No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,
v.

THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does a houseboat that was towed several times over hundreds of miles and then moored with deteriorated ropes in a public marina, where it received power through a 50-amp extension cord and water through a garden-type hose, constitute a "vessel" under 1 U.S.C. § 3, thus supporting federal admiralty jurisdiction?

PARTIES TO THE PROCEEDINGS

In the district court, respondent City of Riviera Beach, Florida, was the plaintiff and petitioner Fane Lozman's houseboat was the *in rem* defendant. Petitioner, asserting his ownership of the defendant houseboat under Federal Rule of Civil Procedure Supplemental Rule C(6)(a), appeared in the district court as "claimant" (*e.g.*, Supp. R. E(2)(a)).

In the court of appeals, petitioner was the appellant and respondent was the appellee. The U.S. marshal sold the defendant houseboat at a judicial sale under Federal Rule of Civil Procedure Supplemental Rule E(9)(b), shortly before the notice of appeal was filed and the houseboat was subsequently destroyed. It was not a party in the court of appeals.

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INTRODUCTION

Congress defined "vessel" in 1 U.S.C. § 3 to mean "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." In *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 496 (2005), this Court construed § 3 as a test of "practical possibility."

The Eleventh Circuit properly upheld the district court's exercise of admiralty jurisdiction, because petitioner's houseboat amply demonstrated both actual use and practical capability for maritime transportation. The houseboat had been towed hundreds of miles. Its mooring in respondent's marina under a wet-slip agreement required that the watercraft be capable of leaving the marina on three days' notice and proceeding to another destination on navigable waterways.

The court below correctly rejected as legally irrelevant what little evidence petitioner proffered, because it did not address the practical-capability requirement of § 3. In this Court, petitioner abandons his previous arguments and asks the Court to divine the houseboat's "purpose" based on his asserted desire to stay at the marina "indefinitely" and to transform the houseboat into a purported "extension of land." But petitioner had no property or contractual right to an indefinite moorage, and his subjective intent is irrelevant to the objective practical capabilities of his vessel. Moreover, the connections to the dock were so flimsy that the houseboat could – and did – depart the marina in a matter of minutes. Petitioner's houseboat therefore bears no resemblance to dry-docks or wharfboats with connections to land that make maritime transportation impracticable. Because enforcing maritime

liens for dockage services and maritime torts is a classic invocation of *in rem* jurisdiction, the judgment below should be affirmed.

STATEMENT

A. Legal Background

This case concerns whether federal admiralty jurisdiction extends to an *in rem* action against petitioner's houseboat. Respondent sought to enforce a maritime lien against the houseboat itself *in rem*, rather than bring an *in personam* action against petitioner. Petitioner then defended the action as "claimant." *See generally*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 586-688 (2d ed. 1975) ("GILMORE & BLACK") (describing maritime liens, *in rem* actions, and related issues).

The judicial power of the United States extends to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Under the so-called saving-to-suitors clause, 28 U.S.C. § 1333(1), state courts have concurrent jurisdiction over almost all maritime cases. *See*, *e.g.*, *Madruga v. Superior Court*, 346 U.S. 556, 561-62 (1954). But federal district courts sitting in admiralty have exclusive jurisdiction over maritime *in rem* actions. *See*, *e.g.*, *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427-31 (1867).

In 1910, Congress enacted the Federal Maritime Lien Act ("FMLA") to provide a uniform federal statute governing maritime liens for the provision of necessaries to vessels. *See* Act of June 23, 1910, ch. 373, § 1, 36 Stat. 604, 604 ("any person furnishing repairs, supplies, or other necessaries . . . to a vessel . . . shall have a maritime lien on the vessel which may be enforced by a proceeding in rem"). The FMLA preempted state laws that had governed maritime liens and "provided a series of simple and

comprehensive rules" designed to "aid . . . those who supply necessaries to ships." *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 272-73 (1940). One of those rules gave suppliers of necessaries an *in rem* remedy against the vessel itself to secure payment of charges. *See generally*, *e.g.*, GILMORE & BLACK 622. "Necessaries" includes "wharfage and dockage." 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-3, at 703 (5th ed. 2011).

Over a century later, the current FMLA, 46 U.S.C. §§ 31341-31343, remains essentially unchanged. It provides that "a person providing necessaries to a vessel on the order of 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." *Id.* § 31342(a).

In the present case, both admiralty jurisdiction and the maritime lien's substantive validity required petitioner's houseboat to be a "vessel," which Congress defined as "includ[ing] 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.[1] Thus, the central question in this case is whether petitioner's houseboat was "used, or capable of being used, as a means of transportation on water."

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[1] When Congress recodified Title 46 (which includes the FMLA) in 2006, it provided that, "[i]n this title, the term 'vessel' has the meaning given that term in [§ 3]." 46 U.S.C. § 115. Section 3 has defined "vessel" in the same terms (except for a minor change in punctuation) since 1873. *See* Rev. Stat. § 3 (1873).

This Court recently examined § 3's "vessel" definition in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), which held that a dredge – a floating platform with a bucket that removes silt from the ocean floor – was a vessel under § 3. The *Stewart* Court explained that the statute requires "practical," as opposed to "merely a theoretical," capability. *Id.* at 496. The relevant issue accordingly is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* Merely theoretical capability arises when a watercraft "has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* at 494.

Stewart rejected the view that vessel status turns on "primary purpose" or intended use. *See id.* at 497. It also rejected the view that "a structure's locomotion at any given point matter[s]." *Id.* at 496. "Under § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Id.* at 497. In other words, § 3 "requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose." *Id.* at 495.

B. Factual Background

Petitioner purchased the houseboat at issue in 2002. (It is pictured most clearly at JA69. Other pictures – interior and exterior – are at JA12, 31-33, 44-66.) The bill of sale described it as a "Homemade Custom Houseboat/Barge" purchased for $17,000. JA79. The houseboat was then located near Fort Myers, on Florida's west coast. JA70-71. Petitioner towed it to North Bay Village on Florida's east coast

(JA71), a distance of more than 200 miles (App. 3a). While in North Bay Village, petitioner moved the houseboat multiple times, docking temporarily at three different marinas as circumstances changed. JA71-72, 77-78.

In 2006, Hurricane Wilma destroyed the marinas and most of the vessels in North Bay Village, but did not damage petitioner's houseboat. JA78. He therefore moved it yet again. Using a 30-foot motorboat, petitioner towed the houseboat to Riviera Beach (JA73-74) – a distance of approximately 70 miles (JA83; App. 19a n.9). To facilitate that journey, a building contractor installed four new towing cleats on the houseboat. JA86; App. 19a n.9.

Petitioner contracted with the Riviera Beach Marina ("Marina"), which is owned and operated by respondent, to dock his houseboat there. The Marina, situated on the Atlantic Intracoastal Waterway, provides wet and dry storage for approximately 510 commercial and recreational vessels. *See* Affidavit of Edwin C. Legue ¶¶ 5-6 (July 31, 2009) ("Legue Aff.") (D.C. Dkt. 80-1). Commercial vessels occupy roughly 15% of the Marina's wet slips. *Id.* ¶ 7. A quarter of the Marina's dockage revenue comes from transient vessels that dock at the Marina for less than 10 days while en route to other destinations. *Id.* ¶ 9.

The "Wet-Slip or Dry Storage Agreement" that petitioner signed (JA13-21) permitted him to use a "wet slip" in exchange for a fee. The Agreement referred generally to petitioner's houseboat as a "vessel" (JA13-20) or "boat" (JA13-19), and more specifically described it as a "Houseboat" (JA13).

The Agreement did not entitle petitioner to occupy any particular space at the Marina. The "assigned space" clause instead provided:

> Owners of vessels assigned slips, moorings, or dry-storage spaces as may be specifically designated by the City at Marina facilities agree to relinquish their berth when requested by the City. . . . [T]he City may at any time, in its absolute discretion, require the Owner to remove the vessel from its assigned storage area to another storage area within the Marina, and if the Owner fails to comply, the City shall have the right to move the vessel itself.

JA13-14. The Agreement noted that respondent would have a maritime lien on the vessel:

> In addition to any other remedies provided for in this Agreement, the Marina, as a provider of necessities to this vessel, has a maritime lien on the vessel and may bring a civil action *in rem*, under 46 United States Code 31342 in Federal Court, to arrest the vessel and enforce the lien and shall not be required to allege or prove in such action that credit was given to the vessel.

JA15. Petitioner agreed "to abide by . . . any additional rules which from time to time may be conspicuously posted on the premises." JA17. Finally, the termination clause provided:

> This Agreement may be terminated upon any of the following conditions:
>
> * * *
>
> By written notice of termination by the City delivered to the owner at the address specified at least three (3) days prior to the effective date of termination. The Owner hereby agrees to remove

> the vessel from the City's premises by the date specified.

Id.

While at the Marina, petitioner moored the houseboat using rope lines (pictured at JA32). An independent surveyor described the lines as "deteriorated, hanging in the water," and noted that they were "not sufficient to prevent the craft from breaking loose." JA32. The houseboat –

- received electricity through a single, 50-amp extension cord (pictured at JA33) that was plugged into an outlet on the dock, JA33;
- received water through a hose (pictured at JA33), comparable to an ordinary garden hose, which was connected to a spigot on the dock, JA31;
- was not connected to a land-based sewer line; petitioner simply pumped raw sewage overboard while he lived at the Marina, *see* Cert. Opp. 7-8 (quoting Deposition of Fane Lozman 52:17-53:19 (Aug. 25, 2009) ("Lozman Dep.") (D.C. Dkt. 98-2));
- had a satellite dish (pictured at JA12, 69) for television reception.

Finally, the dock had a telephone jack on the same box as the power outlet (pictured at JA33), and petitioner could have used that jack for telephone or internet service.

In June 2007, the Riviera Beach City Council unanimously adopted a revised dockage agreement that required all vessels to: (1) secure and maintain liability insurance to specified limits and to name the Marina as an additional insured; (2) show proof of valid registration or documentation; (3) be operational and capable of vacating the Marina in case of an

emergency; and (4) comply with the Florida Clean Vessel Act, Fla. Stat. § 327.53, which, among other things, prohibits owners of vessels or floating structures from discharging raw sewage into Florida waters.[2] The resolution did not provide for use of the Marina by any watercraft other than vessels, and the Marina itself reserved no space for permanently moored craft.

Nine months later, respondent hired an independent surveyor to determine which vessels at the Marina had not complied with the revised regulations. Approximately a dozen vessels, including petitioner's houseboat, were non-compliant.[3] Every other non-compliant vessel, with the sole exception of petitioner's houseboat at issue here, either corrected the deficiencies or left the Marina. Legue Aff. ¶ 25. Petitioner failed to comply and did not sign the new agreement, despite multiple requests that he do so. *E.g.*, JA25-27. In April 2008, respondent informed petitioner that he had missed the extended deadline to execute a new agreement and that respondent would enforce its rights against the vessel. JA28-29. When petitioner still failed to comply, respondent instructed petitioner to remove his houseboat from the Marina by April 1, 2009. JA34-35. It also advised petitioner that he had an outstanding balance of $2,537.83 for unpaid dockage. *Id.* Petitioner neither

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[2] The following month, respondent notified its customers of the new requirements, along with the new agreement, which was to be executed by September 30, 2007. JA25-26.

[3] Among those vessels was a second houseboat owned by petitioner, the *And Triumphant*. He removed it from the Marina upon notice of its non-compliance. *See* Lozman Dep. 27:10-17, 29:16-30:23. The *And Triumphant* is pictured at JA31 (described as "Yellow & White House Boat").

executed the new agreement nor removed his houseboat from the Marina.

C. Procedural Background

1. District court proceedings

Complaint. Respondent instituted the present *in rem* action against petitioner's houseboat to execute maritime liens for necessaries under 46 U.S.C. § 31342 and for maritime trespass. The district court issued a warrant for the houseboat's arrest. The U.S. marshal executed that warrant and towed the houseboat (JA69), still containing some of petitioner's personal property (JA68),[4] from Riviera Beach to Miami.

In Miami, a surveyor inspected the houseboat and reported that "the vessel had been towed approximately 80 nautical miles, [and] there were no observations to indicate recent damage from this tow." JA39. He estimated the market value, "based primar[il]y on [the] condition of the structure," as "between $5,000.00 and $7,500.00." JA43. He noted a number of maintenance problems, e.g., "[w]ater had collected in the bilge spaces," "the surface of the plywood evidenced deterioration and rot," and "[b]ilge pumps and automatic float switches previously installed in the bilge had been . . . neglected and were non-functional." JA38.

Motions to dismiss. Petitioner moved to dismiss, arguing that his "floating structure" was not a "vessel." Emergency Mot. To Dismiss Pl.'s Verified Compl. 1-2 (Apr. 21, 2009) (D.C. Dkt. 9). The court denied the motion without prejudice but permitted petitioner "to enter the vessel . . . to obtain his personal belongings." JA68.

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[4] Some of the personal property carried on the houseboat to Miami is pictured at JA45-46, 55, 57-66.

Petitioner subsequently filed a new motion to dismiss "for lack of subject matter jurisdiction," again arguing that his "floating residential structure" was not a vessel. Claimant's Mot. To Dismiss Pl.'s Verified Compl. 1 (July 27, 2009) (D.C. Dkt. 64). He acknowledged that federal courts have jurisdiction over vessels and that houseboats are vessels, *id.*, but contended that his structure was not a vessel because it would be "damaged when . . . moved in the water any considerable distance," *id.* at 2. He further argued that the houseboat was constructed with land-based building materials, *id.*; had no means of propulsion, *id.* at 2-3; did not have a Hull Identification Number ("HIN"), *id.* at 3-5; and was not a vessel under Florida law, *id.* at 5-9.

Partial summary judgment motion. Independently of petitioner's then-pending motion to dismiss for lack of subject-matter jurisdiction, respondent moved the following month for partial summary judgment on the maritime trespass claim. *See* Pl.'s Mot. for Partial Summ. J. (Aug. 21, 2009) (D.C. Dkt. 80). Respondent argued that there were no genuine disputes of material fact regarding the termination of petitioner's right to dock his houseboat at the Marina. Because the houseboat had remained at the Marina, it was liable for trespass and a maritime lien arose in respondent's favor.

In response, petitioner contended that he had not trespassed. He identified several allegedly disputed facts ranging from ownership of the Marina to respondent's motives for enacting the revised rules and regulations. *See* Claimant's Response to Pl.'s Mot. for Partial Summ. J. 3-7 (Sept. 15, 2009) (D.C. Dkt. 100). Petitioner also disputed the amount of damages under the maritime trespass claim and the

amount of any unpaid dockage fees. *Id*. at 7-9. Although he twice described respondent's "vessel" characterization of the houseboat as a disputed fact, petitioner identified no fact on this issue that was in dispute.[5] He stated simply:

> 8. Contrary to CITY's assertion in its undisputed fact #17, the defendant in this action is not a vessel as alleged by the CITY. It is a floating residential structure as recognized by Florida Statute. . . .
>
> * * *
>
> 12. Contrary to CITY's assertion in "undisputed" fact #22, LOZMAN does not have a vessel but rather he has a floating residential structure. . . .

Id. at 5-6. Additionally, petitioner argued that the Marina's actions were in retaliation for his protected political activities. *Id.* at 12-20.

District court rulings. The district court denied petitioner's motion to dismiss for lack of subject-matter jurisdiction. *See* Order (Sept. 11, 2009) (D.C. Dkt. 103).[6] The court did not decide at that time whether petitioner's houseboat was a "vessel," noting "a factual dispute" on the question. Add. 1-2. It held simply that respondent's allegations were sufficient to withstand the motion to dismiss. Add. 2.

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[5] Petitioner raised additional issues in Claimant's Surreply to Plaintiff's Motion for Partial Summary Judgment (Oct. 5, 2009) (D.C. Dkt. 127) ("Claimant's Surreply"), but the district court struck the surreply because it was filed without leave and in violation of the Local Rules. App. 47a-49a.

[6] Because that district court order was omitted from the petition appendix and joint appendix, it is reprinted in the addendum to this brief ("Add.").

More than two months later, the court granted respondent's motion for partial summary judgment on the maritime trespass claim. App. 33a-49a. The court also explained in greater detail that it had subject-matter jurisdiction. App. 38a-42a. As part of that analysis, it held that petitioner's houseboat was indeed a "vessel." App. 40a-42a. That determination turned on "whether the boat 'was rendered practically incapable of transportation or movement,'" App. 40a (quoting *Board of Comm'rs v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)); "on a boat's capability of maritime transport, rather than its primary or present use, or the owner's intent," *id.* (citing *Belle of Orleans*, 535 F.3d at 1310); and "on 'whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one' and whether the vessel was '"rendered practically incapable of transportation or movement,"'" App. 41a (quoting *Belle of Orleans*, 535 F.3d at 1310, 1312, quoting in turn *Stewart*, 543 U.S. at 494). In applying the governing principles, the court noted that there had been a factual dispute on vessel status but concluded that petitioner had offered "no evidence" to support his assertions. *Id.* Finally, the court found that petitioner's houseboat was trespassing because it was "undisputed that the Defendant vessel remained at the marina after the City terminated consent." App. 43a.[7]

Trial. The next week, the district court held a two-day bench trial to resolve remaining issues, including damages on the trespass claim and both liability and damages on the dockage claim. In its final judgment,

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[7] The district court also found that petitioner had failed to demonstrate that respondent's actions were retaliatory. App. 45a-46a.

the court awarded $1 nominal damages for maritime trespass and $3,039.88 for dockage.

After petitioner failed to post bond, the court ordered the sale of the houseboat in satisfaction of the judgment. *See* Order (Feb. 26, 2010) (D.C. Dkt. 187). Because petitioner bid less than respondent's credit-bid,[8] respondent obtained title. *See* Bill of Sale (filed Mar. 10, 2010) (D.C. Dkt. 190).[9]

2. Eleventh Circuit appeal

Petitioner appealed, principally on the ground that the district court lacked admiralty subject-matter jurisdiction because his houseboat was not a "vessel."[10] *See* Pet'r C.A. Br. 12-26. That jurisdictional argument relied on four overlapping contentions. Petitioner asserted first that his houseboat was not capable of being used as a means of transportation over water under the criteria applied in *Belle of Orleans* and *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864 (11th Cir. 2010). *See* Pet'r C.A. Br. 13-16, 22-25. Second, the houseboat was constructed using the same type of building materials as are used on land. *Id.* at 16-17, 23. Third, it lacked both an HIN and

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[8] This Court recently addressed credit-bids in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012).

[9] Respondent's subsequent attempts to sell the houseboat were unsuccessful. Habitat for Humanity and AMVETS refused to accept it as a donation. Faced with the high costs of keeping the houseboat, respondent destroyed it.

[10] Petitioner also argued that he "was never behind in his rent," Pet'r C.A. Br. 27; that respondent filed this action to retaliate against petitioner for exercising his First Amendment rights, *id.* at 31-33; and that respondent was estopped from asserting a maritime lien, *id.* at 32-34. The Eleventh Circuit rejected petitioner's additional arguments, *see* App. 11a, 21a-32a, and petitioner does not renew them here.

Coast Guard certification. *Id.* at 17-18, 24-25. Finally, it was not a vessel under Florida law. *Id.* at 19-24.

The Eleventh Circuit affirmed in all respects. In holding that petitioner's houseboat was a vessel subject to admiralty jurisdiction, the court explained "that the primary inquiry in determining whether a craft is a vessel is whether the craft was 'rendered practically incapable of transportation or movement.'" App. 13a (quoting *Belle of Orleans*, 535 F.3d at 1312, quoting in turn *Stewart*, 543 U.S. at 494). The court further explained that its analysis "echoed the Supreme Court's pronouncement in *Stewart* . . . that the determination of whether a craft 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.'" *Id.* (quoting *Stewart*, 543 U.S. at 496). The court then looked to "the capability of the craft, 'not its present use or station.'" *Id.* (quoting *Belle of Orleans*, 535 F.3d at 1310). Finding that petitioner's houseboat was "practically capable of transportation over water by means of a tow," App. 21a – as demonstrated by making "actual voyages . . . under tow," App. 18a – the court concluded that petitioner's houseboat was a vessel under § 3.

The Eleventh Circuit rejected each of petitioner's arguments in turn. "The record disputes [petitioner's] characterization [that the houseboat was not capable of transportation over water]," App. 17a, because "[petitioner's houseboat] *was* towed several times over considerable distances," App. 18a. The court further rejected petitioner's claim that the houseboat required emergency repairs during any of its actual voyages because there was not a "shred

of evidence" in the record of any such damage or repairs. *See id.*[11]

The Eleventh Circuit also rejected for lack of "any record support" petitioner's argument that his houseboat had been constructed using land-based building materials. App. 18a-19a. "The fact that [petitioner's houseboat] was an unusually designed craft is relevant only to the extent that the design prevents it from having any practical capacity for transportation over water." App. 19a. Reiterating that "the record is clear that [petitioner's houseboat] had this practical capacity," the court found the houseboat's design to be "of little moment." *Id.* Moreover, the court observed "that a houseboat 'affords a water-borne place to live with the added advantage of at least some maritime mobility.'" App. 15a (quoting *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968)). To the extent that petitioner's argument relied "on the intent of the shipowner," the court found it inconsistent with *Stewart*. App. 16a (internal quotations omitted).

The Eleventh Circuit found the lack of an HIN and Coast Guard certification to be irrelevant because "the craft's practical capacity for maritime transport" is the test for vessel status, not "legal navigability." App. 20a.

Finally, the court held that petitioner's state-law arguments "miss the point" because "[f]ederal law governs the existence of admiralty jurisdiction, and

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[11] Alternatively, even if petitioner's houseboat had suffered damage under tow, the court concluded that would not be enough to defeat vessel status. App. 18a (citing *Belle of Orleans*, 535 F.3d at 1312).

the term 'vessel' is specifically defined in [§ 3]." App. 12a n.6.

SUMMARY OF ARGUMENT

I. Section 3 defines a "vessel" as any "artificial contrivance" that is "used, or capable of being used," for water "transportation." 1 U.S.C. § 3. Petitioner's own definitions demonstrate § 3's breadth; they show that an object is "capable" of performing any task its attributes permit. A craft is "capable" of maritime transportation, therefore, if it has the practical ability to carry people or things over water. Had Congress wanted to restrict § 3 to structures intended for maritime transportation, it would have said so, as it did in statutes defining "vessel" in other contexts.

This Court's holding in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), confirms that § 3's plain language controls. Although *Stewart* recognized that some structures could be non-vessels because of their moorings, it held that a structure's moorings are relevant only when they affect its practical capacity for waterborne transportation. The question "in all cases" is not what a structure's moorings signal about its owner's intent, but whether its use for maritime transportation "is a practical possibility." *Id.* at 496.

II. Interpreting § 3 in accordance with its plain language comports with this Court's preference for clear and simple jurisdictional rules, which conserve judicial resources and enhance predictability. A practical-capability test is easy to apply. In most cases, a watercraft that can float, carry objects, and be towed over water will qualify as a "vessel." The administrative simplicity of this approach outweighs petitioner's speculative concerns, which are overblown in any event, that it might sweep in some exotic structure.

By contrast, petitioner's amorphous "purposive" test would spawn confusion and gamesmanship. Petitioner's proposed tests have morphed several times during this litigation, but he has never explained how courts should determine a watercraft's "purpose." Because petitioner's approach would actually turn on an owner's subjective intent, it would prove difficult to apply, allowing a watercraft's owner to maneuver his craft in and out of vessel status.

The Government's proposed test is also unworkable. The majority of the Government's argument supports the Eleventh Circuit's holding. The only objectively verifiable factors that the Government identifies bear on a watercraft's practical capability. The Government correctly repudiates any reliance on an owner's subjective intent. But by suggesting consideration of a craft's amorphous "purpose" in addition to its objectively verifiable physical attributes, the Government invites a confusing multi-factor balancing test that strays from the statutory text and conflicts with this Court's stated preference for simple jurisdictional rules.

III. Petitioner offers no good reason to depart from § 3's plain language and misreads the general maritime law as supporting an interpretation of § 3 that conflicts with the statutory text. Early admiralty cases took divergent approaches to vessel status, and the mere fact that some cases appeared to employ a "purposive" approach does not suggest that Congress silently imported such an approach into § 3.

This Court also should disregard petitioner's policy arguments. Not only do those arguments conflict with § 3's text, but they fail on their own terms. Excluding from admiralty jurisdiction watercraft that are practically capable of maritime transportation

would contravene important federal policies, including those that underpin the FMLA. Because those policies concern the regulation of activity on navigable waterways, they outweigh any competing local interests.

IV. This Court should affirm the Eleventh Circuit's judgment. That court correctly applied the practical-capability test and concluded that the "record [was] clear" that petitioner's houseboat retained the "practical capacity" for waterborne transportation. App. 19a. The record supports the Eleventh Circuit's holding. The houseboat's repeated maritime voyages – and its flimsy attachments to the land – refute petitioner's assertion that it was "indefinitely moored." And petitioner had no contractual or property right to keep his houseboat moored indefinitely in respondent's Marina. In such circumstances, a remand would be pointless.

Further, the record supports affirming the Eleventh Circuit's judgment even under petitioner's proposed theory. Far from functioning as an "extension of land," petitioner's houseboat was objectively intended to offer him the "advantage of . . . maritime mobility." *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968). Petitioner took advantage of that mobility on multiple occasions, and he docked his houseboat in a marina from which respondent could expel it with little notice.

Finally, the procedural posture of this case requires affirmance. Petitioner challenges only the district court's subject-matter jurisdiction over respondent's claims. Because vessel status is relevant both for jurisdiction and the merits, respondent's burden of demonstrating vessel status was modest. Under any theory, respondent satisfied that burden.

ARGUMENT

I. A VESSEL UNDER § 3 IS ANY STRUCTURE PRACTICALLY CAPABLE OF MOVING PEOPLE OR THINGS OVER WATER

A. Section 3's Plain Language Conditions Vessel Status On A Craft's Use Or Capability

1. The interpretation of § 3's definition of "vessel" must begin "with the language employed by Congress." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotations omitted). Section 3 confers vessel status on any "artificial contrivance" that is "used, or capable of being used," for water "transportation." 1 U.S.C. § 3. That language contemplates two categories of vessels: those actually "used" for maritime transportation and those merely "capable" of such use. The latter category must encompass some structures that the former excludes; interpreting the statute otherwise would disregard the "cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted).

A watercraft is "capable" of being used for maritime transportation if its physical characteristics allow such use. When Congress enacted § 3 in 1873, "capable" meant "[e]ndued with power competent to the object." 1 Noah Webster, *An American Dictionary of the English Language* (1828). That definition has not changed: "capable" today means "having sufficient power . . . or other needed attributes to perform or accomplish" a task. *Webster's Third New International Dictionary* 330 (2002) (giving as an example "ships [capable] of facing the heavy seas"); *see Random House Unabridged Dictionary* 308 (2d

ed. 1993) (defining "capable of" as "having the ability or capacity for"). An object's capability, therefore, depends not on its inherent purpose but on its physical attributes; it is "capable" of anything that those attributes permit.[12]

Petitioner's proffered definitions reinforce that conclusion. He states that "capable," in 1873, meant "[p]ossessing ability, qualification, or *susceptibility*; having capacity; adapted; *suited*." Pet. Br. 20 n.7 (quoting dictionary) (emphases his). The very words that petitioner italicizes – "susceptibility" and "suited" – demonstrate that § 3 sweeps broadly. A structure can be "susceptible" of many uses not contemplated by its creator. *See* 1 Webster, *An American Dictionary* (defining "capable" as "susceptible of: as, a thing is *capable* of long duration; or it is *capable* of being colored or altered"). So too can it be "suited" for more than its intended or current use. *See Webster's New International Dictionary* 2522 (2d ed. 1950) ("suit" means to "answer the requirements or demands of" or to be "convenient for, good for"). Those words indicate, along with petitioner's other definitions,[13] that an object's capability is distinct from – and broader than – its intended purpose.

Everyday experience confirms that many objects are "capable" of being used for purposes other than those for which they were intended. *Cf. Mohamad v.*

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[12] That does not mean that any contrivance that can float is a vessel; it must also be practically capable of carrying people or things over water. *See infra* p. 30.

[13] *See* 2 *Oxford English Dictionary* 856 (2d ed. 1989) (defining "capable" as "[h]aving the needful capacity, power, or fitness for (some specified purpose or activity)" and illustrating with statement "You are capable of better things"); *id.* ("of a nature, or in a condition, to allow or admit of").

Palestinian Auth., 132 S. Ct. 1702, 1707 (2012) (looking to "everyday parlance" to inform meaning of statutory term). As campers can attest, newspapers are "capable" of being used as kindling (or, for that matter, packing material). Carving knives – although designed for culinary preparation – are "capable" of being used to inflict bodily harm. Few would maintain that those household objects are "capable" of being used for *only* their intended functions. *Cf. Sea Village Marina, LLC v. 1980 Carlcraft Houseboat*, 2010 AMC 404, 419 (D.N.J. 2009) ("The word 'capable' is often used to contrast ability from intention."). Similarly, a watercraft is "capable of being used" for maritime transportation, in ordinary parlance, if its physical attributes allow it to carry things over water.

2. Section 3 gives no indication that Congress intended to deviate from the ordinary meaning of "capable." The Government argues (at 18-19) that "contrivance" refers only to things that are "made (or adapted) with a design or purpose." To be sure, § 3 applies only to man-made objects (thus excluding, for example, driftwood). *See* 1 Webster, *An American Dictionary* (defining "artificial" as "[m]ade or contrived . . . by human skill"; "contrive" means "[t]o invent" or "to devise"). A man-made object's design for *some* particular purpose, however, has little bearing on whether it is "capable of being used" for *other* purposes.

Nor does the term "transportation" alter the plain meaning of "capable." A watercraft serves as a means of "transportation" whenever it performs an "act of carrying or conveying from one place to another." *Id.* In most cases, such "transportation" will involve conveying "things or persons." 18 *Oxford*

English Dictionary 424. But a watercraft need not *actually* transport people or things over water to attain "vessel" status under § 3 – it need only be "capable" of doing so. Thus, petitioner's observation (at 18) that "[o]bjects that are merely 'moved' . . . do not necessarily serve as a 'means of transportation'" is true, but irrelevant. The question, in all cases, is whether a structure capable of being moved over water has the physical ability to carry persons or things.

The term "used" further demonstrates that Congress intended § 3 to sweep broadly. This Court has recognized that the term "use" is "'elastic,'" *Watson v. United States*, 552 U.S. 74, 79 n.7 (2007) (quoting *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting)), and that one of its "standard definitions" is "to 'apply to one's own purposes,'" *id.* (quoting *Random House Unabridged Dictionary* 2097). A person can "use" a watercraft, therefore, for purposes other than those for which it was intended. Just as a "boy who trades an apple to get a granola bar is sensibly said to use the apple," *id.* at 79, a person who tows his belongings on a houseboat is sensibly said to "use" the houseboat for transportation. In neither case – bartering the apple or towing the houseboat – does the object's predominant purpose foreclose it from being "used" for other aims.

3. Other statutes eliminate any doubt that § 3 extends beyond watercraft intended for maritime transportation. Had Congress wanted § 3 to condition vessel status on a watercraft's intended purpose, it would have defined "vessel" to include that requirement. In 18 U.S.C. § 2311, for example, Congress defined "vessel" as "any watercraft or other contrivance used *or designed for* transportation" on water. (Emphasis added). Similarly, in 49 U.S.C. § 13102(25),

Congress defined "vessel" as a "watercraft or other artificial contrivance that is used, is capable of being used, *or is intended to be used*, as a means of transportation by water." (Emphasis added). Congress eschewed any similar reference to a structure's intended purpose in § 3, which is powerful evidence that § 3 contains no such requirement. *Cf. Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (looking to "[v]arious federal statutes" and noting that, "[w]here Congress intends to refer to ownership in other than the formal sense, it knows how to do so").[14]

B. This Court's Precedents Confirm That § 3 Vessel Status Turns On A Watercraft's Physical Capability

1. In *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), this Court confirmed that vessel status under § 3 turns on a structure's capability. *Id.* at 495. *Stewart* concerned a dredge, the *Super Scoop*, which had "only limited means of self-propulsion" and could "move[] long distances" only by "tugboat." *Id.* at 484. Its predominant function was "remov[ing] silt from the ocean floor," and it moved no more than

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[14] Espousing the same principle, petitioner cites (at 19) 18 U.S.C. § 1081, which defines "vessel" to include any "contrivance used or capable of being used as a means of transportation on water . . . as well as . . . any structure capable of floating on the water." Congress's addition of "structure[s] capable of floating" to the § 3 definition embodies the common-sense recognition that not all structures capable of *floating* are capable of *movement* (and thus transportation). *See Stewart*, 543 U.S. at 494 (noting that vessels that have been "rendered practically incapable of transportation or movement" are not "vessels" under § 3). Vessel status under § 3, of course, requires that a watercraft be capable of both floating and movement. Thus, floating but practically immobile structures, such as floating bridges, are vessels under § 1081 but not under § 3.

"30-to-50 feet" "once every couple of hours." *Id.* at 484, 485.

Seizing on those facts, the dredge's owner argued that "[t]he Super Scoop d[id] not transport passengers or cargo" but was instead a "floating, anchored work platform." Resp. Br. 7, *Stewart*, *supra* (U.S. filed Aug. 2, 2004) (No. 03-814), 2004 WL 1743936. The dredge owner further asserted that admiralty jurisdiction depends on the "'purpose for which the craft [was] constructed and the business in which it [was] engaged.'" *Id.* at 11 (quoting *Perry v. Haines (The Robert W. Parsons)*, 191 U.S. 17, 30 (1903)) (alterations in original). For the dredge owner, "a float's business and purpose are important considerations" in determining vessel status, and the *Super Scoop*'s purpose was dredging, not transportation. *Id.* at 6-7.

The *Stewart* Court unanimously rejected the dredge owner's argument. The Court first observed that § 3's text "sweeps broadly." 543 U.S. at 494. Section 3's plain language "requires *only* that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel." *Id.* at 495 (emphasis added). The Court therefore rejected the First Circuit's test, which had turned on whether a structure's "primary purpose" was "navigation or commerce." *Id.* (citing *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (en banc)).

Although the Court noted that "dredges serve[] a waterborne transportation function, since in performing their work they carried machinery, equipment, and crew over water," *id.* at 492, the *Super Scoop*'s status as a vessel did not depend on that fact. The Court discussed the *Super Scoop*'s "function" to re-

inforce its conclusion about the dredge's capability: "not only [was it] 'capable of being used' to transport equipment and workers over water – it *was* used to transport those things." *Id.* at 495. The *Super Scoop*'s actual "use[]," in other words, provided powerful *evidence* of its capability. That holding does not imply that, contrary to § 3's plain language, vessel status requires that a craft actually be used for maritime transportation.

2. *Stewart* declined to say that a structure is "capable" of maritime transportation simply because its movement over water hypothetically might be imaginable. Rather, *Stewart* established practicality as the touchstone of vessel status; the question "in all cases" is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." 543 U.S. at 496. That holding rested on the Court's recognition that a watercraft "rendered practically incapable of transportation or movement" is "not 'capable of being used' for maritime transport in any meaningful sense." *Id.* at 494.

Stewart found support for its reasoning in *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), and *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926). In *Cope*, the Court considered the status of a dry-dock, which had been "permanently moored by means of large chains" and "was sparred off from the bank." 119 U.S. at 627. The Court concluded that the dry-dock was not a vessel because it "could not be practically used" for maritime transportation. *Id.* In so concluding, the Court compared the dry-dock to other "fixed structure[s]," such as ferry-bridges and floating meeting-houses, that typically lack any practical capacity

for movement over water. *Id.* The Court observed that those structures, like the dry-dock before it, were generally immobilized by some substantial (and difficult to remove) physical restraint. *Id.*[15] When a watercraft is "permanently moored or attached to a wharf" in such a manner, it is not a vessel. *Id.* at 630.[16]

Evansville relied on similar reasoning in finding that an overhauled wharfboat was not a vessel. The wharfboat was moved during the winter "to protect it from ice." 271 U.S. at 20-21. But, once it returned to Evansville each spring, it was "secured to the shore by four or five cables," "connected with the city water system" and power grid, and attached to telephone lines. *Id.* at 21. Each end of the wharfboat was further attached to the land by means of a "driveway," *id.*, from which trucks entered and exited to load and unload cargo from ships. Because these substantial physical attachments combined to immobilize the wharfboat, it was not, the Court concluded, "practically capable of being used as a means of transporta-

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[15] Specifically, the dry-dock was "permanently moored by means of large chains," while ferry-bridges are typically "hinged or chained to a wharf" and floating meeting-houses are generally "kept in place by a paling of surrounding piles." *Cope*, 119 U.S. at 627.

[16] *Cope*'s references to the dry-dock's putative "purpose" do not indicate that the Court's holding depended on that purpose. *Cf.* Pet. Br. 26. On the contrary, *Cope* described the dry-dock's "purpose" only to explain why the dry-dock in fact lacked the practical ability to move over water. *See* 119 U.S. at 627 ("It was not designed for navigation, and could not be practically used therefor."). No other reading comports with *Stewart*, which authoritatively interpreted *Cope* as holding that the dry-dock was not a vessel "because [it was] not *practically* capable of being used to transport people, freight, or cargo from place to place." 543 U.S. at 493.

tion." *Id.* at 22. Unlike petitioner's houseboat, it truly had become an "extension of land."

Stewart recognized that *Cope* and *Evansville* turned on the fact that, in each case, the structure's moorings had defeated any practical mobility. Indeed, *Stewart* explained that the dry-dock in *Cope* and the wharfboat in *Evansville* lacked vessel status for one simple reason – neither was "*practically* capable of being used to transport people, freight, or cargo from place to place." 543 U.S. at 493. As such, *Cope* and *Evansville* "did no more than" enforce the "distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor." *Id.* at 493-94. And a craft is "permanently affixed to shore," according to *Stewart*, when its moorings deprive it of "'mobility and [the] capacity to navigate.'" *Id.* (quoting *The Alabama*, 19 F. 544, 546 (S.D. Ala. 1884)) (brackets in *Stewart*). So interpreted, *Cope* and *Evansville* simply confirm how to apply § 3's plain language in real-world contexts: a watercraft's capability – its "mobility" and "capacity to navigate" – determines whether it is a vessel.[17]

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[17] Petitioner's reliance on *Roper v. United States*, 368 U.S. 20 (1961), which did not even mention § 3, is misplaced. *Roper* addressed whether a "mothballed" liberty ship was unseaworthy when a worker suffered injuries on board. *Id.* at 20-21. He could recover for unseaworthiness only if the vessel was "in navigation." *See id.* at 23-24. Emphasizing that it could reverse only for "clear error," *id.* at 23, the Court "[could not] say as a matter of law" that the ship was a "vessel in navigation," *id.* The Court had no occasion to decide whether the mothballed ship was a § 3 "vessel."

This case is different both procedurally and factually: it does not involve clear-error review, a "mothballed" ship, or "in

II. INTERPRETING § 3 AS CONFERRING VESSEL STATUS ON WATERCRAFT WITH THE PRACTICAL ABILITY TO CARRY PEOPLE OR THINGS OVER WATER AFFORDS A CLEAR AND SIMPLE STANDARD

A. A Bright-Line Rule For § 3 Is Preferable, Especially For Jurisdictional Rulings

The sole question here is whether the district court had subject-matter jurisdiction over respondent's *in rem* action against petitioner's houseboat. *See infra* p. 56 & n.28. In a jurisdictional inquiry, this Court should adopt an interpretation of § 3 that is "as simple as possible." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1185-86 (2010). Simple and clear jurisdictional rules forestall "litigation over whether the case is in the right court" – litigation that is "essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (internal quotations omitted). They also "promote greater predictability," which benefits plaintiffs and defendants alike. *Hertz*, 130 S. Ct. at 1193.

These benefits obtain fully in the admiralty context. In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), this Court rejected a proposed rule limiting admiralty tort jurisdiction to cases in which the "totality of the circumstances reflects" a "federal interest in protecting maritime commerce sufficiently weighty to justify" the application of maritime law. *Id.* at 543 (internal quotations omitted). The Court did so for a "most powerful" reason: the petitioner's proposed "multifactor test" would "be hard to apply, jettisoning

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navigation" status. In any event, *Stewart* construed *Roper* as demonstrating simply that vessel status turns on the "practical possibility" of maritime transportation. 543 U.S. at 496.

relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Id.* at 547. A predictable rule that could be "underst[ood] reasonably well" was much better. *Id.* For in the admiralty context, as elsewhere, a jurisdictional "boundary" that is "vague and obscure" risks consuming an "enormous amount of expensive legal ability" that would "be much better spent upon elucidating the merits of cases." *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (internal quotations omitted).

The need for a clear "vessel" definition is also acute for maritime liens. Congress's intent in enacting the 1910 FMLA "was to simplify and clarify the rules as to maritime liens as to which there had been much confusion." *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 271-72 (1940). The rules governing maritime liens must be clear because a "material-man['s]" willingness to supply necessaries to a watercraft depends on the availability of "reasonably certain criterion" for assessing his legal rights. *Id.* at 280. Definitional complexity deprives repairmen and marina owners of such certainty and "thwart[s] the purpose" of the Act. *Id.*

B. A Practical-Capability Test Is Easy To Apply

A practical-capability test, as the Government notes (at 13), carries "the virtue of relative simplicity." Under that test, a court need only determine whether a floating structure is practically capable of carrying people or things over water. Such a determination will in most cases present no great difficulty, as most structures that are "afloat," can carry cargo or persons, and have the capacity to be "towed

across the [water]" will qualify as vessels. *Board of Comm'rs v. M/V Belle of Orleans*, 535 F.3d 1299, 1307 (11th Cir. 2008). The question, most often, is simply whether some physical impediment has rendered such a floating structure "'practically incapable of transportation or movement.'" *Id.* at 1311 (quoting *Stewart*, 543 U.S. at 494).

Petitioner mistakenly asserts (at 21) that the Eleventh Circuit's test bestows vessel status on any floating object. "Driftwood," for example, is not an "artificial contrivance" and so would not qualify. Neither would most "floating bridges," *id.*, which are typically "fixed and immovable." *E.g.*, *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 216 (1867). Moreover, it is unlikely that "doors removed from their hinges," Pet. Br. 21, could bear the weight of a person or cargo without sinking. Nor would their movement over water be practical. And, even if a door could meet those objective challenges, no one is likely to invoke a federal court's *in rem* jurisdiction over a door. Maritime jurisdiction should not rise or fall on imaginative hypotheticals bearing no relation to the real world.

In any event, the remote possibility that in a future case some exotic structure might attain "vessel" status under the practical-capability test is no reason to reject it. As this Court recently emphasized, "[a]ccepting occasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration." *Hertz*, 130 S. Ct. at 1194. Just as a "nerve center" test of corporate domicile is simpler than any multi-factor alternative, so too is the practical-capability test "relatively easier to apply" than petitioner's amorphous balancing test with its embedded subjective factors. *Id.* This

Court should not forgo the benefits of administrative simplicity merely because isolated "anomalies" might arise. *Id.*

C. Petitioner's "Purposive" Test Is Complicated And Unworkable

The disparate approaches offered by petitioner in his various briefs afford nothing resembling a clear jurisdictional rule. He states (at 16) that "only structures whose purpose is transportation" are vessels. But petitioner provides no clear test for divining a watercraft's "purpose." His failure to do so is telling; a jurisdictional rule turning on a vessel's "purpose" would prove unworkable.

1. Petitioner's Disjointed Formulations Of A "Purposive" Test Are Muddled And Confused

At no stage in the proceedings has petitioner articulated a clear and consistent approach to vessel status. Before the Eleventh Circuit, petitioner accepted that vessel status turns on a craft's practical capability. *See* Pet'r C.A. Br. 15-16 (calling *Stewart*'s "most important criterion" "whether the watercraft's use 'as a means of transportation on water' is a practical possibility") (emphasis omitted). When seeking certiorari, however, petitioner for the first time expressly articulated a "purpose-based test" under which structures are not vessels if "their owners have no design whatsoever to use them" for maritime transportation. Pet. 26. At that point, petitioner framed the Eleventh Circuit's essential error as its failure to consider "whether [a watercraft's] owner intends it to be used for maritime transportation." Pet. 9; *see also* Cert. Reply Br. 6 ("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.").

In his merits brief, petitioner changed his position yet again. Now, according to petitioner (at 22 n.8), the "concept of purpose [is] an objective one" that "disregards an actor's *subjective* intent." His current theory (at 16) is that his houseboat was a non-vessel because it was "indefinitely moored" and "functionally [an] extension[] of land." He offers no clear test for determining whether a structure is "indefinitely moored" and no explanation for the source or content of the shibboleth, "extension of land."

Petitioner's discordant theories – and his repeated failure to articulate clearly what he means by a structure's "purpose" – underscore the fatal flaw in his approach. Tying a structure's vessel status to factors beyond its practical capability results in needless complexity and confusion.

2. Vessel Status Should Not Depend On The Intent Of Its Owner Or Designer

The first possible approach proffered by petitioner is that a vessel's "purpose" turns on whether it is in fact "used to move people or goods over water." Pet. Br. 15. As an empirical matter, the houseboat's actual use renders it a vessel under this test, because petitioner towed the houseboat (and all its interior contents) over water on multiple occasions. Petitioner nonetheless suggests that his houseboat was not actually "used" in this fashion because he *intended* it to serve as a stationary residence. *See id.* at 6 ("petitioner planned to live in Riviera Beach indefinitely"); *id.* at 9 ("purpose" of houseboat was "to serve as a stationary residence").

That suggestion, however, contradicts petitioner's purported disavowal (at 22 n.8) of any reliance on an

owner's subjective intent. This Court should reject any test that includes an element of owner intent, for "[m]otives are difficult to evaluate" and frustrate the principle that "jurisdictional rules should be clear." *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002). The *Lapides* Court's warning applies here; allowing the unverifiable intent of a watercraft's owner to determine vessel status would foment unpredictability and invite gamesmanship. *See* U.S. Br. 26 (noting that such a test is "subject to manipulation"). It would also, as the Government observes (at 25-26), permit a structure to "move in and out of" admiralty jurisdiction with the momentary whims of its owner. *Stewart*, 543 U.S. at 494; *see Sea Village Marina*, 2010 AMC at 419 (noting that a watercraft owner's "mere plans and expectations" are "always subject to change"). Petitioner cites no authority suggesting that admiralty jurisdiction can turn on something so ephemeral.

Petitioner's second suggestion fares no better. He asserts (at 15) that his houseboat lacked the requisite purpose because it was "not designed . . . to move people or goods over water." Again, that standard makes vessel status turn on subjective intent, in this case of someone significantly removed from the litigation. Determining the actual purpose for which a watercraft was originally "designed" will likely prove even more "difficult to evaluate" than determining the intent of its current owner. *Lapides*, 535 U.S. at 621. Indeed, courts "are rarely presented with direct evidence of the subjective purpose motivating the designer or builder of a floating structure." *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 832 n.25 (5th Cir. 1984). And that is true here: petitioner offered no evidence below of the houseboat designer's intent.

Given that evidence bearing on the intent of a structure's builder will be only rarely available, this Court should not require a marina invoking *in rem* jurisdiction to establish such intent.[18]

3. The Government's "Objective Purpose" Test Contains An Unworkable Criterion

The Government correctly repudiates any reliance on an owner's subjective intent, but its proffered standard also raises difficulties and lacks any grounding in § 3's text. It insists (at 25) that a structure's purpose appears from "objective criteria" like its "physical attributes" and "history of use." But the Government, like petitioner, offers no clear method of actually discerning a structure's purpose from those imprecise criteria, which are nowhere found in § 3.

The only determinate factors that the Government identifies (at 28-29) bear largely on a craft's practical capability, not its purpose. The Coast Guard has articulated a "non-exclusive" list of unweighted factors that characterize non-vessels, including whether a craft: (1) is "surrounded by a cofferdam, land or other structure" depriving it of "practical access to navigable water"; (2) is "affixed to the shore by steel cables, I-beams or pilings, or coupled with land based utility connections for power, water, sewage and fuel"; (3) would be "endangered because of its construction" if "operated in navigation"; (4) possesses a "purpose, function, or mission" suggestive of perma-

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[18] Although a structure's construction with "land-based building materials" might indicate something about its purpose, *cf.* Pet. Br. 3, the construction "materials" should be relevant to vessel status only insofar as they affect its practical capability for maritime transportation. Petitioner's houseboat demonstrably had the capability of being used for maritime transportation.

nent mooring; and (5) cannot "get underway in less than eight (8) hours." Craft Routinely Operated Dockside, 74 Fed. Reg. 21,814, 21,815 (May 11, 2009) ("Coast Guard Policy"). The Government offers no guidance for courts in evaluating those factors when some, but not all, are met.

In this case, four of the factors – whether a cofferdam forecloses access to navigable water, whether moorings deprive a craft of mobility, whether its construction makes waterborne transportation infeasible, and whether it can readily get underway – are objectively verifiable and speak directly to the houseboat's practical capacity for maritime transportation. All four cut against petitioner. *See infra* p. 52. This Court can thus affirm the Eleventh Circuit's practical-capability test while accepting the relevance of those four factors.

But the remaining factor – a craft's "purpose, function, or mission" – sinks the Government's test.[19] The Government articulates no coherent standard for divining a craft's "function" or "mission." To the extent that those elastic terms invite consideration of facts apart from a craft's practical capability for transportation, they would only spawn confusion and invite courts to invent factors not found in the statutory text. The Fifth Circuit, for example, struggled before *Stewart* to articulate a test for divining a craft's objective purpose, and it produced only a jumbled multi-factor test.[20] The Government offers

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[19] Significantly, no federal agency – including the Coast Guard – signed onto the Government's brief here. In that respect, this case differs from *Stewart*.

[20] *See, e.g.*, *Holmes v. Atlantic Sounding Co.*, 437 F.3d 441, 446 (5th Cir. 2006) (listing 10 factors that the Fifth Circuit had

little hope that its preferred approach – likewise requiring courts to balance a hodgepodge of factors in search of a craft's amorphous "purpose" – would be any clearer. Such a vague and malleable multi-factor test cannot be squared with this Court's command that jurisdictional rules "remain as simple as possible." *Hertz*, 130 S. Ct. at 1186.[21]

III. PETITIONER'S ARGUMENTS FOR DEPARTING FROM § 3's PLAIN LANGUAGE ARE UNPERSUASIVE

A. The General Maritime Law Does Not Override § 3's Text

Petitioner argues (at 22) that this Court should adopt a "purposive approach" to vessel status because the general maritime law assertedly employed such an approach. Petitioner's argument contravenes this Court's settled approach to interpreting statutes and misunderstands the general maritime law.

1. Section 3 unambiguously says that a watercraft's capability determines whether it is a vessel. Accordingly, courts should assess whether a structure is "capable" of maritime transport – if it is,

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considered before *Stewart* "[t]o evaluate the purpose for which a craft is constructed").

[21] The Government suggests (at 22) that other "maritime-law questions often depend upon a particular vessel's purpose or function." The occasional relevance of a watercraft's purpose to the merits of a dispute, however, does not mean that purpose should determine admiralty jurisdiction. Jurisdiction demands simplicity in a way that substantive law does not; in fact, jurisdictional rules should be simple precisely so that litigants can focus on "elucidating the merits of cases." *Sisson*, 497 U.S. at 375 (Scalia, J., concurring in the judgment) (internal quotations omitted); *accord Grubart*, 513 U.S. at 549 (Thomas, J., concurring in the judgment).

the "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotations omitted). Indeed, this Court has held it inappropriate to rely on the common law when doing so would conflict with clear statutory language. *See Neder v. United States*, 527 U.S. 1, 24-25 (1999) (refusing to incorporate the "common-law requirements of 'justifiable reliance' and 'damages'" into mail-fraud statute because those elements were "incompatible" with the statute's "language").

2. Petitioner's interpretation of *Stewart* is misguided. *Stewart* stated that "Section 3 merely codified the meaning that the term 'vessel' had acquired in general maritime law." 543 U.S. at 490. Petitioner interprets this statement to give courts carte blanche to bypass the statutory text and piece together the meaning of the word "vessel" from nineteenth-century court opinions. *See* Pet. Br. 23 (citing historical "lower court decisions" that supposedly "applied the purposive approach").

Stewart authorized nothing of the sort. The Court referenced the general maritime law, but only to illuminate – not upend – the statutory text. *See* 543 U.S. at 493 (rejecting argument that previous decisions "ha[d] implicitly narrowed § 3's definition"). It cited early cases, such as *The Alabama*, that had recognized dredges (like the *Super Scoop*) as having "'the capacity to be navigated in and upon the waters.'" *Id.* at 491 (quoting *The Alabama*, 19 F. at 546). As such, the Court readily concluded that the *Super Scoop*, too, was a vessel under § 3. But the Court left no doubt that its conclusion rested not on some freewheeling survey of old cases, but on Congress's clear textual instruction that "Section 3 requires only that a watercraft be 'used, or capable of

being used, as a means of transportation on water.'" *Id.* at 495.

3. The unsettled nature of the general maritime law further undermines petitioner's interpretive theory because no single approach to vessel status was universally accepted when Congress enacted § 3. Petitioner selectively cites certain maritime cases to support a sweeping over-generalization (at 24) that "general maritime courts treated as vessels only craft whose *purpose* . . . was to move people or things over water." But in fact the courts took differing approaches to vessel status.

Many early cases held that vessel status turned primarily on a structure's capacity for waterborne movement. In 1884, a federal court considering a maritime lien asserted against a dredge and a scow "distinctly recognize[d] mobility and capacity to navigate as a prime element" of vessel status. *The Alabama*, 19 F. at 546. During that era, the "reasons the courts . . . held [dredges] to be subject to admiralty jurisdiction" were that dredges were "used or capable of being used as means of transportation." *The International*, 83 F. 840, 841 (E.D. Pa. 1897) (internal quotations omitted), *aff'd*, 89 F. 484 (3d Cir. 1898).

Similarly, courts routinely bestowed vessel status on crafts that had non-transportation purposes. Judge Benedict, for example, had "no doubt as to the jurisdiction of the court . . . to enforce a claim for towage against a house boat." *Rogers v. A Scow Without A Name*, 80 F. 736, 736 (E.D.N.Y. 1897); *see also The Ark*, 17 F.2d 446, 447 (S.D. Fla. 1926) (enforcing maritime lien against moored "house boat" used as a "residence" and "floating supper club"). This Court, too, upheld admiralty jurisdiction over a

car float whose "deck [was] relaid to make a dancing floor" and intended "to be used for amusement purposes." *The Jack-O-Lantern*, 258 U.S. 96, 98 (1922) (internal quotations omitted). Even when the owners had no "present intention to use [it] for transportation purposes," an "amusement vessel[]" was nevertheless a "vessel" because it "could be towed . . . anywhere that a barge can be taken." *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930).

Although some admiralty courts prior to enactment of § 3 attempted to divine a watercraft's purpose, *see* Pet. Br. 23-24 & n.9, petitioner offers no evidence that their decisions reflected a consensus so dominant as to justify a presumption that Congress silently imported their views into § 3. Indeed, a fairer way to characterize the state of the general maritime law on this issue is that courts held divergent views of vessel status. Accordingly, petitioner cannot meet his high burden of establishing that Congress meant to include a "purpose" requirement in § 3.

In sum, the absence of any consensus among admiralty courts on the correct approach to determining vessel status fatally undermines petitioner's theory that Congress imported general maritime law wholesale into § 3. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011) (Congress cannot be said to incorporate courts' usage unless "all (or nearly all) of the relevant judicial decisions have given a term or concept a consistent judicial gloss") (internal quotations omitted).

Of course, general maritime law cases are not always so discordant. On some questions – such as whether dredges are vessels – maritime courts reached a general consensus. *See Stewart*, 543 U.S. at 490-92. Similarly, courts have overwhelmingly

agreed that "floating homes" like petitioner's are vessels. *See Sea Village Marina*, 2010 AMC at 413-14 (collecting cases). In such cases, § 3 "should be construed consistently with the general maritime law." *Stewart*, 543 U.S. at 492. But because general maritime courts disagreed on whether purpose determines vessel status, this Court should presume that Congress meant what it said: that the word "vessel" encompasses any structure "capable of being used" for maritime transportation.

4. This Court's opinion in *Parsons* is not to the contrary. In *Parsons*, the Court considered whether general maritime law preempted a state statute conferring jurisdiction to enforce a lien for necessaries furnished to a vessel. The Court had no occasion to discuss § 3's relevance to a maritime lien, because the case pre-dated the FMLA. In holding the state statute preempted by maritime law, the Court remarked that the "question of jurisdiction . . . regards only the purpose for which the craft was constructed, and the business in which it is engaged." 191 U.S. at 30. Understood in its proper context, that statement poses no conflict with § 3's text.

The issue in *Parsons* was whether admiralty jurisdiction reached a small horse-drawn canal boat. *See id.* at 30-31. In answering affirmatively, the Court rejected the defendant's argument that the boat's small size – and the fact that it was drawn by horses – exempted it from admiralty jurisdiction. *See id.* *Parsons*'s comment about a structure's "purpose" should therefore be read in light of the clause that immediately preceded it: that "neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction." *Id.* at 30. The Court thus held that a watercraft actually

intended for maritime transportation – notwithstanding an esoteric size or shape – is *included* within the admiralty jurisdiction. That holding accords with § 3: a craft whose purpose is waterborne transportation will typically be "practically capable" of such transportation. But it does not follow – and *Parsons* did not hold – that a structure otherwise capable of being used for maritime transportation can be *excluded* from vessel status based on its perceived "purpose."

Parsons cannot bear petitioner's more aggressive interpretation. The opinion nowhere mentioned § 3, and, as *Stewart* made clear a century later, the text of § 3 controls whether a watercraft qualifies as a vessel. *See* 543 U.S. at 490-91. Not once in the intervening hundred years did this Court quote *Parsons*' statement about the "purpose for which the craft was constructed." And, despite the *Stewart* respondent's emphatic reliance on the case, *Stewart* did not cite it at all. Accordingly, *Parsons* provides no support for denying vessel status under § 3 to a watercraft practically capable of maritime transportation.

B. Petitioner's Policy Arguments Are Unpersuasive

Petitioner advances various policy considerations (at 35-47) for confining vessel status to those crafts intended for maritime transportation.[22] But those

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[22] Petitioner's policy arguments are more properly addressed to Congress, as this Court has admonished. An admiralty court's primary task is not to speculate about the policy ramifications of a statute, but rather to "keep strictly within the limits imposed by Congress." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990). When Congress has legislated, "an admiralty court should look primarily to [Congress's] enactments for

arguments compound the jurisdictional complexity and uncertainty that his approach would produce. To "decide in each case," as petitioner urges, whether federal or state jurisdiction "would make a better fit with the particular circumstances" of a dispute would "make the determination of jurisdiction hopelessly uncertain." *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012, 1015 (7th Cir. 2006) (Posner, J.). That is "not a price worth paying," even if petitioner's approach might in some future case produce a "slightly better match of law to fact." *Id.*

Even if the Court were to consider petitioner's policy arguments, they have no merit. This Court has long emphasized that admiralty jurisdiction's "broad scope" extends well beyond disputes "concerning a peril occurring on the high seas or within the ebb and flow of the tide." *Simmons v. The Steamship Jefferson*, 215 U.S. 130, 139 (1909). *See*, *e.g.*, *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23 (2004) (recognizing admiralty jurisdiction over a cargo claim arising out of a train wreck in northern Alabama). Excluding from admiralty jurisdiction watercraft that are practically capable of waterborne transportation would contravene this principle and frustrate important federal policies.

1. Petitioner erroneously argues (at 35-36) that his purposive approach to vessel status comports with the goals of the FMLA. Congress enacted the 1910 FMLA "to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries." *Piedmont &*

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policy guidance." *Id.* As with most statutes, the "best evidence" of the policy that Congress sought to advance in enacting § 3 is the "statutory text." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 11 (1920). Its purpose was to create a "significant, clear, and predictable security device" that would provide ships the "ability to offer something of value in exchange for what it needed." *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 870-71 (11th Cir. 2010). In doing so, Congress also insured those servicing vessels against the risk that ship owners might "sail their vessels away after services are rendered." *Id.* at 870.

Recognizing petitioner's houseboat as a vessel advances these purposes. His houseboat occupied a slip in "one of the most desirable" areas of the Marina (JA33), and respondent provided the houseboat with valuable dockage services (JA34). Those services are "necessaries" under the FMLA. *See* 1 SCHOENBAUM § 9-3, at 703. Moreover, respondent expressly noted its entitlement to a maritime lien when it offered petitioner dockage services. JA15 (Wet-Slip Agreement stating that "the Marina . . . has a maritime lien").

Refusing to recognize a maritime lien in these circumstances would upset respondent's expectations and discourage the provision of similar dockage services in the future. *Cf. Crimson Yachts*, 603 F.3d at 871 (emphasizing need for maritime liens to be "clear[] and predictable"). It also would invite owners of all sorts of assertedly "indefinitely moored" watercrafts to move "away after services are rendered." *Id.* at 870. That possibility existed here, because petitioner had already relocated his houseboat from marina to marina (JA71-72, 77-78), and no coffer dam, concrete footings, or heavy chains kept petitioner's houseboat affixed to its location at the Marina (JA33). Thus, when petitioner owed money

for the dockage services he received, a maritime lien was entirely appropriate.

2. Petitioner speculates (at 38) that applying substantive maritime tort doctrines to stationary structures would have "perverse" consequences. Petitioner's Question Presented, however, addresses only whether his houseboat was a "vessel" for jurisdictional purposes. Pet. i. Thus, this Court need not address the substantive maritime tort doctrines that petitioner invokes. *See Grubart*, 513 U.S. at 546 (rejecting proposal that it "synchronize the jurisdictional enquiry with the test for determining the applicable substantive law"). In any event, it is a "fundamental feature of admiralty law[] that federal admiralty courts sometimes do apply state law." *Id.*; *see also*, *e.g.*, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-16 (1996) (recognizing admiralty jurisdiction but holding that state substantive law applied).

Petitioner's arguments are better saved for an admiralty court deciding which doctrine to apply in a given dispute. No matter how "[i]ncongruous" petitioner may find those doctrines, his policy arguments cannot justify "gerrymandering our admiralty jurisdiction in an effort to avoid the statute's plain import." *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1267 (9th Cir. 1993) (Kozinski, J., dissenting).[23]

3. Petitioner's arguments about the Jones Act fail for similar reasons. *See* Pet. Br. 39-41. The mere fact that a watercraft is a "vessel" does not transform everyone on board into a "seaman" for Jones Act pur-

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[23] In *Grubart*, this Court vindicated Judge Kozinski's dissent, which the Ninth Circuit recognized by abrogating *Delta Country* in *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005).

poses. A seaman "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Thus, a court faced with a Jones Act claim must "weigh[]" the "total circumstances of an individual's employment" to "determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Id.* at 370 (internal quotations omitted). A proper application of that test may well exclude petitioner's imagined waiter, nanny, or blackjack dealer. *See* Pet. Br. 40. Regardless, courts should resolve those issues as they arise – on factual records actually presenting the question of Jones Act status. *See Stewart*, 543 U.S. at 494 (emphasizing that "other prerequisites to qualifying for seaman status under the Jones Act provide some limits, notwithstanding § 3's breadth"). There is no reason to gerrymander admiralty jurisdiction in the meantime.

4. Petitioner suggests (at 41-43) that treating his houseboat as a "vessel" would subject it to ill-fitting Coast Guard regulations. However, petitioner cites many provisions – such as those requiring "'an adequate supply of potable water'" – that do not apply to vessels like houseboats. *Id.* at 41-42 (quoting 46 U.S.C. § 3305(a)(1)(D)); *see* 46 U.S.C. § 3305(a)(1) (limiting application to "vessel[s] subject to inspection"); 46 C.F.R. § 24.05-1 table (row (3)) (criteria absent here required for non-self-propelled craft to be subject to inspection). To the extent other regulations might apply to vessels like petitioner's houseboat (*but cf.* Am. Gaming Ass'n *Amicus* Br. 11 n.8 ("AGA Br.") (doubting that regulation would be affected by vessel status)), the Department of Homeland Security is free to exercise its expert judgment

and exempt any craft for which it believes regulation would be unnecessary. *See*, *e.g.*, 46 U.S.C. § 4302(c)(1) (directing Secretary, in prescribing regulations for recreational vessels, to "consider the need for and the extent to which the regulations will contribute to recreational vessel safety"); Coast Guard Policy, 74 Fed. Reg. at 21,815 (cancelling "[e]xisting policy documents . . . until they can be conformed to the Stewart decision").

5. Petitioner's federalism arguments are likewise unfounded. Admiralty jurisdiction "extends at least" to all "activities traditionally undertaken by vessels, commercial or noncommercial," and mooring a watercraft "at a marina on a navigable waterway is a common, if not indispensable, maritime activity." *Sisson*, 497 U.S. at 367. Indeed, a docked watercraft like petitioner's houseboat implicates several traditional maritime interests. It could, for example, break free of its moorings and collide with vessels or other structures in a marina. *See*, *e.g.*, *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922-23 (11th Cir. 2001) ("casino vessel" under construction "broke free from her moorings" and "struck and damaged a grain-loading conveyor facility").

Here, petitioner's houseboat posed a recognized threat to other vessels in the Marina. JA32-33 (inspector noting that houseboat risked slipping its moorings). Not only would a collision with another structure have dampened commercial activity throughout the Marina, but it could have required significant "salvage and wreck removal" for which the houseboat was not insured. JA33. Addressing such risks demands the predictable and uniform legal regime that admiralty supplies. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982) ("The

federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity."). This strong federal interest in ensuring legal uniformity for those that use navigable waterways – including marinas – outweighs competing local interests. *See id.* at 674 (rejecting argument that "'federalism' concerns dictate" the application of state law to non-commercial vessels).

Petitioner's invocation (at 45-47) of Florida's homestead laws does not alter this conclusion. Respondent was entirely justified in instituting the present *in rem* action. Petitioner owed money for dockage services provided by the Marina, and his houseboat was trespassing at the Marina. JA22-24, 28-29, 34-35. The FMLA and federal maritime law were designed to provide a federal remedy for such situations, notwithstanding possible state-law defenses. *Cf. Piedmont*, 254 U.S. at 12 (stressing that FMLA was intended to supersede "conflicting state statutes") (internal quotations omitted). In any case, the federal remedy here did not conflict with Florida law. Even if petitioner's houseboat at some point qualified for a Florida homestead exemption, that "exemption was extinguished" once petitioner trespassed on the Marina. *Meadow Groves Mgmt., Inc. v. McKnight*, 689 So. 2d 315, 316 (Fla. Dist. Ct. App. 1997) (affirming denial of homestead exemption for mobile home whose owner failed to pay rent).

IV. PETITIONER'S HOUSEBOAT WAS A "VESSEL"

A. Petitioner's Houseboat Was Practically "Capable" Of Carrying People And Goods Over Water

The Eleventh Circuit correctly interpreted § 3 and concluded that petitioner's houseboat was "capable" of conveying things over water. The court "echoed" *Stewart* and held that vessel status turns on "'whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one.'" App. 13a (quoting *Stewart*, 543 U.S. at 496). As such, its "primary inquiry" focused on whether petitioner's houseboat was "'rendered practically incapable of transportation or movement.'" *Id.* (quoting *Belle of Orleans*, 535 F.3d at 1312, quoting in turn *Stewart*, 543 U.S. at 494).

Applying the *Stewart* test, the Eleventh Circuit found that the record demonstrated unequivocally that petitioner's houseboat was capable of water-borne transport. It observed that the houseboat "*was* towed several times over considerable distances" and that the "record dispute[d]" petitioner's unsupported contention that it lacked the ability to make a similar voyage again. App. 17a-18a. The court likewise noted that not a "shred of evidence" supported petitioner's assertion that his houseboat had sustained damage during its previous voyages. App. 18a. In short, the "record [was] clear" that petitioner's houseboat retained the "practical capacity" for water-borne movement. App. 19a.

This Court should affirm the Eleventh Circuit's judgment. Petitioner does not deny that his houseboat had the physical ability to carry things over water; he acknowledges installing towing "cleats" on

his houseboat so as to permit exactly that. Pet. Br. 4; JA86-87. He also admits that he successfully towed his houseboat on multiple occasions. Pet. Br. 4-5; JA83-84. Petitioner testified that, on one occasion, he moved the houseboat approximately sixty nautical miles simply by "borrow[ing] a friend's speed boat" and "pull[ing]" it. Lozman Dep. 12:1-14:4. As the Eleventh Circuit correctly held, this "evidence of the actual voyages made by [petitioner's houseboat] under tow" conclusively established its practical capacity for maritime transportation. App. 18a.

B. Petitioner's Assertions Lack Merit

Petitioner does not genuinely dispute that his houseboat had the practical capability of being used for maritime transportation. Instead, he mostly recites facts – such as what his houseboat "looked like," Pet. Br. 3; his on-board "living quarters," *id.*; and his purported "plan[] to live in Riviera Beach indefinitely," *id.* at 6 – that are wholly irrelevant to vessel status. And the few relevant assertions that he does make cannot support a remand, because they are "contradicted by the record." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

1. Petitioner maintains (at 4) that his houseboat incurred "damage" during its maritime voyages and that moving it was "difficult." Neither fact, even if true, would demonstrate that the houseboat lacked the practical capacity for waterborne transportation. After all, any logistical challenges that petitioner may have faced did not prevent him from moving the houseboat over water on multiple occasions. And a watercraft that sustains some incidental damage after repeatedly moving over water is a far cry from the sort of structures that courts have held practically incapable of maritime transport. *Cf. Kathriner*

v. UNISEA, Inc., 975 F.2d 657, 660 (9th Cir. 1992) (denying vessel status to craft that had "large opening . . . cut into her hull" such that, "[w]hen she put out to sea, she would surely sink").[24]

In any event, the record refutes petitioner's assertion (at 4) that his houseboat "sustained serious damage" while moving. In support of that proposition, petitioner now cites only the Eleventh Circuit's opinion, *see* Pet. Br. 4-5 (citing App. 18a), which rejected his assertion as unsupported by even a "shred of evidence." App. 18a. Moreover, after the U.S. marshals conducted their own tow of petitioner's houseboat, a surveyor found "no observations to indicate recent damage." JA39. Apart from speculation in a stricken district court brief,[25] petitioner can point to nothing suggesting that his houseboat incurred any damage at all – much less damage eliminating its practical capacity for movement over water.

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[24] If a watercraft lost its status as a vessel because it was unseaworthy, seamen on poorly maintained vessels would lose the protections afforded them under the general maritime law and the Jones Act, an irony Congress could not have intended.

[25] *Cf.* Pet. Br. 5 n.6 (citing Claimant's Surreply 5-6). The district court properly struck that brief for failing to comply with the Local Rules, *see supra* note 5, and this Court should not now rely on it. Nor did that brief contain actual evidence. Petitioner merely speculated that he "could take photographic evidence" of the purported damage and "provide it to the Court." Claimant's Surreply 6. A party's allusion to hypothetical evidence in a legal brief is not itself evidence, and it cannot defeat a motion for summary judgment. *See Scott*, 550 U.S. at 380 (requiring a party to "do more than simply show that there is some metaphysical doubt as to the material facts") (internal quotations omitted).

2. In his merits brief, petitioner for the first time describes his watercraft as "indefinitely moored." *E.g.*, Pet. Br. 2, 11-12, 16. That description is inaccurate. Petitioner tied his houseboat to the dock using ropes that were "deteriorated" and "not sufficient to prevent the craft from breaking loose." JA32. Apart from those rotting ropes, only a single 50-amp extension cord and a small hose connected the houseboat to the shore. JA33, 41; Trial Transcript 28:4-9 (Nov. 23, 2009). An inspector recommended that "[a]ll dock lines should be removed and replaced with new [lines] of adequate size and scope to properly secure the craft." JA32.

Those insubstantial attachments to the shore belie petitioner's description of his houseboat as "indefinitely moored." *Stewart* made clear that a vessel is "permanently" or "indefinitely" moored only when its use for transportation no longer remains a "practical possibility." 543 U.S. at 496. Structures whose moorings preclude practical maritime transportation include a dry-dock secured by "large chains" and "sparred off from the bank," *Cope*, 119 U.S. at 627; a wharfboat secured by "four or five cables," telephone lines, semi-permanent electrical and water connections, and driveways, *Evansville*, 271 U.S. at 21-22; and a barge "moored to shore by lines tied to sunken steel pylons that were filled with concrete," "connected to the pier by steel ramps," "joined to a shore-side building," and "connected permanently" by "numerous shore-side utility lines – telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer." *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 564 (5th Cir. 1995).

Petitioner's houseboat was nothing like those crafts.[26] To free his houseboat from its so-called "indefinite" moorings, petitioner needed only to untie or cut the four dilapidated ropes, unplug the extension cord, and unscrew the hose. A craft that can be put to sea with such minimal effort is not "indefinitely moored."

The Coast Guard's criteria for assessing whether a craft is "permanently moored" – embraced by both petitioner (at 42) and the Government (at 28) – reinforce that conclusion. Four of those factors (*see supra* pp. 34-35) indicate that petitioner's houseboat was not permanently moored: no physical structure foreclosed its access to water; its weak moorings did not even resemble "steel cables," let alone "I-beams or pilings"; its previous maritime journeys did not "endanger[]" it; and "get[ting it] underway" took only minutes, not eight hours. Because these facts establish the houseboat's practical capability for transportation, petitioner's asserted purpose for the craft was irrelevant.

3. The overwhelming evidence of the houseboat's practical capacity for maritime transportation obviates any need for a remand. "Every court to have considered the question has found floating homes [comparable to petitioner's] to be vessels." *Sea Village Marina*, 2010 AMC at 413 (collecting cases). Petitioner and the Government offer no persuasive reason why this case should be any different.

The Government asserts (at 30-31) that there is "little evidence" about the "purpose or function of petitioner's floating home; about its design; or about

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[26] Petitioner's houseboat was also nothing like a "boat[] in a moat," AGA Br. 2, or the permanently moored post-*Stewart* casino boats that have been held to be non-vessels, *id.* at 9-12.

how suitable the structure was for . . . transporting people, freight, or cargo." But, as the Eleventh Circuit properly concluded, such factors are "relevant only to the extent that [a craft's] design prevents it from having any practical capacity for transportation over water." App. 19a. The Government fails to identify any concrete facts that petitioner might adduce on remand to create a genuine dispute over this question.[27] Whatever (unspecified) facts petitioner might adduce on remand, they could not refute what the record definitively establishes: that his houseboat was practically capable of – and was actually used for – maritime transportation. A remand in such circumstances would "serve no purpose." *Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 728, 738 (1982) (declining to remand wrongful-discharge action because plaintiff "will not now be able to adduce evidence, which he has heretofore declined to present," that he had necessary employment contract).

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[27] The Government notes (at 30) that the houseboat lacked "motive power or steering" and that "there was some evidence that it could be towed only with great care, at very low speeds, in relatively calm waters." But vessel status has never required effective self-propulsion, *see Stewart*, 543 U.S. at 484 (noting that the *Super Scoop* had "only limited means of self-propulsion" and could "move[] long distances" only by "tugboat"); nor has it required navigation at high speeds or in turbulent waters, *see Norton v. Warner Co.*, 321 U.S. 565, 567 (1944) (holding that a barge was a vessel, even though it had "no motive power of its own" and "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia").

C. This Court Should Affirm Even If It Considers Factors Other Than The Houseboat's Practical Capability

1. Alternatively, this Court can affirm because waterborne transportation was important to the purpose of petitioner's houseboat. That purpose should be judged based solely on objective criteria. *See supra* pp. 32-33 (explaining that admiralty jurisdiction cannot turn on subjective intent). Petitioner's houseboat was objectively intended to provide "a water-borne place to live with the added advantage of at least some maritime mobility." *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 597 (5th Cir. 1968). That mobility proved valuable to petitioner, permitting him on multiple occasions to relocate his home in response to changing circumstances. JA71-72, 77-78.

The houseboat's physical characteristics also refute petitioner's assertion that it was intended to remain stationary. Petitioner's houseboat bore little resemblance to the "floating homes" that, according to petitioner's *amici*, lack a transportation purpose. *Cf.* Seattle Floating Homes Ass'n *et al. Amicus* Br. 12-17 ("SFHA Br."). Unlike typical floating homes, petitioner's houseboat had "cleats" to facilitate towing. *Compare id.* at 16 *with* JA86-87. It also lacked the semi-permanent (and difficult to remove) utility connections typical of floating homes. *Compare* SFHA Br. 20 (floating home's "electrical connection generally must be detached by an electrician"; floating home may require "a diver to detach the home's sewage hookup") *with* JA33 (showing houseboat's 50-amp extension cord); Cert. Opp. 7-8 (houseboat lacked sewage connection). And, in contrast to most floating homes, petitioner's houseboat was docked

in a municipal marina filled with commercial and recreational vessels. *Compare* SFHA Br. 7 (floating homes "typically located" in "the aquatic equivalent of a suburban subdivision") *with* Legue Aff. ¶¶ 6-10 (Marina services primarily recreational and commercial vessels).

The objective indicia of petitioner's state of mind demonstrate that he well understood these differences between his houseboat and a stationary "floating home." The bill of sale documenting petitioner's purchase of his watercraft designated it a "Homemade Custom Houseboat/Barge." JA79; *see Hudson Harbor 79th St. Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) ("[c]ases referring to houseboats have uniformly held that a houseboat is a vessel"). The Wet-Slip Agreement also classified petitioner's watercraft as a "Houseboat" (JA13), and it repeatedly described the houseboat as a "vessel" or "boat" (JA13-20). That Agreement further required petitioner to "relinquish [his] berth when requested by the City" (JA13), and it permitted respondent, on three days' notice, to terminate entirely petitioner's right to dock in the Marina (JA17). Petitioner agreed that, upon receipt of such notice, he would "remove the vessel from the City's premises." *Id.* These circumstances do not even remotely "evidence a permanent location." *Evansville*, 271 U.S. at 22.

For similar reasons, petitioner's houseboat – notwithstanding his conclusory assertions to the contrary – did not "function[] as an extension of land." *E.g.*, Pet. Br. 2, 16. Petitioner lacked any property interest in the Marina's land, and the Wet-Slip Agreement required him to "remove" the houseboat from the Marina on a mere three days' notice. JA17. Petitioner was not even entitled to remain in

a particular slip. The Agreement gave respondent unfettered discretion to relocate the houseboat to another slip at any time without advance notice. JA14. A structure cannot be an "extension" of land to which it is so tenuously connected.

Moreover, unlike in *Evansville*, petitioner's houseboat performed a function that could not "have been performed as well by an appropriate structure on the land." 271 U.S. at 22. The *Evansville* wharfboat served as an "office, warehouse, and wharf" that merely "stor[ed]" goods and "transferr[ed]" them to adjacent steamships – functions that a land-based structure could have fully replicated. *Id.* at 21-22. By contrast, the capacity for waterborne movement was pivotal to the function of petitioner's houseboat; had petitioner lived in a land-based home, for instance, he could not have relocated so easily. JA73-74, 78.

2. Respondent's burden to establish a prima facie case for subject-matter jurisdiction fortifies the conclusion that this Court should affirm even under petitioner's legal theory. Petitioner's Question Presented asks this Court to review only the Eleventh Circuit's judgment that the district court had admiralty jurisdiction over respondent's claims. Pet. i.[28] Because this case turns solely on a jurisdictional issue, the question is whether respondent made a "nonfrivolous assertion of jurisdictional elements."

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[28] Even if the Question Presented (notwithstanding its express focus on "federal maritime jurisdiction") could be read broadly to include merits issues turning on the "vessel" definition, broader issues were not preserved for this Court's review. The only vessel-status issue raised in the Eleventh Circuit was petitioner's challenge to the exercise of admiralty subject-matter jurisdiction. *See* Pet'r C.A. Br. 12-26. The only non-jurisdictional challenge to the maritime lien was factual. *See id.* at 27-31.

Grubart, 513 U.S. at 537. Moreover, because those jurisdictional elements overlapped with the merits of respondent's claim to a maritime lien, respondent's burden in demonstrating jurisdiction required only that it satisfy a "prima facie standard." *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 978 & n.12 (2006) (collecting cases adopting the prima facie standard). That standard requires "less than a preponderance showing," *id.* at 989, and it applies throughout the entire litigation – including at summary judgment, at trial, and on appeal, *id.* at 996.

Accordingly, this Court is confronted with the question whether respondent made a "prima facie" showing that petitioner's houseboat was a vessel. Under any theory of vessel status, respondent has satisfied that minimal burden.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 12, 2012

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-80594-CIV-DIMITROULEAS

CITY OF RIVIERA BEACH,
Plaintiff,
v.

THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL, APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH, HER ENGINES, TACKLE, APPAREL, FURNITURE, AND ALL OTHER NECESSARIES APPERTAINING AND BELONGING IN REM,
Defendant.

[Filed Sept. 11, 2009]

ORDER

THIS CAUSE is before the Court on Claimant's July 27, 2009 Motion to Dismiss [DE-64]. The Court has considered Claimant's July 27, 2009 Memorandum [DE-65], Plaintiff's August 13, 2009 Response [DE-68] and Claimant's August 21, 2009 Reply [DE-81] and finds as follows:

On April 20, 2009, Plaintiff succeeded in convincing this Court to arrest the vessel pursuant to a valid maritime lien. Claimant contends that this Court has no jurisdiction over this case, as the seized structure is not a vessel or a houseboat, but a floating residential structure, not subject to federal maritime law. Whether a floating residential structure is subject to federal maritime law need not be decided at

this time, as there is a factual dispute as to what the seized structure is.

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. *See Linder v. Portocarrero*, 963 F. 2d 332, 334-36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)). To survive a motion to dismiss, the plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.v. Twombly*, 127 S. Ct. 1955, 1960 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1968. Taking Plaintiff's allegations to be true, the instant Complaint is sufficient to withstand Defendant's motion to dismiss.

Wherefore, Claimant's Motion to Dismiss [DE-64] is Denied. The request for attorneys fees is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of September, 2009.

/s/ WILLIAM P. DIMITROULEAS
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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