long as the circuits remain split on the issue of the availability of punitive damages as a remedy in maintenance and cure cases, CLIA's cruise line members are unable to weigh the potential consequences of their decisions regarding benefits payable to foreign crew subject to competing legal regimes. They and their crewmembers will bear the economic burden of needless litigation on this issue, fueled by forum shopping created by the disparity in the case law. CLIA is therefore uniquely situated to request that this Court grant certiorari on the issue of whether, and to what extent, punitive

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First, Fourth, Sixth, and Eleventh Circuits have relied on a statement in the *Vaughan* dissent in permitting recovery of punitive damages, over and above attorneys' fees, for such a failure to pay maintenance and cure.

damages are available to crewmembers upon a showing of willful failure to pay maintenance and cure.

The cruise industry substantially benefits the U.S. economy.[6] A uniform and predictable rule potentially affecting the approximately 140,000 crewmembers working aboard CLIA's member's cruise ships will allow employers to understand their liabilities under U.S. law, assess the consequences of their often-difficult benefits determinations, reduce unnecessary litigation, and enable them to continue to offer affordable and diverse vacation choices for the increasing number of passengers,[7] thereby benefitting both the U.S. job market and economy.

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[6] A 2007 annual Business Research Economic Advisors (BREA) study found that the total economic benefit of the cruise industry in the United States is $38 billion and that cruise industry activity generated $15.4 billion in wages and 354,000 jobs for U.S. employees alone.

[7] Over the past 10 years, the industry has responded to extensive market and consumer research that has guided the addition of new destinations, new ship design concepts, new onboard/on-shore activities, new themes and new cruise lengths to reflect the changing vacation patterns of today's market. Over the next three years, nearly 51 million North Americans (from the U.S. and Canada) indicate an interest to cruise with 33.7 million stating a strong intent to act on that interest. By maintaining historical occupancy levels, the cruise industry will welcome 12.8 million guests in 2008.

SUMMARY OF ARGUMENT

The Eleventh Circuit decided in *Atlantic Sounding Co., Inc., et al. v. Townsend*, 496 F.3d 1282 (11th Cir. 2007) that punitive damages, in addition to attorneys' fees, are available to seamen upon a showing of a willful failure of the shipowner to pay maintenance and cure. *Townsend* brings the absence of uniformity on the issue of punitive damages for a willful failure to pay maintenance and cure to the forefront. This decision further widens an entrenched conflict with the case law of other circuits, creating a four-four circuit split. This case presents an opportunity for the Court to restore uniformity in maritime law, and in so doing, eliminate unnecessary litigation and discourage forum shopping.

This Court has long recognized the importance of maritime law operating uniformly throughout the whole country. Uniformity is essential in the cruise line industry given the transitory and multi-jurisdictional nature of its operations. A lack of uniformity in maritime law, especially laws affecting remedies available to approximately 140,000 crewmembers, engenders confusion and unpredictability resulting in unnecessary litigation. Shipowners and crewmembers are too often unable to amicably resolve maintenance and cure disputes as their divergent positions on the availability of punitive damages (typically the most substantial item of damages sought by crewmembers and their attorneys) results in resort to the courts and unnecessary litigation. The judicial confusion over whether punitive damages are

available, and if so, what the measure of punitive damages is, also engenders additional litigation that a uniform rule would discourage.

Additionally, the lack of uniformity on the issue of a crewmember's available remedies results in forum shopping both domestic and transoceanically. A crewmember with a maintenance and cure claim is encouraged to bring suit in the United States, and disproportionately so in circuits which permit recovery of punitive damages. On the other hand, the lack of uniformity provides incentive for maritime employers to first file declaratory relief actions on their obligation to pay maintenance and cure in jurisdictions which do not permit punitive damages. In either event, the result is unnecessary litigation, including litigation over the appropriateness of the forum (*e.g.*, motions to transfer venue and motions to dismiss for *forum non conveniens*.)

REASONS TO GRANT CERTIORARI

I. THE ENTRENCHED CIRCUIT SPLIT IS ERODING THE LONG-STANDING DOCTRINES OF UNIFORMITY AND PREDICTABILITY IN MARITIME MATTERS, RESULTING IN INCREASED LITIGATION

A. THE GENERAL PRINCIPLE OF UNIFORMITY UNDER MARITIME LAW

The importance of maritime uniformity is particularly germane to cruise ships sailing throughout

the various jurisdictions of the United States and, indeed, the world. Uniformity of maritime law is a century-old doctrine with its foundation in the United States Constitution. In addition to giving Congress the power to regulate foreign and interstate commerce in Article I, § 8, Clause 3, known as the Commerce Clause, the Framers also provided in Article III, § 2, Clause 1, known as the Admiralty Clause, that the federal judicial power extends to "all cases of admiralty and maritime jurisdiction." This latter provision, though on its face only a jurisdictional grant, has long been construed as incorporating the pre-existing law of admiralty into the law of the United States. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. 356 Bales of Cotton,* (1 Pet.) 511, 545-46 (1828).

The importance of national and international maritime uniformity is well established in the decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601 (1974), *reh. denied*, 415 U.S. 986 (1974); *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874). The need for national and international uniformity in admiralty matters is so critical that even Congress is limited in its power to authorize the states to adopt rules of law leading to state-by-state variations. *Knickerbocker Ice Co. v. Stewart*, 253

U.S. 149, 164 (1920). This Court aptly stated long ago:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. at 574-75.

The principle of uniformity is particularly important with respect to remedies available to seamen. In *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990), this Court held:

> an admiralty court should look primarily to . . . legislative enactments [in the area of seamen's legal protection for injury and death] for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate but we must also keep strictly within the limits imposed by Congress.

Id. at 27. The *Miles* Court held that a non-dependent parent of a deceased seaman could not recover non-pecuniary damages (in that case, loss of society damages) because such damages are not available under the dominating statutes governing remedies available to seamen.[8] Courts have cited this opinion in maritime worker personal injury and death cases for what has been termed the "Miles Uniformity Principle."

B. THE LACK OF PREDICTABILITY REGARDING THE AVAILABILITY OF PUNITIVE DAMAGES IN MAINTENANCE AND CURE CASES RESULTS IN INCREASED LITIGATION

The *Miles* court relied upon this Court's prior decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) which, citing to *The Lottawanna*, reaffirmed the "constitutionally based principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Id.* at 401-402. The *Moragne* Court discussed the importance of the doctrine of *stare*

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[8] The dominating statutes governing remedies available to seamen for personal injury or death are The Jones Act, 46 U.S.C. §§ 30104-30105(b), which incorporates the remedies of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30302-30303. Neither permit recovery of non-pecuniary damages.

decisis to the uniform application of federal admiralty law and identified three factors for a court's consideration before overruling a past decision, the first of which is particularly pertinent to this discussion of uniformity. The first factor is "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Id.* at 403. The *Moragne* Court explained, "The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts." *Id.* Citing *Moragne*, one district court recognized:

> the need for predictability in the commercial maritime arena is arguably greater than in other areas of law and commerce. This is true because there are already numerous and inherently unpredictable factors stemming from the perils of the sea and the continual – and frequently fortuitous – interaction with enterprises of other nations. It is axiomatic that when the rules of law are clear, parties may contract within or around their boundaries, and the commercial system is facilitated in many ways, including reduced litigation, more favorable insurance coverage, and overall ease of application.

Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1137-1138 (5th Cir. 1995).

The entrenched four-four circuit split on the issue of availability of punitive damages for a willful failure to furnish maintenance and cure results in increased litigation. While the law on this issue remains unclear, parties' ability to settle disputes without resort to the courts is hampered as they cannot gauge the legal consequences of their actions. For example, a cruise line may deny maintenance and cure to a crewmember, arguing that the crewmember's injury or disability was the result of willful misconduct in the form of "gross inebriation," a valid basis for denying maintenance and cure.[9] The crewmember may dispute the denial of maintenance and cure, arguing his injury or disability was the result of only ordinary drunkenness.[10] In attempting to resolve this dispute over maintenance and cure, the crewmember would likely assert entitlement to punitive damages for a willful failure to provide maintenance and cure while the cruise line would take the position that punitive damages are not recoverable. The opposing expectations of the parties concerning a significant, if not the largest, item of the crewmember's alleged damages will prevent the parties from assessing the legal consequences of their respective positions and

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[9] *See*, footnote 2, *supra*.

[10] Some courts have held that a crewmember's mere drunkenness (as opposed to "gross inebriation") is not a valid defense to a claim for maintenance and cure. *Bentley v. Albatross S.S. Co.*, 203 F.2d 270 (3d Cir. 1953); *Ellis v. American Hawaiian S.S. Co.*, 165 F.2d 999 (9th Cir. 1948).

thus thwart an amicable resolution of their dispute without resort to the courts.

Maritime employers, including CLIA's cruise line members, are entitled to predictability with respect to the remedies of its crewmembers. Although CLIA's cruise line members are committed to the payment of maintenance and cure in all appropriate cases where foreign law does not dictate the benefits and remuneration available, the motive of maritime employers is ultimately irrelevant to the principle of predictability. As this Court recently stated in *Exxon Shipping Company v. Baker*, 128 S.Ct. 2605, 2627 (2008), "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another. [Citation omitted.]" In *Baker*, this Court considered the appropriate amount or ratio of punitive damages in a maritime case but did not decide the broader question of whether punitive damages are available under maritime law;[11] nor did this Court decide the more specific question of whether punitive damages are available for a willful failure to pay maintenance and cure. However, this Court's discussion of predictability

[11] As set forth in Petitioners' Petition for Writ of Certiorari, this Court's *Baker* decision did not present an opportunity to decide the broader issue of whether punitive damages were available at all under the general maritime law. This Court noted in *Baker*, "[Exxon] does not offer a legal ground for concluding that maritime law should never award punitive damages. . . ." *Id.* at 2620-21.

applies herein, *a fortiori*. If a person is entitled to predictability as to the *amount* of a punitive damages award, then maritime employers are certainly entitled to know whether punitive damages are even available in the case of a willful failure to pay maintenance and cure.

Furthermore, if even a "bad man" is entitled to predictability, then certainly maritime employers are entitled to the same predictability regarding the remedies available to their crewmembers so that they can know the consequences of their decisions to either pay or deny maintenance and cure in those close or unclear cases, where the issue typically arises. As mentioned above, where the crewmember's injury or disability may be attributable to the crewmember's own willful misconduct, such as gross inebriation, the shipowner can lawfully deny maintenance and cure but also subjects itself to a suit for failure to pay maintenance and cure. Such employer is entitled to know the remedies available to its crewmembers, and thus, the consequences of its decisions. Additionally, the world of medicine is expanding to include holistic and experimental treatments about which the maritime employer may have legitimate concerns, but for which the employer may feel bound to pay in order to prevent any allegation of willful failure to pay maintenance and cure. Encouraging the payment for such holistic and experimental treatments without careful examination simply to avoid punitive damage exposure may become problematic if the unproven treatment goes horribly wrong for the seaman.

C. THE JUDICIAL CONFUSION FOLLOWING *VAUGHAN* RESULTS IN INCREASED LITIGATION

Petitioners' Petition for Writ of Certiorari details the evolution of the judicial confusion in the circuit courts regarding the availability of punitive damages, in addition to attorneys' fees, for a willful failure to pay maintenance and cure. The source of the confusion can be traced to this Court's opinion in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In *Vaughan*, the majority found that a crewmember is entitled to attorneys' fees in the case of a callous, recalcitrant, willful, and persistent failure to pay maintenance and cure, holding "[w]hile failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows . . . the recovery may also include 'necessary expenses.'" [Internal citations omitted.] *Id.* at 530. Nowhere does the majority mention punitive or "exemplary" damages. The cases cited by *Vaughan* for the proposition that a crewmember is entitled to attorneys' fees are not punitive damages cases.[12]

Indeed, *Vaughan* seemingly permitted recovery of attorneys' fees as an item of *compensatory damages* to

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[12] In *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932), this Court held: "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only ***necessary expenses***, but also compensation for the hurt." (Emphasis added.)

bring the seaman back to the position he was in prior to denial of maintenance and cure, which necessarily included his attorney's fees, and not as an item of punitive damages. As one circuit court later explained, "We are also mindful that maintenance and cure is a pseudo-contractual obligation, [internal citation omitted], and that absent contrary authority – which *Vaughan* does not afford – punitive damages are not normally recoverable on contract claims." *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505 (9th Cir. 1995), *cert denied*, 516 U.S. 1046 (1996). In deciding the present matter of *Townsend*, the Eleventh Circuit noted that it had previously "acknowledge[d in *Hines v. J.A. La Porte, Inc.*, 820 F.2d 1187 (11th Cir. 1987)] that it was unclear whether the *Vaughan* majority regarded attorney's fees as an item of compensatory damages or as a punitive measure." *Townsend*, *supra*, 496 F.3d at 1285, fn. 2.

Nevertheless, some courts have held that *Vaughan* permits recovery of *attorneys' fees only* as an item of punitive damages. *Kraljic v. Berman Enter.*, 575 F.2d 412, 415 (2d Cir. 1978). Other courts have held that punitive damages *in addition to attorneys' fees* are available in cases of willful failure to pay maintenance and cure.[13] The present judicial confusion stems from a statement in *Vaughan*'s dissenting

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[13] *See, e.g., Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973).

opinion that a seaman should recover "exemplary damages" which "would not be measured by the amount of counsel fees." *Vaughan*, 369 U.S. at 534-40. The Second Circuit found "obvious difficulty with . . . follow[ing] the views of the dissenters in [*Vaughan*] and not the majority." *Kraljic, supra.*

The circuits are additionally confused as to the appropriate standard for an award of attorneys' fees and/or punitive damages. In *Vaughan*, this Court noted the maritime employers in that case were:

> *callous* in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that *recalcitrance*, libellant was forced to hire a lawyer and go to court to get what was plainly owed him. . . . The default was *willful* and *persistent*. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one. [Emphasis added.]

369 U.S. at 530-531.

However, subsequent circuit court decisions diluted the *Vaughan* standard to allow an award of punitive damages for the "arbitrary" failure to pay maintenance and cure. Before overruling its precedent awarding punitive damages in maintenance and cure cases in light of *Miles,* the Fifth Circuit cited *Vaughan* for the proposition that "an employer's *willful and arbitrary* refusal to pay maintenance and cure gives rise to a claim for damages in the form of attorneys' fees in addition to the claim for general

damages." [Emphasis added.] *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984). Other courts subsequently adopted this new standard. For example, the Fourth Circuit cited *Holmes* and noted, "courts have long awarded punitive damages to seamen where maintenance and cure benefits have been *arbitrarily* and *willfully* denied." [Emphasis added.] *Manuel v. United States*, 50 F.3d 1253, 1260 (4th Cir. 1995).

The Eleventh Circuit's decision in *Hines*, upon which the *Townsend* court held it was bound, also exemplifies the diluted standard for circumstances wherein courts will permit awards of punitive damages:

> Although there is no bright line to measure arbitrary conduct, the Fifth Circuit has identified examples of willfulness meriting punitive damages and counsel fees [including] . . . laxness in investigating a claim. . . .

Hines, *supra*, 820 F.2d at 1190. Between *Vaughan* and *Hines*, the degree of odious conduct upon which an award of punitive damages could be based was lowered from a callous, recalcitrant, willful, and persistent failure to even investigate a crewmember's maintenance and cure claim to allow punitive damages recovery for a mere arbitrary "laxness in investigating a claim." This reflects the judicial confusion not only about whether *Vaughan*'s grant of attorneys' fees was compensatory or punitive in nature and, therefore, whether punitive damages are even available for the willful failure to pay maintenance and

cure, but also the type of conduct upon which a punitive damage award can be based.

II. A UNIFORM RULE REGARDING THE AVAILABILITY OF PUNITIVE DAMAGES IN MAINTENANCE AND CURE CASES WILL ELIMINATE "THE MISCHIEF OF FORUM SHOPPING" AND REDUCE LITIGATION OF CASES IMPROPERLY BROUGHT IN U.S. COURTS

The current circuit split on the issue of whether punitive damages are available for a willful failure to pay maintenance and cure encourages forum shopping.[14] A crewmember with a maintenance and cure claim is encouraged to bring suit in the circuits which permit recovery of punitive damages, regardless whether the case is more appropriately brought, or more convenient, in a jurisdiction which does not permit recovery of punitive damages. Similarly, maritime employers are encouraged to bring declaratory relief actions in jurisdictions where punitive damages are not allowed. In either event, the result is

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[14] This Court has described forum shopping as plaintiff's pursuit of 'justice blended with some harassment.' *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *see also*, *Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146, 155 (2d Cir. 2005), *cert denied*, 547 U.S. 1175 (2006). Indications of forum shopping include, in part: "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, [and] the habitual generosity of juries in the United States or in the forum district." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001).

increased litigation including motions to transfer venue and motions to dismiss for *forum non conveniens* which would otherwise be discouraged by circuit uniformity and the consequent disincentive to forum shop.

Courts have repeatedly fashioned rules to avoid the negative impact of "forum shopping" resulting from non-uniform application of maritime rules and laws. In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 230 (1958), Justice Brennan recognized the "mischief" of forum shopping which results from application of varying state statutes of limitations to maritime actions:

> The alternative of subjecting the parties' rights to the variant state statutes of limitations and the consequent uncertainty of legal obligation would inject an unnecessarily sporting element into the affairs of men. . . . The mischief to be avoided is the possibility of shopping for the forum with the most favorable period of limitations. In actions arising at sea, frequently beyond the territorial bounds of any State, normal choice-of-law doctrines are likely to prove inadequate to the task of supplying certainty and predictability.

In enacting a uniform three-year statute of limitations for maritime personal injury and death actions, Congress also considered the "mischief" of forum shopping as recited by the First Circuit in

Butler v. American Trawler Co., 887 F.2d 20, 22 (1st Cir. 1989):

> Congressman Murphy, a sponsor of the provision, told the House of Representatives:
>
> > The act is . . . aimed at eliminating the forum shopping and the presentation of stale claims which can result when claimants seek to bring their suit in the jurisdiction having the most advantageous procedural rules. . . . The Congress should take action to eliminate the inherent unfairness that exists when three claimants may be subject to three different sets of rules merely because they have utilized different legal tools.
>
> 126 Cong.Rec. 2591 (1980) (statement of Rep. Murphy). See 126 Cong.Rec. 26,884 (1980) (statement of Sen. Cannon) (section 763a will eliminate "the mischief of forum shopping"); 126 Cong.Rec. 2592 (1980) (statement of Rep. Dornan) (section 763a will eliminate inconsistency associated with doctrine of laches, which "often allow[ed] litigants bringing suit to pick the court with the most favorable interpretation of timeliness"); H.R.Rep. No. 737, 96th Cong., 2d Sess. 1-2, reprinted in 1980 U.S. Code Cong. & Admin.News 3303 (section 763a is needed because "divergent interpretations of timeliness for bringing an unseaworthiness claim have resulted in many litigants choosing the most favorable forum in which to bring suit").

Federal courts have discouraged forum shopping in a variety of other maritime contexts. In *Silver Star Enters. v. Saramacca MV*, 82 F.3d 666, 669 (5th Cir. 1996), the Fifth Circuit held with respect to maritime lien law:

> . . . there is much to be said for legal consistency and predictability. A decision by this circuit creating a circuit split and permitting the affixation of maritime liens for bulk container lessors would spawn uncertainty, *compounded by forum-shopping* and extravagant lien claims. (Emphasis added.)

In *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir. 1993), *cert denied*, 510 U.S. 915 (1993), the Sixth Circuit found that applying indemnity principles in maritime strict products liability would violate the doctrine of uniformity as other maritime statutes such as the Jones Act, DOHSA, and the Longshore and Harbor Workers' Compensation Act ("LHWCA") apply principles of comparative fault. The court held:

> to allow indemnity in a strict products liability claim, while all other maritime claims are subject to contribution based on comparative fault would cause seamen to 'attempt to escape the comparative fault of the traditional theory of unseaworthiness and label their case (sic) products cases.' [Citation omitted.] This could lead to forum shopping by seamen seeking to obtain recovery under products

> liability theories without reduction for their own contributory fault. [Citation omitted.]

Id. at 1462.

This Court has also addressed the menace of transoceanic forum shopping. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court reversed the previous admiralty rule against "divided damages,"[15] finding: "Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of proportional fault – a fact that encourages transoceanic forum shopping." *Id.* at 403-404. [Footnote omitted.]

To combat forum shopping by foreign plaintiffs improperly bringing suit in the United States solely to benefit from the more generous relief provided by U.S. courts than their home countries, courts have granted dismissal on the grounds of *forum non conveniens*. The Eleventh Circuit upheld such a dismissal in *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985), describing the plaintiff as "the archetypal foreign plaintiff bringing her foreign tort claim to American courts to secure relief more generous than she would get under the law of her homeland [Greece]." *Id.* at 1520.

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[15] The "divided damages" rule, typically in collision cases, required the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of fault may have been. *Id.* at 397.

Regardless whether this Court rules that punitive damages are available or not for a willful failure to pay maintenance and cure, as long as the law remains unclear, foreign plaintiffs will continue to disproportionately bring suit in those U.S. Circuits which permit punitive damages, even where there is little connection to or interest in the United States resolving the foreign dispute, because punitive damages are widely disapproved of and not recognized in most of the world.[16] Foreign crewmembers injured abroad continue to file suit in the U.S. in light of the specter of punitive damages even though, under *Vaughan,* it is unclear that such damages are available. The *Townsend* case presents a timely opportunity for this Court to clarify *Vaughan* and discourage forum shopping.

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[16] This Court, citing to an international law scholar, recently noted that "punitive damages are higher and more frequent in the United States than they are anywhere else." *Baker, supra,* 128 S.Ct. at 2623.

CONCLUSION

As the chasm between the circuits widens on the issue of availability of punitive damages for a willful failure to pay maintenance and cure, the *Townsend* case presents a timely opportunity for this Court to reestablish uniformity which has eroded as the result of judicial confusion since its *Vaughan* decision. This Court recently spoke to its responsibility to clarify confusion generated by its judicially-created law. In limiting punitive damages to a 1:1 ratio in *Baker*, this Court noted that the remedy of punitive damages "is itself entirely a judicial creation" and concluded that it "may not slough off [its] responsibilities for common law remedies because Congress has not made a first move. . . ." 128 S.Ct. at 2630.

In *Townsend*, the court held it was bound by Eleventh Circuit precedent which permitted punitive damages for a willful failure to pay maintenance and cure. The concurring opinion in *Townsend* aptly stated that adhering to precedent "promotes predictability and stability of the law, it helps to keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided." *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1286 (11th Cir. 2007). While this may be true within the confines of the Eleventh Circuit, this Court's responsibility is broader; its jurisdiction encompasses all eleven circuits, eight of which are presently entrenched in a four-four circuit split. As maritime law must be fashioned in light of its national – and indeed international – ramifications, the

values of predictability, stability, comity, and efficiency cannot be viewed through the prism of one circuit. This Court alone can restore predictability and stability on the national level by clarifying *Vaughan* and restoring uniformity.

Accordingly, CLIA respectfully requests this Court grant certiorari.

DATED: September 19, 2008.

Respectfully submitted,

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