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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondent does not dispute that the question of what legal test determines "vessel" status is a tremendously important one. *See* Pet. 16-23; MLA Amicus Br. at 6 n.9. Nor does respondent dispute that for over a century prior to this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005), it was settled that the question of whether a structure constituted a vessel turned on the structure's purpose, or intended use. As this Court summarized the test in 1903, "neither size, form, equipment, nor means of propulsion are determinative factors upon the question [of vessel status], which regards *only the purpose for which the craft was constructed, and the business in which it is engaged.*" *Perry v. Haines*, 191 U.S. 17, 30 (1903) (emphasis added); *see also Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627 (1887) (key is the "purpose," or intended "use," of the structure); Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 1-6 (4th ed. 2004) ("The most basic criterion used to decide whether a structure is a vessel is the *purpose* for which it is constructed and the business in which it is engaged.") (emphasis in original); 1 Steven F. Fridell, *Benedict on Admiralty* § 164 (6th ed. 1989) ("It is not the form, the construction, the rig, the equipment, or means of propulsion that establishes [vessel status], but the purpose and business of the craft as an instrument for maritime transportation, that is to say, whether the craft is a navigable

structure intended for maritime transportation.").[1] "The application of this criterion," this Court continued, traditionally has "ruled out [of the category of vessels] the floating dry dock, the floating wharf," as well as other indefinitely moored floating structures. *Perry*, 191 U.S. at 30. Even though such structures are capable of being towed across water, this Court has held that such structures, as well as other structures in subsequent cases, were not vessels because they were not used for maritime transportation or commerce. *See* Pet. 25-26 (discussing other cases).

Nor does respondent dispute that a square conflict has developed over whether *Stewart* somehow abrogated this purpose-based test and the decades of jurisprudence based upon it. Consistent with *Stewart*'s reaffirmation that the definition of "vessel" in 1 U.S.C. § 3 "should be construed . . . in light of the term's established meaning in general maritime law,"

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[1] For a sample of pre-*Stewart* court of appeals cases following this rule, see *Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975) ("To be a vessel, the purpose and business must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters.") (internal quotation marks omitted); *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 36 (2d Cir. 1996) ("the important factor" in determining whether a structure is a vessel "is the purpose for which the structure is presently being used – e.g., transportation, construction, etc."); *Hercules Co. v. The Brigadier General Absolom Baird*, 214 F.2d 66, 69 (3d Cir. 1954) ("[T]he purpose and business of the craft or use for which she is intended . . . are the factors which determine whether there is admiralty jurisdiction.").

543 U.S. at 492, the Fifth and Seventh Circuits continue to apply a purpose-based definition of vessel. *See* Pet. App. 16a (citing cases). In direct contrast, the Eleventh Circuit has interpreted *Stewart* to hold that vessel status now "does not depend in any way on either the purpose for which the craft was constructed or its intended use." Pet. App. 19a. Accordingly, while neither the district court nor the Eleventh Circuit disputed that petitioner's structure would have been exempt from maritime jurisdiction in either the Fifth or Seventh Circuits (as well as under this Court's pre-*Stewart* jurisprudence), the courts below ruled the structure's purpose and use irrelevant and deemed it a vessel simply because it was capable of being towed across water without sinking. Pet. App. 21a, 40a-42a. This reasoning upends decades of jurisprudence and portends a dramatic expansion of the reach of maritime law in a federal circuit with substantial geographic coverage.

2. Respondent does not attempt to distinguish petitioner's floating residential structure from any other floating home, such as those in Seattle and Sausalito, or indefinitely moored commercial establishments. *See* Pet. 16-17 (describing common features and nationwide prevalence of such structures). Respondent nevertheless opposes certiorari on the ground that this case is an unsuitable vehicle for resolving the split of authority at issue. Respondent is mistaken. The fault line between the purpose-based test for determining "vessel" status and the "capability of tow" test dictates whether indefinitely moored

floating structures that are not intended for use in maritime transportation continue to fall outside of maritime jurisdiction. The floating home at issue here falls squarely in this category. Petitioner used the structure as his residence, and, as the Eleventh Circuit explained, it "was moored to a dock by cables, received power from land, and had no motive power or steering of its own." Pet. App. 19a; *accord* Pet. App. 41a-42a. Those qualities would exempt petitioner's floating home from vessel status according to a purpose-based test.

Respondent disputes this vehicle analysis on three grounds, none of which has merit.

a. First, respondent asserts that "[t]he record is barren of evidence" indicating that petitioner intended his vessel to remain indefinitely moored at respondent's marina. BIO 10. This is untrue; among other things, petitioner's driver's license and declaration of homestead listed the marina as his primary residence. Dkt. 81 at 5; Dft. Ex. 30. Indeed, the whole reason petitioner fought the eminent domain battle against respondent that triggered this litigation is because he wanted to live indefinitely in its marina instead of moving. Pet. App. 4a; *see also* Tr. 173 ("I don't want to go anywhere"). Lest there be any doubt, the construction of the floating residential structure itself – a rectangle with no means of propulsion or steering, built from plywood with French doors on either end, just above the waterline – made clear enough it was designed for stationary living, not

transportation. Dft. Ex. 31; Dkt. 44 (photos of the structure).

Any extent to which the current record lacks additional evidence of intent derives not from any failure on petitioner's part, but rather from the fact that Eleventh Circuit law at the time of the district court proceedings held that vessel status did "not depend in any way on either the purpose for which the craft was constructed or its intended use." Pet. App. 19a (citing *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1310 (11th Cir. 2008)). Thus, the district court and Eleventh Circuit rejected on relevance grounds petitioner's attempt to present such evidence and granted summary judgment to the City simply because the structure was capable of being towed. *Id.*; Pet. App. 40a-42a. If this Court reverses and reaffirms that evidence of intent is relevant, all such evidence will be admissible on remand in the event it is necessary for petitioner to make any additional showing to remove any doubt that he should prevail on that ground.

b. Respondent next quibbles over various statements in the petition regarding the floating residential structure's form and equipment, suggesting that the structure was more like a boat than the petition lets on. BIO 6-10. Let petitioner be clear: even if respondent were right about all of these issues, it would not matter. Under the purpose-based test this Court has applied in cases other than *Stewart*, neither the "form" nor "equipment" of a structure, nor the mere fact that it could be towed over water,

determines vessel status. *Perry*, 191 U.S. at 30; *see also* 1 *Benedict on Admiralty* § 164 (vessel status does not depend on "the form, the construction, the rig, [or] the equipment"). Thus, in the Fifth and Seventh Circuit cases that the Eleventh Circuit rejected here, the floating, moored structures at issue actually *were* "boats," yet those courts still deemed them *not* to be "vessels" because their owners did not intend them to be used for transportation. Pet. 13-15 (discussing those cases). That is petitioner's legal argument here – that his structure was not a vessel because it was not intended to be used for maritime transportation. Hence, there is no need whatsoever for this Court to detain itself with the factual squabbles respondent raises.

In any event, respondent's quibbles are of little moment. First, respondent contends that petitioner's statement that his floating residential structure "contained no bilge pumps for expelling water during transport," Pet. 3, is inaccurate because the structure was actually "fitted with '[b]ilge pumps' . . . customarily found on vessels." BIO 8 (citing Dkt. 44). But the source respondent cites, a surveyor's report and exhibits, does not say that the structure was "fitted" with any pumps "customarily found on vessels." Those are respondent's words. In fact, the pumps were not installed on the structure at all; they were loose pumps that were not designed to operate during any kind of movement over water.

Second, respondent disputes whether evidence shows that the residential structure received television and internet service from shore. BIO 8-9. But a photo appended to respondent's own complaint shows the cable that delivered that service running into the structure, Dkt. 1 at 21; *see also* Dkt. 44 at 9-10 (additional photos). In addition, respondent obtained bank records from petitioner during discovery showing his payments to Bell South, the service provider.[2]

Third, respondent disputes petitioner's statement that the cleats installed on the structure "were inappropriate for towing," Pet. 3, emphasizing that the structure was, in fact, towed for several miles. BIO 9. But the import of the phrase "inappropriate for towing" – as petitioner explains later on that page and respondent does not contest – is that the structure was never designed to be towed significant distances and thus sustained serious damage due to its towings. Pet. 3; Pet. App. 18a. Petitioner did not imply that "inappropriate" meant "impossible."

Fourth, respondent states that, contrary to petitioner's assertion, the floating residential structure was not "affixed to a land-based sewer line while at

[2] The district court later quashed the subpoena that led to the production of those records and ordered respondent to return them as a sanction "for repeatedly disregarding the discovery cutoff date in the Court's orders and repeatedly disregarding the Local Rules pertaining to the timing of discovery requests," as well as improperly forwarding the records to another attorney not involved in this litigation. Dkt. 131 at 11.

the Marina." BIO 6. Respondent is correct on this point; the Petition contains an inadvertent misstatement in that respect. But the reality does not alter the legal equation here one iota: the structure was fitted for a land-based sewer line but was unable to hook up to one at the Marina during the relevant time period here because the Marina's infrastructure for allowing such hook ups was degraded and had not yet been rebuilt.

c. Finally, respondent disputes petitioner's assertion that he had applied for – and been granted – homestead protection for his floating residential structure. Once again, this issue is irrelevant to vessel status, Pet. App. 12a n.6, 17a, and thus has nothing to do with resolving the question presented. The only reason the Petition discusses Florida's homestead exemption is to highlight one way in which classifying a floating residential structure as a vessel has tangible consequences. *See* Pet. 18-19.

At any rate, respondent itself acknowledges that petitioner filed a properly certified declaration of homestead in Florida state court in 2006. BIO 10; *see also* Dft. Exh. 30. Even if a Florida court's acceptance of such a filing is not technically the same as "grant[ing]" it, BIO 10, respondent itself acknowledges that the right to homestead exemption "attaches by operation of state law provided certain circumstances are met," BIO 9, and there is no doubt that petitioner and his structure satisfied those circumstances. *See Miami Country Day Sch. v. Bakst*, 641 So.2d 467 (Fla. App. 1994) (floating home

that was "designed for use as [a] residence[ ]" and "was towed to its present location" at a marina was entitled to homestead exemption); *compare In re Hacker*, 260 B.R. 542, 546-47 (M.D. Fla. 2000) (distinguishing floating homes in this respect from houseboats customarily used for navigation). Nothing in respondent's brief, in fact, actually contends otherwise, and if it wishes to raise such a futile argument on remand, it may do so.

* * *

As the tone of respondent's brief indicates, the proceedings below were contentious and sometimes bitterly fought. But respondent overlooks the fact that the phase of the case for squabbling and histrionics is now over. All that remains is a pure issue of federal law – whether the test for determining whether vessel status turns on a structure's purpose/use or its mere ability to be towed without sinking – that the district court and the Eleventh Circuit implicitly recognized is outcome-determinative here. Pet. App. 16a, 19a, 42a. That issue is a critical one for the implementation of maritime law across the country, and this Court should resolve it.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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