No. 11-626

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On 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

It is common ground between the parties – and has long been the law – that a structure is a "vessel" if it is "practically capable of maritime transportation." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497 (2005); *see also Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) ("practically capable"); Petr. Br. 27-28, 31; Resp. Br. 16. The City thus does not distinguish itself from petitioner, or advance the ball in terms of the question presented, insofar as it propounds a "practical capability" rule for vessel status. This case turns on *how to assess* such "practical capabil[ity]."

Petitioner asks this Court to adhere to the test it announced over a century ago and that it has applied in practice for nearly one hundred and fifty years: a floating structure is practically capable of maritime transportation if "*the purpose* for which the craft was constructed, and the business in which it is engaged" is moving people or things over water. *Perry v. Haines*, 191 U.S. 17, 30 (1903) (emphasis added); *see also* Petr. Br. 12-14, 25-30 (discussing other cases). The City, on the other hand, contends (like the Eleventh Circuit) that this Court's decision in *Stewart sub silentio* "rejected" the longstanding purposive test. Resp. Br. 24; *see also* Pet. App. 16a, 19a. Even though there was no need in *Stewart* to coin a new test for vessel status, the City argues that *Stewart* expanded the definition of the word "vessel" to cover the "broader" category of most anything that floats and that is not securely moored to shore with some unspecified degree of firmness. Resp. Br. 20.

This Court should turn aside the City's request to dramatically expand maritime jurisdiction. The

purposive test has been followed not only by this Court, but also by lower courts and espoused by maritime treatises, for over a century. It is fully consistent with *Stewart*. And it has long produced consistent and sensible results. Respondent's new formula, by contrast, contravenes well-settled principles of statutory interpretation, finds no support in precedent, and would open the door to artificial manipulations of maritime coverage.

Applying the purposive test to the facts here makes clear that the district court erred in assuming jurisdiction and granting summary judgment for the City. The purpose of petitioner's floating home was to serve as a stationary residence that functioned as an extension of land. Neither the fact that it had been towed and repositioned a few times over the years nor that it was secured by ropes instead of chains altered that purpose or otherwise rendered the indefinitely moored home a vessel.

ARGUMENT

I. This Court Should Reaffirm That The Purposive Test Controls Whether A Floating Structure Is Practically Capable Of Maritime Transportation.

This case provides no reason for this Court to change the basic test for determining "practical capability" of maritime transport. The purposive test this Court adopted over a century ago is firmly grounded in law and has worked well. The City's alternative test – which covers most anything that floats and then exempts items moored to shore to some unspecified degree – lacks legal pedigree and would raise serious administrability concerns.

A. The Purposive Test Is Well-Grounded In Law And Has Worked For Over A Century.

The City contends that the purposive approach contradicts the text of 1 U.S.C. § 3, misreads precedent, and is unworkable. None of these criticisms has merit.

1. The purposive test comports with the text of Section 3. As petitioner has explained, the word "capable" often connotes an object's suitability or fitness for performing a certain function. Petr. Br. 20. Such is the case here. The word "capable" in Section 3 asks whether one of an object's purposes is moving people or things over water.

Contrary to the City's suggestion (Resp. Br. 19), this definition gives the "capability" prong of Section 3 independent meaning from the "use" prong. If a busy lawyer in a coastal area purchases a sailboat intending to use it for weekend excursions but never has time to set sail, the sailboat is still a vessel, even though it is continuously moored at the local marina and is never used for maritime transportation. *See, e.g.*, *The Scorpio*, 181 F.2d 356, 358-59 (5th Cir. 1950). The "capable of" prong of Section 3, in short, ensures that watercraft designed to move people or things over water do not pass in and out of maritime jurisdiction depending on a "snapshot" of whether they are actually in use at any particular time. *See Stewart*, 543 U.S. at 494-95.[1]

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[1] Neither of the other statutes the City cites is helpful in construing Section 3. *See* Resp. Br. 22-23. The definitional section of the criminal code, 18 U.S.C. § 2311, uses the phrase

2. Any uncertainty generated by the text of Section 3 standing alone is quickly dispelled by the precedent and tradition dictating that a structure's purpose determines whether it is practically capable of moving people or things over water. Indeed, petitioner is at a loss to understand the City's suggestion (Resp. Br. 40-41) that this Court has never adopted the purposive test.

As noted at the outset of this brief, this Court explained in 1903 that the question of vessel status "regards only [whether] *the purpose* for which the craft was constructed, and the business in which it is engaged" is moving people or things over water. *Perry v. Haines*, 191 U.S. 17, 30 (1903) (emphasis added). Every decision before or since has applied that test and has excluded from vessel status those structures whose purpose is not moving people or things over water. *See Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887) (repeatedly stating that the "purpose" of a structure determines vessel status and concluding that a dry-dock was not a vessel because it was "not used for the purpose" of maritime transportation); *Evansville & Bowling Green Packet*

"designed for" where Section 3 uses the term "capable of," but gives no hint that Congress intended the two phrases to be anything other than interchangeable. The definition in 49 U.S.C. § 13102(25) includes the phrase "or is intended to be used" on top of the language in Section 3. That language encompasses objects whose purpose is not maritime transportation but whose owners nonetheless use them for that purpose – the very category of objects the City claims is already encompassed in the phrase "capable of" and thus would be superfluous if the City's construction of "capable of" were correct.

Co. v. Chero Cola Bottling Co., 271 U.S. 19, 21-22 (1926) (holding that a wharfboat that was towed numerous times was not "practically capable" of maritime transport because its "function" was "storage and handling" of items, "not . . . to carry freight from one place to another"); *Roper v. United States*, 368 U.S. 20, 21-23 (1961) (floating warehouse that was repeatedly towed was not a vessel because it was "withdrawn from navigation"; "its function [was] storing grain until needed" and "was not moved in order to transport commodities from one location to another").[2] Federal courts of appeals and authors of maritime treatises likewise have long taken the purposive test as settled law.[3]

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[2] The City suggests that this Court's decision in *The Jack-O-Lantern*, 258 U.S. 96 (1922), "bestowed vessel status on [a] craft[] that had [a] non-transportation purpose[]." Resp. Br. 38. But the craft there was "a steamer" with a working "engine and boilers," and "propeller[s]." *Jack-O-Lantern*, 258 U.S. at 98-99. It is hardly surprising, therefore, that no one disputed it was a vessel.

[3] *See* Pet. Br. 22, 25-26 (quoting test from Benedict's 1870 treatise and modern treatises that tracks *Perry*'s test practically verbatim); *see also, e.g.*, *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 (2nd Cir. 1996) ("[T]he important factor" in determining vessel status "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 (3rd 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."); *Great Lakes Dredge & Dock*

Furthermore, even the City acknowledges that general maritime courts around the time Section 3 was enacted employed the purposive test. Resp. Br. 38; *see also* Petr. Br. 22-24. The City, of course, also asserts that a few cases followed a different path. Resp. Br. at 38-39 (citing *Rogers v. A Scow Without a Name*, 80 F. 736 (E.D.N.Y. 1897); *The Ark*, 17 F.2d 446 (S.D. Fla. 1926); and *The Showboat*, 47 F.2d 286 (D. Mass. 1930)). But none of those cases deviated from the purposive test.

The structure at issue in *Rogers* was seemingly an ordinary "house boat," which was so obviously a vessel – and so obviously different than a "floating home" – that the court spent only one sentence on the issue. 80 F. at 736; *see also* Petr. Br. 2 (distinguishing "houseboats" from "floating homes"); *infra* at 16-17 (same). Indeed, the same judge held in another case that a floating home nearly identical to petitioner's was not a vessel because it was not "employed in the transportation of freight or passengers from place to place upon water." *Woodruff v. One Covered Scow*, 30 F. 269, 270 (E.D.N.Y. 1887).[4] The "amusement vessel[]" in *The*

Co. v. City of Chicago, 3 F.3d 225, 229 (7th Cir. 1993) ("[A] craft is a 'vessel' if its purpose is to some reasonable degree the transportation of passengers, cargo, or equipment from place to place across navigable waters.") (internal quotation marks omitted), *aff'd sub nom.*, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

[4] The "Judge Benedict" who the City notes (Resp. Br. 38) authored *Rogers* and *Woodruff* was a different person than Erastus Cornelius Benedict, who wrote the leading treatise of the time on admiralty law. *See* http://www.fjc.gov/servlet/nGetInfo?jid=154&cid=999&ctype=na&instate=na.

Showboat was "a five-masted schooner" with "a crew consisting of a licensed master or mate and two or three seaman." 47 F.2d at 287. Noting that this ship remained a vessel even when its owners lacked any "*present* intention" to sail, *id.* (emphasis added), the court rejected a "snapshot" test, not the purposive test. Indeed, the court accepted and distinguished another case holding that a similar structure was *not* a vessel because it "was not used, *or intended to be used*, to carry freight or passengers from one place to another." *Hayford v. Doussony*, 32 F.2d 605 (5th Cir. 1929) (emphasis added), *cited in Showboat*, 47 F.2d at 287. Finally, the court in *The Ark* held that the "boat" at issue there, which was being used at the time as a "floating supper club and dance hall," was a vessel because it had been only "*temporarily* withdrawn from commerce." 17 F.2d at 447-48 (emphasis added). Once again, this decision simply rejected a "snapshot" argument, not the purposive test.

That leaves the City's reliance on *Stewart*. According to the City, *Stewart sub silentio* "rejected" *Perry*'s purposive test. Resp. Br. 24. But *Stewart* did nothing of the sort. It reaffirmed this Court's prior cases that employed the purposive test and its "withdrawn from navigation" corollary. *See* 543 U.S. at 493-94, 496. The *Stewart* Court also stressed that the statutory term "vessel" should continue to be construed "in light of the term's established meaning in general maritime law," *id.* at 492, and it used the phrase "capable of" interchangeably with "function," *id.* at 495. *Stewart* thus reinforced that while Section 3 "does not require that a watercraft be used *primarily* for th[e] purpose" of transportation on water, a structure must have a "function" of carrying

people or things over water in order to be a vessel. 543 U.S. at 492, 495 (emphasis in original).

3. Finally, the City attacks the administrability of the purposive test on three grounds. None is persuasive.

First, the City claims to be "confused" concerning exactly what approach to "practical capability" petitioner advocates and suggests that courts would share its confusion. Resp. Br. 31. Let petitioner be clear: his position is that this Court should continue to employ the purposive test articulated in *Perry* and applied in all of this Court's other cases. *See also* Petr. Br. 12, 25-26. Maritime treatises and lower courts have followed this test for almost one hundred and fifty years, *see id.*, and it has never before generated trouble.

Second, the City contends that the purposive test is problematic insofar as it depends on "an owner's subjective intent." Resp. Br. 32-33. But the purposive test does not turn on any such intent. To the contrary, petitioner and the Government agree that the purposive test turns on an objective assessment of a structure's function. Petr. Br. 22 n.8; Gvt. Br. 24. The City's objection thus has no bearing on this case.[5]

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[5] The objective nature of the purposive test also disposes of the vast majority of the concerns of amici that have filed briefs on the City's side of the case, which are all premised on an aversion to a subjective inquiry for vessel status. *See* Br. of United Bhd. of Carpenters and Joiners of Am. at 3; Br. of Mar. Law Ass'n at 11-14; Br. of Thirty-Six Admiralty and Mar. Law Professors at 15-24; Br. of Marine Bankers Ass'n at 9-19. The Maritime Law Association's related suggestion (at 21-24) that

Third, the City asserts that a rule turning on a structure's objective purpose is difficult to apply. Resp. Br. 34-36. The short answer is that the past century-plus of applying the purposive test demonstrates otherwise. At any rate, tests dependent on objective purposes abound across numerous areas of the law. *See, e.g.*, *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011) (Confrontation Clause's application turns on objective purpose of police interrogation); *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005) ("[t]he eyes that look to purpose" to determine the legality of a law respecting religion "belong to an objective observer") (internal quotation marks omitted); *Warren v. Fairfax Cnty.*, 196 F.3d 186, 191 (4th Cir. 1999) (test for public forum under First Amendment depends on the forum's objective purpose); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 950 (7th Cir. 2004) (Clean Water Act's application depends on objective purpose of discharges); *Nickerson v. C.I.R.*, 700 F.2d 402, 404 (7th Cir. 1983) (objective purpose determines whether taxpayer's enterprise was profit or pleasure). Such tests are effective because they generate predictable outcomes based on the innate natures of things.

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commercial lenders could be prejudiced if certain "dead ships" with ship mortgages are treated as non-vessels substantially underestimates the prudence of commercial lenders. For such loans, lenders ordinarily require borrowers to grant a ship mortgage *and* a real estate mortgage, *as well as* a UCC security interest (in case the property is deemed neither real estate nor a vessel, but merely personal property).

The City offers no persuasive reason why a purpose-based test is uniquely ill-suited to maritime jurisdictional inquiries. For the most part, floating structures either have a function of conveying people or things over water or they are intended to sit still (save perhaps incidental relocations). It is not hard to say which is which. Indeed, as the United States explains, numerous maritime doctrines themselves depend on assessing a vessel's purpose or function. Gvt. Br. 22-23.

B. The City's Proposed Method For Assessing Vessel Status Lacks Legal Foundation And Would Be Unduly Manipulable.

Like the Eleventh Circuit (*see* Pet. App. 16a, 19a), the City contends that purpose has nothing to do with vessel status. Advancing the broadest possible definition of the word "capable," the City emphasizes that "many objects are 'capable' of being used for purposes other than those for which they [a]re intended," and asks this Court to confer vessel status on objects based purely on what their "physical attributes" would allow to occur. Resp. Br. 20-21.

Yet faced with this Court's repeated holdings that structures that were towed across water were not vessels, the City does not defend the Eleventh Circuit's rule that anything that floats and can be towed across water is a vessel, Pet. App. 18a, 21a. Instead, the City contends that "*most* structures that are afloat" and "have the capacity to be towed across the water will qualify as vessels." Resp. Br. 29-30 (emphasis added) (internal quotation marks, alterations, and citation omitted). The City then offers the two qualifications implicit in its word

"most": (1) objects that "can[not] carry cargo or persons" are not vessels and (2) objects that are "immobilized by some substantial (and difficult to remove) physical restraint" are not vessels. *Id.* at 26, 29.

The City's more complicated alternative to the purpose test fares no better than the Eleventh Circuit's. The first purported restriction is really no restriction at all. And the second presents numerous legal and practical problems.

1. It is true that a structure must be able to convey people or things over water to be a vessel. But making merely that "physical" ability a prerequisite for vessel status, *id.* at 20-21, instead of requiring the structure to have a *purpose* of transporting things, does not meaningfully limit the category of covered objects. Virtually anything that floats and has either a somewhat flat surface or a cavity of some kind can carry people or things across water while under tow. For example, modular dock pieces, *see* http://www.ez-dock.com/en.html; water trampolines and play structures, *see* http://www.ravesports.com/proline.html; and floating commercial fishing nets and cages (gill nets, for instance, *see* http://en.wikipedia.org/wiki/Gill_net), all have the physical attributes necessary to carry people or things over water under tow. Yet none of these things are, as Section 3 requires, "commonly thought of as being capable of being used for water transport." *Stewart*, 533 U.S. at 494. Indeed, it is telling the City does not point to any floating object that cannot carry people or things over water.

2. The City's second proposed qualification to vessel status – the "substantial physical restraint" exception – is even more vexing.

As an initial matter, this test has no basis in law. Section 3 asks whether a structure is "capable of" maritime transportation. If, as the City says, all the phrase "capable of" means is having "physical attributes that allow it to carry things over water," Resp. Br. 21, then the origin of the City's mooring exception is unclear. The mere fact that a floating object is firmly secured to land does not deprive *the object* of any physical attribute that would allow it to carry things over water. Nor does it make maritime transportation impractical, in the sense of being difficult to accomplish. Instead, a connection to land simply requires someone to exert a certain amount of effort to unlatch the structure before using it to transport something.

Nor does the City's physical restraint exception comport with precedent. The structures this Court deemed non-vessels in *Cope* and *Evansville* were fastened to shore by chains or cables. But the same cannot be said of the "mobile warehouse" in *Roper*, 368 U.S. at 23, or the floating fish processing plant in *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 659 (9th Cir. 1992), which was merely "anchored and tied to a dock." Yet this Court in *Stewart* confirmed that the latter two structures were non-vessels as surely as the former two were. 543 U.S. at 494, 496. Scows that general maritime courts deemed non-vessels likewise were sometimes simply "attached to the wharf by lines." *Woodruff*, 30 F. at 269; *see also Ruddiman v. A Scow Platform*, 38 F. 158, 158 (S.D.N.Y. 1889) (scow "designed to be moored along-

side a wharf" was not a vessel "because it was not designed or used for the purpose of navigation"). Equally important, *none* of these decisions turned on the precise characteristics of the attachments to shore; while judicial opinions sometimes included descriptions of the attachments as relevant evidence of a structure's function, the driving *legal test* in each case was the structure's purpose. *See supra* 4-6 Petr. Br. 22-31.

No other test makes sense. There is no way to pinpoint exactly how firmly secured a structure must be to render it a non-vessel. Must it be affixed with new ropes instead of "deteriorated" (Resp. Br. i) ones? Chains or cables instead of ropes? A particular number of chains? What if a structure is securely fastened to land with steel beams but can be easily detached from them if necessary "to tow [the structure] to sheltered waters in the event potentially damaging weather is forecast"? *See Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 564 (5th Cir. 1995). The potential questions go on and on.

Even if this Court were willing to create out of whole cloth a precise test for what constitutes a "substantial physical restraint," the test would be utterly manipulable. If all that separated petitioner's floating home from the structures at issue in *Cope* and *Evansville* were four or five chains, then everyone in petitioner's position in the future could simply use chains instead of ropes to fasten their structures to piers. Worse yet, owners of sailboats or yachts who used them sparingly could presumably moor them with chains or cables instead of nylon lines and thereby evade maritime jurisdiction entirely. In short, if any rule has the potential to

undermine stability in maritime law and wreak havoc on things such as preferred ship mortgages (*see* Br. of Nat'l Marine Bankers Ass'n), it is the City's proposal.

Lastly, the City's proposed test for vessel status would extend maritime law into disputes in which there is no need for federal jurisdiction – and in which maritime law's special rules designed to "compensat[e] or offset[] the special hazards and disadvantages" of navigation at sea, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991), do not sensibly apply. To repeat just one example: the City's test would confer "seaman" status on waiters on floating restaurants, blackjack dealers in floating casinos, and nannies on floating homes. Petr. Br. 40. A "seaman" is anyone who has a "substantial" connection to a vessel and who "contributes to the vessel's function or mission." *Stewart*, 543 U.S. at 494-95. As OSHA has explained and court decisions confirm, such waiters, blackjack dealers, and nannies most certainly would satisfy these requirements, *see* Petr. Br. 40 (citing authority), and the City does not seriously contend otherwise, *see* Resp. Br. 45.[6] Instead, the City simply says "this Court need not address the substantive maritime tort doctrines that petitioner invokes." *Id.* at 44.

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[6] Also noteworthy is the United States' warning that "adopting the Eleventh Circuit's test on a nationwide basis would significantly increase the number of large passenger 'vessels' that the Coast Guard would be required to inspect, diverting time and resources away from structures that are far more relevant to maritime safety and security." Gvt. Br. 29 n.11.

This will not do. It is perfectly understandable for a litigant – as well as the Maritime Law Association and some maritime professors – to want to broaden the scope of admiralty jurisdiction and expand the reach of maritime law's generous remedies. But one cannot ignore the potential consequences of such a request or deride them as mere "policy arguments." *Id.* at 42. It is a fundamental canon of construction that when this Court construes a statutory term – especially, as here, a term in a definitional provision – it must consider "'not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Such is the essence of structural analysis. That the City endeavors to steer this Court away from contemplating whether its rule fits with the rest of maritime law is compelling reason, in and of itself, to reject its proposal.

II. The Purposive Test Dictates That Petitioner's Floating Home Was Not A Vessel.

Even though the City itself initially pursued relief against petitioner "under state landlord-tenant law" in state court, Pet. App. 30a – turning to federal law only after losing at trial and subsequently being enjoined for engaging improper self-help tactics (Dft. Tr. Exh. 4) – the City now contends that petitioner's floating home was so clearly a vessel that it was entitled to summary judgment on that jurisdictional issue. Applying the purposive test to the record here, however, shows that the Eleventh Circuit's decision should be reversed because petitioner's home was not

a vessel. At the very least, this case should be remanded so that the lower courts can apply the proper legal test and take any extra evidence that is necessary to do so. *See* Gvt. Br. 29-31.[7]

Without denying that "floating homes" are non-vessels, the City urges this Court to lump petitioner's home in with the "houseboats" that various lower courts have held are vessels. Resp. Br. at 54-55 (citing *Miami River Boat Yard, Inc. v. 60' Houseboat Serial #SC-40-2860-3-62*, 390 F.2d 596 (5th Cir. 1968); *Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987 (S.D.N.Y. 1979)). But unlike houseboats, which have a "purpose" of moving

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[7] The City now suggests for the first time in this litigation (and on the last page of its brief) that it need only have "made a 'prima facie' showing that petitioner's [home] was a vessel." Resp. Br. 57. Because the City made no such argument in its Brief in Opposition, this Court should consider it waived. *See* Sup. Ct. R. 15.2. At any rate, the City's suggestion is frivolous. A plaintiff may need to make only a prima facie showing on a jurisdictional issue when the issue first arises in district court proceedings, or on appeal after a district court has dismissed the case. But when, as here, a district court postponed any jurisdictional determination until the submission of evidence and then assumed jurisdiction and entered judgment for the plaintiff, Pet. App. 40a-42a, an appellate court must decide whether the plaintiff properly established jurisdiction by a preponderance of the evidence. *See Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Data Disc, Inc. v. Sys. Techn. Assocs., Inc.*, 557 F.2d 1280, 1285 n.2 (9th Cir. 1977) ("Of course, at any time when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove the jurisdictional facts at trial by a preponderance of the evidence."); *see also Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675-78 (1st Cir. 1992) (same in context of jurisdictional facts that go to merits).

people and their things over water, *Miami Boat Yard*, 390 F.2d at 597, the objective facts indicate that petitioner's home lacked any such purpose. Petitioner's home was constructed with plywood to specifications governing land-based dwellings. Petr. Br. 3. It may not have been as architecturally impressive or meticulously maintained as upmarket floating homes in places like Seattle and Sausalito. But, just like such structures, petitioner's home was designed to sit still and function as an extension of land, not to carry things over water. *Id.* at 4. Indeed, at the time of its seizure, the home had been sitting still for three years and was indefinitely affixed to the City's marina. *Id.* at 16.

None of the City's quibbles with these inalterable facts indicate any contrary purpose.

• The City emphasizes that petitioner's floating home was secured in its marina pursuant to a "wet-slip agreement" and that "[p]etitioner lacked any property interest in the Marina's land." Resp. Br. 55. But floating homeowners frequently lack any real property interest. *See* Br. of Seattle Floating Homes Ass'n at 7, 25; *Woodruff*, 30 F. at 269 (floating home not a vessel even though it was tied to municipal wharf). And to the extent the terms of the standard moorage agreement petitioner signed shed any light on whether its purpose was maritime transportation, the venue provision, requiring any lawsuit to be governed by "the laws of the State of Florida,"

suggested that federal admiralty law did not apply to his home. J.A. 20.[8]

• The City contends that the home's affixations to land – ropes, a power line, and a water hose – were too "insubstantial" to indicate indefinite mooring. Resp. Br. 51, 54. But it is common for floating homes on saltwater to be attached by rope instead of cables or other metal devices; rope provides greater elasticity in fluctuating tides. Br. of Seattle Floating Home Ass'n at 7-8; *Woodruff*, 30 F. at 269. The critical aspect of petitioner's home's utility connections, therefore, was not how difficult they might have been to remove, but rather – as one state law distinguishing floating homes from houseboats puts it – that they showed that the home was "*dependent* for utilities upon a continuous utility linkage to a source originating on shore." CAL. HEALTH & SAFETY CODE § 18075.55(d) (emphasis added). The nature of petitioner's utilities connections, in other words, underscored, rather than undermined, the non-transportation purpose of his home.

• The City next notes that petitioner's floating home was "relocated" twice over the six years of his ownership – first from the place of purchase to North Bay Village, and then from North Bay Village to the City's marina. Resp. Br. 56, 48-49. But petitioner

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[8] The City incorrectly suggests that after it invoked federal law to trump petitioner's state-court victory, petitioner bid for his home at the U.S. Marshal's auction. Resp. Br. 13. In truth, he never registered to bid. The City outbid the public, foregoing the money it could have obtained at the sale in order to take ownership of the structure and destroy it.

had the structure moved only out of necessity. When he purchased the home, it was affixed to someone else's private property, so he had to move it. And he moved it from North Bay Village only because a hurricane destroyed the facility. Those reasons for moving hardly suggest that petitioner's home had any transportation purpose.[9]

• Finally, the City disputes that petitioner's floating home incurred damage when it was towed. *Id.* at 49. Even if petitioner's home had remained unscathed, this would not suggest petitioner's home was a vessel. There is no indication that the structures at issue in *Evansville*, *Roper*, or *Pavone* incurred any damage whatsoever when towed repeatedly. Yet this Court treated each as non-vessels because they lacked any transportation function. *See Stewart*, 543 U.S. at 493-94, 496. In any event, numerous photos in the record reflect the damage petitioner's home suffered when towed. *See, e.g.*, J.A. 52 (photo 17; bright plywood patch showing where exterior wall failed), 48 (photo 10: white epoxy patch), 44 (photo 1: discolored patches showing

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[9] The City also occasionally references the U.S. Marshal's arrest and tow of the structure after the City has filed its complaint and acted on its purported maritime lien. *E.g.*, Resp. Br. 50. But it is well-established that a plaintiff may not establish subject matter jurisdiction based on facts it manufactures after filing its lawsuit. *See, e.g.*, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."); *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986) (a plaintiff cannot "create jurisdiction retroactively where it did not previously exist").

repairs below French doors). And if the district court or Eleventh Circuit had ruled evidence on this particular point relevant, petitioner could have introduced much more. *See* Petr. Br. 5 n.6; Gvt. Br. 30.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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