No. 11-626

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

As the Petitioner himself argued in his initial brief to the Eleventh Circuit Court of Appeals, this case presents a "novel or unusual situation" requiring a "case by case approach" to reach resolution. Consequently, the case is a poor vehicle for resolving purported lower court conflicts because it is necessarily fact-bound. Further, the Petitioner now asserts "facts" directly contradicted by the record below, which are material to the formulation and resolution of the Question Presented in the Petition. Thus, the ongoing factual dispute presented in this case renders it unworthy of *certiorari*.

STATEMENT OF THE CASE

The Respondent incorporates by reference the statement of facts contained in the Eleventh Circuit's opinion. Pet. App. 3a-10a. The following facts bear further emphasis.

The Respondent owns and operates a municipal marina ("Marina"), which sits squarely on the navigable waters of the Atlantic Intracoastal Waterway in Riviera Beach, Florida. Pet. App. 3a. The Marina provides both wet and dry storage for approximately 510 commercial and recreational vessels. *Id.* Approximately 15% of the Marina's wet slips are occupied by commercial vessels, which use the Marina for storage, maintenance and a base of operations. Dkt.67-2, ¶¶ 7-8. The Marina is the base of operations for a ferry service, which normally makes several trips per day to Peanut Island Park, an island across the Atlantic Intracoastal Waterway from the Marina. *Id.* ¶ 10. Approximately 25% of the Marina's

dockage revenue comes from transient vessels—vessels docking at the marina for less than ten days—while en route to other destinations. *Id*. ¶ 9. Annually, a large number of these transient vessels docks at the Marina when either going to, or coming from, ports in the Bahamas. *Id.* Ten percent or less of the slips are rented to live-aboard vessels. Tr.1 66:17-18.

The Petitioner purchased the vessel that is the subject of this case (the "Vessel") in 2002. The bill of sale described the Vessel as a "homemade custom houseboat barge." Lozman Dep. 8:3 (Dkt. 98-1 at 3, 18). He had the Vessel towed from a location near Fort Myers, on the west coast of Florida, to North Bay Village, on the east coast of Florida; a voyage exceeding 200 miles. Pet. App. 3a. While in North Bay Village, the Petitioner moved the Vessel from one marina to another. Lozman Dep. 16:12-23 (Dkt. 98-1 at 4). Then, in 2006, the Petitioner towed the Vessel from North Bay Village to Riviera Beach, Florida using a borrowed thirty foot motorboat. *Id*. at 13:1-11(Dkt. 98-1 at 4). This voyage was more than 60 miles.

On March 10, 2006, the Petitioner executed a "Wet-Slip or Dry Storage Agreement" for dockage at the Marina. Pet. App. 3a-4a. The Agreement, in which the Vessel was described as a "houseboat," was for month-to-month dockage. Dkt. 67-3 at 1. In relevant part the Agreement provided:

> It is understood and agreed by the Owner that the services provided by The City of Riviera Beach hereinafter "City", are limited to providing storage space with an in/out launching service according to the terms of this agreement. 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. The City agrees, insofar as possible, to temporarily reassign these Owners to suitable berths at the same facility if space is available, or otherwise credit the Owner with equivalent time (days) at the current transient dockage rates in effect for the same facility. In addition to all other power and authority retained by the City, the 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. The City also reserves the right to, in its absolute discretion, move any vessel off the floating docks.

Id. The Agreement further provided that it could be terminated by either party upon certain conditions, including:

> 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. at 3. Finally, the agreement also provided:

> In addition to any other remedies provided for in the 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.

Id. at 2.

In 2009, the U.S. Marshals arrested the Vessel. Within hours of its arrest, it was towed south from Riviera Beach to the Miami River, another trip for the Vessel which exceeded 60 miles. The voyage to Miami resulted in no damage to the Vessel. It remains undisputed the Vessel, between 2002 and 2009, made voyages totaling hundreds of miles.

In its decision, the Eleventh Circuit specifically noted the Petitioner's assertions "that each of the three times the [Vessel] was moved over 250 feet it sustained serious damage and that it would have sunk two out of the three times if immediate underwater repairs had not been performed" were "without any evidentiary support in the record." Pet. App. 18a. Likewise, the Eleventh Circuit held there was no record evidence supporting the Petitioner's arguments regarding the Vessel being a "floating shack, built out of plywood with only 1/16" of fiberglass surrounding its unraked hull, without proper cleats for towing, no bilge pumps, no navigation aids, no lifeboats and other lifesaving equipment, no propulsion, [and] no steering." *Id.* 18a-19a.

REASONS FOR DENYING THE PETITION

In his initial brief on appeal to the Eleventh Circuit, the Petitioner conceded this case involved "a novel or unusual situation," which required "a case-by-case approach . . . to determine whether admiralty jurisdiction applies." App. Brief at 15-16 (*citing Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 875 (11th Cir. 2010)). Thus, by the Petitioner's own admission, this case turns on its unique circumstances, rendering it a poor vehicle to resolve the conflict alleged. The fact-bound nature of this case is evident in the Petitioner's formulation of the Question Presented: the sole Question Presented is bound by the essential factual predicate that the Vessel received "power *and other utilities from shore*."

Close examination of the cases chiefly relied upon by the Petitioner reveals that regardless of the test applied, there is nonetheless a fact-intensive inquiry required to determine vessel status. Evidence of substantial connection to shore is critical to the determination. *See De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187 (5th Cir. 2006) (listing, among other things, numerous land based utilities supplied, including "water, telephone lines, sewer lines, cable television and data processing lines"); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 564 (5th Cir. 1995) (noting substantial physical connection to shore-side building and numerous "shore-side utility lines-telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer...."). Despite assurance that "all of the relevant facts are documented and undisputed," the Petitioner strains to assert facts showing the Vessel's substantial connection to shore that were never established in the record below. Further, the

Petitioner asserts "facts" squarely contradicted by the record evidence.

The lack of record evidence renders the Question Presented hypothetical in nature, which can be resolved only through advisory opinion. Further, the Petitioner's unsupported assertions reveal an ongoing factual dispute that, if reviewed, would reduce this Court to a court of error.

1. Factual Misstatements

The Petitioner's portrait of this litigation bears little resemblance to what was presented to the lower courts. In an apparent attempt to conform the facts of this case with those of *De La Rosa* and *Pavone*, the Petitioner affirmatively states the Vessel was "affixed to land-based utilities, including power, sewer lines, cable television, and the internet." Pet. 3. Further, the Petitioner asserts, among other things, the Vessel "contained no bilge pumps for expelling water during transport." *Id.* There is no dispute the Vessel received power from shore.[1] However, the Petitioner goes to great lengths to show other alleged substantial shore connections to evidence the Vessel's indefinite or permanent mooring at the Marina. These assertions are simply not true.

A. At no time was the Vessel affixed to a land-based sewer line while at the Marina. Indeed, the Petitioner's

1. This fact, by itself, is of no moment. Even transient vessels calling at the Marina could receive shore power, a fact clearly established at trial Tr.1 52:10-11. Thus, the receipt of shore power fails to distinguish the Vessel from other watercraft.

own deposition testimony conclusively establishes this fact:

> Q: Did you have a shore hookup for sewage at the dock at Riviera Beach?
>
> A: No. I was promised one but they never put it in.
>
> Q: But you hooked up knowing there wasn't one?
>
> A: I was told they were redoing the docks and that -- there was some excitement there because the county had given the city five million dollars to redo the docks, a five million dollar bond, but as of this date the five million dollars to redo the infrastructure of the docks which was to include the electrical, the water and the sewage, was not done, that's correct.
>
> Q: So did you make any arrangements to dispose of the sewage on your vessel from 2006 to 2009?
>
> A: No.
>
> Q: So, to the best of your knowledge, where was the sewage going?
>
> A: There wasn't much sewage going into that boat. Okay? But any gray water sewage, if there was any, would have been going over, overboard.
>
> Q: You say gray water sewage?

A: Gray water or sewage.

Q: Or sewage. So, both, going into the water?

A: That's correct.

Q: From 2006 to 2009?

A: That's correct.

Lozman Dep. 52:17-53:19 (Dkt. 98-1 at 13-14). Further, the Eleventh Circuit noted the absence of a sewage connection in rendering its decision. To wit, Judge Marcus noted the marina rules and regulations put in place in 2007 required vessels docked at the marina to "comply with the Florida Clean Vessel Act . . ., which, among other things, ***prohibits owners of vessels or floating structures from discharging raw sewage into Florida waters.***" Pet. App. 5a-6a (emphasis added).

B. The Petitioner's misrepresentation the Vessel "contained no bilge pumps for expelling water during transport" is contradicted by the record. According to the survey performed pursuant to the district court's order, the Vessel was fitted with "[b]ilge pumps and automatic float switches previously installed in the bilge [that] were neglected and were non-functional." Dkt. 44-2, 44-3 at 2. Thus, contrary to the Petitioner's argument the Vessel was "not designed ever to engage in maritime transportation," it was, in fact, equipped with bilge pumps customarily found on vessels.

C. The record is devoid of any evidence supporting the Petitioner's assertion the Vessel received cable

television and internet from shore. On the contrary, according to photographs taken during the Vessel's survey, the upper deck was fitted with a satellite dish. Dkt. 44-4 at 1. The Petitioner equipped the Vessel to be independent of land-based television and internet services.

D. The Petitioner concedes the Vessel "had cleats" but attempts, as was argued to the Eleventh Circuit, to downplay this fact by asserting the cleats "were inappropriate for towing." Pet. 3. The Eleventh Circuit specifically found the Petitioner's "own brief and the evidence presented at trial appear to contradict this point." Pet. App. 19a n.1. Indeed, the Petitioner presented evidence at trial that he hired a repairperson, who "fit the [Vessel] with four towing bitts prior to its approximately-seventy mile tow from North Bay Village to the City Marina." *Id.* And in light of the Petitioner's admission "the record here does not contain every factual detail" concerning the Vessel, the evidence contained in the record shows the Vessel was outfitted to be properly towed. Pet. 23. This fact is not arguable, given the Vessel was towed, successfully, for two voyages totaling approximately 150 miles after the towing bitts had been installed.

E. The Petitioner's contention that he had "applied for -- and been granted -- homestead protection" for the Vessel is at once unsupported by the record and a mischaracterization as to the operation of Florida homestead law. Pet. 19. First, one does not "apply for" homestead protection. It is a right that attaches by operation of state law provided certain circumstances are met. Fla. Const. art. X, § 4. The Petitioner has never established the Vessel met the requirements for being a homesteaded property. The fact that the Petitioner

executed an affidavit and had it recorded does not amount to a grant of homestead. "The clerk's acceptance and recording of the document does not ensure the legal effect of such document. Rather, the clerk is merely performing his or her ministerial duty." Fla. AGO 2005-17, 2005 WL 735543 (Fla. A.G.). Second, of the many courts that have reviewed the Agreement and the Petitioner's tenancy rights, none have found that the Vessel was a homestead; the record reflects that in the earlier state court eviction action, the Agreement was held to create a nonresidential tenancy. Pet. App. 38a.

The import of these factual assertions cannot be overemphasized; such blatant misstatements alone render the Petition unworthy of *certiorari*. Even if the Petitioner can somehow show the misrepresentations are colorable or impliedly established, this Court would nonetheless be mired in a factual dispute that would likely result in a colossal waste of scarce judicial resources.

2. The Petitioner's intention the Vessel would never move across water again is raised for the first time in the Petition.

On top of the other factual issues presented above, Petitioner asserts, for the first time, his intention to indefinitely moor the Vessel on its arrival at the Marina, and for it "never to move across water again." Pet. 25. The record is barren of evidence of any such intent. If anything, the original Agreement, executed by the Petitioner, expressly set forth month-to-month dockage, which was terminable by the Marina on only three days notice *without cause*. Additionally, the Agreement required the Vessel to vacate the dock at the Marina's

request with no guarantee any other space would be made available. Accordingly, the Petitioner never had the unfettered control of the premises that would permit him to plausibly form the intent to keep his Vessel moored at the Marina forever. At best, any intent to moor the Vessel indefinitely can only be gleaned through review of the record for facts surrounding the Vessel's design and construction, its connection to shore, and its use as a means of transportation on water. This is precisely what the Eleventh Circuit did, and the Petitioner asks this Court to reexamine those factual determinations as would a court of error.

3. This case presents a minimal conflict that lacks substantial importance

A plain reading of the Eleventh Circuit's opinion clearly shows the court correctly applied the rule of law set forth in *Stewart v. Dutra Construction Co.* and based its holding on the Petitioner's failure to point to any established facts supporting his contention the Vessel was never designed or constructed for maritime transportation. This case, therefore, does not present the conflict suggested, as the Eleventh Circuit's holding was fact based. It cannot be said with confidence that ***any*** other court, applying ***any*** test, would have reached a different conclusion, when presented with such scant and contradictory evidence.

Further, the constellation of circumstances established in this case barely resembles those presented in *De La Rosa* or *Pavone*. Though there may be a conflict between the circuits on the test used to determine vessel status in cases of commercial gambling boats substantially

connected to shore, that conflict is not brought "into stark relief" in this case. Thus, not only is this case a terrible vehicle for resolving the purported conflict, but the novelty of this case shows that it is constrained by its unique facts and not sufficiently important to merit further review.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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