

No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF AND
AMICUS CURIAE BRIEF OF THE
MARITIME LAW ASSOCIATION OF THE
UNITED STATES IN SUPPORT OF
GRANTING WRIT OF CERTIORARI**

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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF WITHOUT THE
CONSENT OF ALL THE PARTIES**

Now comes the Maritime Law Association of the United States (“MLA”) and pursuant to Supreme Court Rule 37.2(b) moves this Court for leave to file a brief as *amicus curiae* without the consent of all of the parties.

The MLA is a voluntary, nationwide bar association founded in 1899, with a membership of approximately 3,000 attorneys, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists

in maritime law, represent virtually all maritime interests – ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The Petitioner’s legal representative has consented to the MLA filing an *amicus curiae* brief; however, the Respondent has not given its consent for the MLA to file an *amicus curiae* brief. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA wishes to submit the enclosed *amicus curiae* brief only to argue in favor of review. The MLA believes that this case presents substantial questions about the uniform application of the “vessel status” test and that this Court should grant certiorari to resolve what is a conflict amongst the Circuit Courts of Appeals.

No delay in the proceedings will result in the granting of this application and the MLA believes that the proposed *amicus curiae* brief will be of considerable help to the Court. Pursuant to Supreme Court Rule 37.2(b) the proposed *amicus curiae* brief is attached to this motion.

Respectfully submitted,

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***AMICUS CURIAE* BRIEF OF THE
MARITIME LAW ASSOCIATION OF THE
UNITED STATES IN SUPPORT OF
GRANTING WRIT OF CERTIORARI**

The Maritime Law Association of the United States (hereinafter “MLA”) respectfully submits the following *amicus curiae* brief in support of the petition of Fane Lozman for a writ of certiorari. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA submits this brief only to detail the issues that it believes warrant the attention of the Court and to argue in favor of review.¹

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nationwide bar association founded in 1899 and incorporated in 1993. The MLA has a membership of over 3,000 attorneys, law professors, and other distinguished members of the maritime community. The MLA is affiliated with the American Bar Association and it is represented in the ABA's House of Delegates.

The MLA's attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests: ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The MLA's purposes, as stated in its Articles of Incorporation, are:

To advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping

contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that all Parties received timely notice of the intent to file this brief and the Petitioner has given written consent to the filing of this brief. However, the Respondent has not given consent and this *amicus curiae* brief is submitted pursuant to Rule 37.2(b) as one document with the required motion for leave.

laws, regulations and practices of different nations.

In an effort to promote these objectives, the MLA has sponsored legislation dealing with maritime matters and has cooperated with Congressional Committees in the formulation of legislation. The MLA also assists with international maritime programs and initiatives alongside the United Nations, the International Maritime Organization and the Comité Maritime International. Consistent with its objective to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in numerous cases that have raised questions substantially affecting admiralty practice and jurisdiction.²

The MLA believes that this case presents substantial questions about the uniform application of the “vessel status” test and that this Court should grant certiorari to resolve what is a conflict amongst the Circuit Courts of Appeals.

SUMMARY OF ARGUMENT

The Petitioner has petitioned for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit that a floating structure³ was a “vessel” pursuant to 1 U.S.C. § 3.⁴

² *E.g.*, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995).

³ The structure was named as a defendant *in rem* in the lower court proceedings and described as “THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, her engines, tackle, appa-

Pet. App. 21a. In its ruling, the Eleventh Circuit relied on its earlier decisions and those of the former Fifth Circuit Court of Appeals⁵ in determining that the floating structure was “practically capable of transportation over water” and therefore was a vessel such that the district court had federal admiralty jurisdiction over the structure. Pet. App. at 21a. The “vessel status” test applied by the Eleventh Circuit was based on its interpretation of this Court’s decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005). The Eleventh Circuit relied upon language contained in *Stewart* which stated that the determination of whether a structure is a “vessel” focuses on “whether the watercraft’s use ‘as a means of transportation on water’ is a practical possibility or merely a theoretical one.” Pet. App. at 13a. The Eleventh Circuit’s analysis of vessel status thus focuses on “the capability of the craft, ‘not its present use or station.’” Pet. App. at 13a. This analysis differs from the approach employed by the U.S. Courts of Appeals for the Fifth and Seventh Circuits, which have considered the floating structure owner’s intent as a relevant factor in determining vessel status. Pet. App. at 16a.

rel, furniture, equipment and all other necessities appertaining and belonging *in rem*”. Pet. App. 1a.

⁴ “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. § 3.

⁵ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

The conflict created by these cases related to the “vessel status” test creates substantial uncertainty for maritime entities, and those who advise them, about what standards and rules apply to floating structures. Specifically, the circuits are split on the issue of whether or not the intent of the owner of the structure is relevant to the determination of vessel status. The uncertainty created by these conflicting decisions will serve to both promote and prolong litigation of this issue. Therefore, the Court should grant certiorari to resolve the uncertainty and to promote uniformity in the application of the general maritime law.

ARGUMENT

I. THE CONFLICT OVER THE APPLICATION OF THE VESSEL STATUS TEST IN *STEWART v. DUTRA* CREATES UNDESIRABLE UNCERTAINTY FOR MARITIME ENTITIES AND THOSE WHO ADVISE THEM

The Respondent had originally brought a claim in the United States District Court for the Southern District of Florida against the floating structure *in rem* under 46 U.S.C. § 31342⁶ which creates a mari-

⁶ § 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action *in rem* to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

time lien in favor of a person providing “necessaries” to a vessel. Pet. App. at 7a. This required that the district court undertake an analysis of whether the floating structure constituted a “vessel” pursuant to 1 U.S.C. § 3. Pet. App. at 12a-13a. The Eleventh Court of Appeals affirmed the decision of the district court⁷ that the floating structure on which the Petitioner resided was a “vessel” such that the district court had exclusive original jurisdiction as granted by the United States Constitution.⁸ Pet. App. at 21a. The Eleventh Circuit’s opinion specifically referenced and confirmed a split amongst the circuits as to the proper factors to consider in making a determination of whether a structure is a “vessel” under maritime statutory regimes and the general maritime law.⁹

⁷ The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review.

⁸ Article III, Section 2, Clause 1 of the U.S. Constitution grants the federal district courts exclusive original jurisdiction over “[a]ny civil case of admiralty or maritime jurisdiction.” 28 U.S.C. § 1333(1).

⁹ “The definition of a ‘vessel’ is important in many different contexts of admiralty and maritime law. Vessel status is important in determining jurisdiction since acts that occur aboard a vessel will be presumed, absent unusual circumstances, to meet the maritime relationship requirement. Furthermore, under the Admiralty Extension Act, [46 U.S.C. § 30101], land-based damages are within the jurisdiction if ‘caused by a vessel.’ The existence of a vessel also may be necessary for the assertion of a salvage award, liability for unseaworthiness, or a maritime lien under the general maritime law. The applicability of several statutes, such as the Jones Act, [46 U.S.C. §§ 30104-30106], the Longshore and Harbor Workers’ Compensation Act, [33 U.S.C. §§ 901-950], the Limitation of Shipowners’ Liability Act, [46 U.S.C. §§ 30501-30512], and the Outer Continental Shelf Lands Act, [43 U.S.C. §§ 1331-1356], may depend on whether a vessel

The Eleventh Circuit relied upon this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) in finding that because the floating structure had been towed several times over considerable distances, it was "practically capable of transportation over water" and therefore a vessel in navigation subject to federal admiralty jurisdiction. Pet. App. at 13a, 21a. The Eleventh Circuit also relied upon its own decisions where it had employed a broad definition of the term "vessel." Pet. App. at 12a-17a (citing *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955); *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial No. SC-40-2860-3-62*, 390 F.2d 596 (5th Cir. 1968); *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008); *Crimson Yachts v. Betty Lynn II Motor Yacht*, 603 F.3d 864, 872 (11th Cir. 2010)). In particular, the Eleventh Circuit cited its prior decision in *M/V Belle of Orleans* where it had determined that a floating casino was a vessel based on the casino's potential ability to sail on the navigable waters. Pet. App. at 15a-16a. The Eleventh Circuit pointed out that in its *M/V Belle of Orleans* decision it had expressly rejected the reasoning of both the Fifth and Seventh Circuits, whose "vessel status" tests have focused on the floating structure owner's intended purpose for the structure rather than the structure's practical capability for maritime transportation. Pet. App. at 15a-16a (citing *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995)(holding that a floating casino that was semi-permanently and indefinitely moored to the shore was not a vessel because it was "removed from

is involved." THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 1-6 at 35, 36 (West Group 2001) (1987).

navigation” and “constructed primarily to be used as a work platform”); *Tagliere v. Harrah’s Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (analyzing owner intent for purposes of whether a vessel can sail again)); see also *De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185, 187 (5th Cir. 2006) (concluding riverboat casino not a vessel due in part to casino owners’ intent to use it only as a casino).

The differing legal standards employed by the various circuit decisions related to vessel status have produced substantial uncertainty for vessel owners and the owners of moored shore-side floating structures on the navigable waters. The split in the circuits also creates substantial uncertainty for those who advise the various maritime interests related to shore-side and maritime activities as the interested entities now face two legal standards which could possibly govern their conduct and operations. This disharmony imposes shifting standards of conduct and legal liability which encourages needless litigation until a verdict has been rendered and appealed.

All of these concerns make it appropriate for the Court to grant certiorari in this case and resolve the conflict amongst the circuits regarding the application of the vessel status test.

CONCLUSION

The MLA respectfully requests that the Court grant certiorari.

Respectfully submitted,

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