University of Miami Law Review

Volume 67
Number 4 *Volume 67 Number 4 (Summer 2013)*

Article 10

7-1-2013

Whatever Floats the "Reasonable Observer's" Boat: An Examination of *Lozman V.city Of Riviera Beach Fla.* and the Supreme Court's Ruling that Floating Homes are not Vessels

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I. INTRODUCTION

Today, as international trade and interstate commerce merely consist of internet transactions from laptops and smartphones, the fundamental policies behind federal admiralty law have seemingly vanished

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into the horizon. It is well-accepted that the creation of admiralty law stemmed from the demands of commerce and the desires of merchants to broaden their horizons.[1] As voyages transitioned from horseback to the high seas, the law was forced to take special precautions to protect and facilitate the unique nature of maritime exchange. The Constitution reserves cases of maritime and admiralty jurisdiction to the federal judiciary and grants Congress the power to enact a body of uniform, federal law to govern such affairs.[2] In a practical sense, admiralty law is an outgrowth of the expansion of trade and the necessities of nautical transit; as such, non-commercial uses of vessels were considered irrelevant in the shaping and scope of early admiralty law.[3]

However, with traditional wooden schooners becoming obsolete, commercial maritime concerns are becoming less of a concern for lawmakers and courts.[4] The recent growth of recreational and residential uses of boats and vessels has injected new uncertainties in admiralty jurisprudence: What nautical laws still remain relevant in light of the shift from commercial to recreational use, and to what types of innovative structures should these laws apply? This Note focuses on one of the most controversial categories within "new" maritime innovation: the floating home.

The United States has seen the presence of floating homes since the early 1900s.[5] The concept of floating home communities took shape during the Great Depression, when the cost of materials for floating homes was substantially less than the price of building or purchasing a house on land.[6] The country also saw an increase in the popularity of floating homes during the 1960s when the liberal, Bohemian lifestyle was prevalent in society.[7] As of today, there are over 5,000 individuals and families occupying floating homes around the United States, with well over 2,000 floating home owners residing atop water in Portland, Oregon alone.[8] For this significant portion of the American population, the questions of whether they must abide by state law or whether federal mari-

1. ROBERT M. HUGHES, HANDBOOK OF ADMIRALTY LAW § 5 (2d ed. 1920).

2. U.S. CONST. art. III, § 2

3. Michael F. Vitt, *Stemming the Tide: Uniformity in Admiralty Commands No Recovery for Recreational Vessel Losses Under a Marine Products Liability Theory in Maryland Courts Due to the Economic Loss Rule of* East River Steamship Corp. v. Transamerica Delaval, Inc., 28 U. BALT. L. REV. 423, 429 (1999).

4. *Id.* at 444.

5. Vicki Gornall, *The Search for a House in Seattle*, WICKED HOUSE OF THE EAST (Oct. 28 2012, 11:32 PM), http://wickedhouseoftheeast.blogspot.com/2012/10/we-have-house.html.

6. *Id.*

7. *Id.*

8. Brief for the Seattle Floating Homes Association and the Floating Homes Association of Sausalito as Amici Curiae Supporting Petitioner at 9, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626).

time statutes preempted those regulations remained issues of great debate among the courts.

Local and state legislatures have taken active steps in developing a workable code of laws and regulations that apply specifically to floating homes.[9] However, because these homes are on top of navigable waters and are physically capable of being towed across the high seas, there was a valid argument that such structures fall under maritime law and are therefore governed by federal admiralty statutes. The term "vessel" is defined in Section 3 of the U.S. Code as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[10] This definition is the threshold question that courts must answer before applying any federal law affecting vessels to a particular watercraft. The caselaw that developed since Section 3's enactment has helped refine that broad definition into a more useable standard.

This Note provides a comprehensive overview of Section 3's place in admiralty law, from its codification in the late nineteenth century, throughout its evolution over the generations, leading to the Supreme Court's 2013 decision in *Lozman v. City of Riviera Beach, Fla.*, that floating homes are not "vessels" as contemplated by federal statutes.[11] Part II of this Note begins by introducing the parties and establishing the history involved in *Lozman*, a case that decided the question of whether a Florida resident's floating home was a vessel subject to admiralty laws and federal jurisdiction. Historical case law and subsequent evaluations of maritime precedent, upon which both the *Lozman* Court and the parties relied, is detailed in Part III. This Note dissects the *Lozman* opinion in Part IV, discussing the Court's reasoning for why it held that the floating home was not a "vessel" for jurisdictional purposes under Section 3. Part V then provides an analysis of the decision, examining the way the Court utilized precedent and incorporated traditional admiralty law tests. Lastly, Part VI lays out various policy concerns existing in the underpinnings of admiralty and property law that point in favor of the Supreme Court's decision to exclude floating homes from federal regulation.

9. *Id.* at 23.
10. 1 U.S.C. § 3 (2006).
11. 133 S. Ct. 735 (2013).

II. EVENTS LEADING TO *CITY OF RIVIERA BEACH V. THAT CERTAIN UNNAMED GRAY, TWO-STORY VESSEL APPROXIMATELY FIFTY-SEVEN FEET IN LENGTH*

A. *Background and Facts of Lozman's Floating Home*

Fane Lozman ("Lozman"), a vocal financial software entrepreneur and former Marine pilot, accomplished great success throughout his career and can now add a Supreme Court victory to his resume.[12] In 2002, Lozman bought a floating home from its original owner and constructer.[13] It was affixed to the seawall adjacent to the owner's Fort Myers, Florida backyard and essentially served as a guesthouse.[14] The plywood structure, now coined as "That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length," complied with Florida's State building code for land-based dwellings, encompassing all the typical features of a common home: A rigid rectangular shape, a flat bottom, French doors lining three sides, a fully functional kitchen and dinette, a living room, three bedrooms, an upstairs office, a full bath, and a sundeck.[15]

Lozman's floating residence was equipped with a land-based sewage connection, just as any similar home on land would be.[16] And although floating atop water, the home lacked any means of self-propulsion, steering, or navigation for easy water transit.[17] There were no lifeboats, marine safety equipment, towing cleats, batteries, or generators on board.[18] The structure neither qualified for vessel certification by the United States Coast Guard nor met the State's standards for vessel registration.[19]

To facilitate the 200-mile transport of the floating home from Fort Myers to Lozman's final destination in North Bay Village, Florida,[20]

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12. Matt Krantz, *High Court to Hear Trader's Floating Home Case*, USA TODAY (Oct. 1, 2012, 9:10 AM), http://www.usatoday.com/story/money/personalfinance/2012/09/30/eminent-domain-houseboat/1580789.

13. Telephone Interview with Fane Lozman, owner of the floating home (Jan. 14, 2013) [hereinafter Lozman Interview].

14. *Id.*

15. Brief for Petitioner at 2, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626) [hereinafter Petitioner's Brief].

16. *Id.*

17. *Id.* at 4.

18. *Id.*

19. *Id.* A Hull Identification Number is required for a craft to be legally recognized as a documented vessel by Florida and the United States Coast Guard. *See* FLA. STAT. § 328.07 (2011); *see also* 33 C.F.R. § 181.29 (2012). Therefore, Lozman would not have been able to independently travel over water in his floating home under the parameters of local and federal laws. Lozman Interview, *supra* note 13.

20. Brief for Respondent at 5, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626) [hereinafter Respondent's Brief].

Lozman had to screw temporary cleats into the structure to enable a tow.[21] After the trip, Lozman comfortably resided in a North Bay Village floating neighborhood, along with approximately fifty other floating homes, for three uninterrupted years.[22] However, Hurricane Wilma destroyed the seaside community in 2005, forcing Lozman to relocate his unharmed home sixty miles, again by towboat, to the Riviera Beach Marina (the "Marina").[23] Lozman implemented more extensive preparations for this journey; he hired a contractor to install new tow cleats and arranged a motorboat tow in the front and an additional towboat in the back of the home to prevent it from "jackknifing" during transit.[24]

The Marina is a public facility that is owned and operated by the City of Riviera Beach, Florida (the "City").[25] In March 2006, Lozman entered into a month-by-month agreement with the Marina, whereby the Marina supplied a slip for Lozman's floating home in exchange for a monthly dockage fee.[26] According to Lozman, the Marina was initially very welcoming to him and his floating home: Lozman provided the facility with steady income and the houseboat utilized an essentially unusable slip for most other watercrafts.[27] Because Lozman's houseboat only required approximately twelve inches of water to safely moor, his dockage slip would not have been suitable for most other moored crafts and would not have been able to generate profit.[28]

From its slip, the floating home was connected to municipal water and was hooked up to shore-based utilities such as electrical power, cable television, internet, and telephone.[29] Lozman also successfully filed for Florida Homestead Exemption on his floating residence at the Marina with the county's Property Appraiser.[30]

Despite their copasetic business exchange, Lozman and the Marina quickly fell into a heated legal battle. Within months of moving to the Marina, Lozman learned of the City's multi-billion dollar agreement with a private contractor to redevelop the Marina into a mega-yacht center.[31] Lozman, a passionate local-activist, promptly brought suit

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21. Petitioner's Brief, *supra* note 15, at 4.

22. Lozman Interview, *supra* note 13.

23. *Id.*

24. Petitioner's Brief, *supra* note 15, at 6.

25. Respondent's Brief, *supra* note 20.

26. *Id.*

27. Lozman Interview, *supra* note 13.

28. *Id.*

29. Petitioner's Brief, *supra* note 15, at 6. Although the structure was equipped to do so, Lozman could not connect his home to land-based sewage because the Marina's sewage infrastructure was deteriorated. *Id.*

30. Lozman Interview, *supra* note 13.

31. Petitioner's Brief, *supra* note 15, at 6.

against the City in state court, claiming that the City's deal violated Florida law by not giving the public proper advance notice.[32] Shortly thereafter, the redevelopment plan was abandoned, suit was dropped, and Lozman was credited with successfully blocking the billion-dollar deal.[33]

B. *State Eviction Suit*

The City of Riviera Beach, still feeling the effects of the lost deal, sought to evict Lozman from his floating home for failing to muzzle his ten-pound dachshund and for hiring unlicensed repairmen to work on his residence.[34] On August 9, 2006, the City filed suit in state court in Palm Beach County and sent Lozman an eviction notice.[35] The City urged the court to apply state landlord-tenant statutes to the case because its contract with Lozman created a nonresidential tenancy under Florida law.[36] The circuit court agreed and applied Florida state landlord-tenant law.[37] Following a three-day trial, where Lozman zealously represented himself,[38] a jury found in favor of Lozman, determining that Lozman's prior efforts to block the redevelopment plan was a "motivating or substantial factor" in the City's retaliatory action to terminate his lease.[39]

C. *Admiralty Suit in Federal Court*

Lozman's victory in the eviction suit was cut short when the Riviera Beach City Council unanimously passed revisions to the Marina's Rules and Regulations.[40] The new provisions in the Rules demanded that all structures at the facility obtain certain liability insurance, produce proof of vessel registration, comply with the Florida Clean Vessel Act, and be "operational and capable of vacating the marina in the case of an emergency."[41] Within an approximately eighteen-month period, the Marina allegedly sent Lozman a total of three noncompliance notices, only one of which he claims he received.[42]

As of April 1, 2009—the deadline to execute the updated agreement—Lozman neither executed the agreement nor complied with its

32. Petitioner's Brief, *supra* note 15, at 7.
33. *Id.*
34. *Id.*
35. City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259, 1263 (11th Cir. 2011).
36. *Id.*
37. *Id.*
38. Petitioner's Brief, *supra* note 15, at 7.
39. *Riviera Beach*, 648 F.3d at 1263.
40. Petitioner's Brief, *supra* note 15, at 7.
41. *Riviera Beach*, 649 F.3d at 1263.
42. *Id.*

provisions. On April 20, 2009, the City filed an in rem suit against the floating home in the United States District Court for the Southern District of Florida.[43] The City sought to foreclose its maritime lien on Lozman's structure for purported unpaid dockage totaling approximately $3,000.[44] The Marina also sought damages through a trespass claim against the floating home.[45]

The City's jurisdictional and substantive hook for getting into federal court lies at the heart of the entire case: the Federal Maritime Lien Act ("FMLA") provides that:

> (a) Except as provided in subsection (b) of the section, a person providing necessaries to a *vessel* on the order of the owner or a person authorized by the owner – (1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel. (b) This section does not apply to a public vessel.[46]

Asserting that Lozman's floating home constituted a "vessel" allowed the City's claims to be governed by FMLA, thus invoking the exclusive and original admiralty jurisdiction of the federal court.[47]

The same day the suit was filed, the federal court issued a warrant for the arrest of the home pursuant to Supplemental Rule C for Certain Maritime and Admiralty Claims.[48] Within hours of its issuance, U.S. Marshals executed the warrant and towed the floating home eighty miles south to Miami, Florida.[49] One day later, Lozman filed an emergency motion to dismiss the complaint and return his home to the Marina.[50] The district court denied Lozman's request just a few days later.[51]

After a brief bench trial, the district court issued an order of final judgment against Lozman on January 6, 2010.[52] The court found that the defendant floating home was indeed a "vessel" subject to federal jurisdiction (thus, subject to the maritime lien imposed by FMLA), and that the vessel was liable to the Marina for over $3,000 in back dockage and

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43. *Id.* at 1264.

44. Petitioner's Brief, *supra* note 15, at 8. According to Lozman, he timely paid his dockage rent to the Marina. Lozman argues that, essentially, the Marina created its own maritime lien by not accounting for and processing his checks. Lozman Interview, *supra* note 13.

45. Petitioner's Brief, *supra* note 15, at 8.

46. 46 U.S.C. § 31342 (2006) (emphasis added).

47. 28 U.S.C. § 1333 (2006).

48. *Riviera Beach*, 649 F.3d at 1264. "If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action." FED. R. CIV. P. SUPP. C(3)(a)(i).

49. Respondent's Brief, *supra* note 20, at 9.

50. *Id.*

51. *Id.*

52. *Riviera Beach*, 649 F.3d at 1265.

$1 in nominal damages from its trespass.[53] The district court ordered the U.S. Marshal to release the watercraft and execute its sale to satisfy the final judgment against it.[54]

In March 2010, the City purchased Lozman's sole residence at public auction in Miami,[55] where it was then, in the words of Justice Kennedy, "mercifully destroyed" by the City.[56] The destruction entailed a five-week dismantlement of the structure, board by board, nail by nail.[57] Lozman could only watch from the street as each piece of his home and various personal belongings were scrapped or recycled.[58] Although his home could not be salvaged, Lozman continued to fight for his rights against the City by appealing the case to the Highest Court.[59]

III. HISTORICAL ANALYSIS AND PRECEDENT ON "VESSEL" UNDER 1 U.S.C. § 3

A. *Early Admiralty Treatise and Case Law*

Dating back to its nineteenth century inception into admiralty law, Section 3 of the Rules of Construction Act has been narrowly interpreted by authorities, tying "vessel" status to the craft's particular purpose of design. The default definition of "vessel," as codified in Section 3, states that a vessel "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[60] This open-ended definition applies to every U.S. Code provision that includes the word "vessel," "unless the context indicates otherwise."[61] The Supreme Court has acknowledged that this definition, which has remained substantially unaltered from its original codification in 1873, was not meant to modify existing admiralty jurisprudence, but was instead meant to solidify the meaning acquired in general maritime law.[62]

One of the top respected admiralty treatises published during the late nineteenth century, shortly after Section 3 was enacted, was Bene-

53. *Id.*

54. *Id.*

55. *Id.*

56. Oral Argument at 4:53, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_11_626.

57. Lozman Interview, *supra* note 13.

58. *Id.* The City spent a total of $6,900 of taxpayer money on the deconstruction of Lozman's house. *Id.*

59. *Id.*

60. 1 U.S.C. § 3 (2006).

61. *Id.* at § 1 (2006).

62. Stewart v. Dutra Constr. Co., 543 U.S. 481, 489–91 (2005) (citing treatises and admiralty decisions from the late nineteenth century that discuss the historical context of the statutory definition of "vessel").

dict on Admiralty.[63] It established a guiding principle for discerning the significance of "vessel" within general admiralty law: "It is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes the jurisdiction, but the purpose and business of the craft, as an instrument of naval transportation."[64] Benedict also asserted that "vessel" and "ship" are equivalent terms within maritime law and that a "ship" is defined as "a locomotive machine *adapted to transportation* over rivers, seas, and oceans."[65] As such, Benedict considered vessel determination dependent on the structure's purpose of design relative to its water transit function.[66] Benedict's legal theories reveal that, from early on, admiralty law has ranked the aquatic function of a structure superior to its mere physical capabilities and attributes when establishing vessel status.

During the era of Benedict's treatise, many cases supported his explanation of vessel status by ignoring the traditional physical attributes and uncovering the true function(s) of the craft. For example, the court in *The General Cass* stated:

> The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion.[67]

Another early court opinion that relied upon Benedict's purpose-based inquiry held that "the structure in question, though afloat, is not such a vessel, because it was not designed or used for the purpose of navigation, nor engaged in the uses of commerce, nor in the common transportation of persons or cargo."[68]

In *Cope v. Vallette Dry Dock Co.*, the Supreme Court offered approval of the purposive test when it looked to the structure's purpose in deciding whether or not a dry-dock was a vessel.[69] The structure in *Cope* was a flat-bottomed, box-shaped floating platform that was "permanently moored by means of large chains . . . ."[70] With no method of

63. Petitioner's Brief, *supra* note 15, at 22.

64. ERASTUS C. BENEDICT, THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE § 218 (2d ed. 1870).

65. *Id.* at § 215 (emphasis added).

66. The historical concept of looking to the craft's design in ascertaining its water transit purpose has also been discussed by Robert Hughes in his 1920 admiralty treatise: "The character of craft included in the admiralty jurisdiction is [a] . . . structure capable of navigation and designed for navigation." ROBERT M. HUGHES, HANDBOOK OF ADMIRALTY LAW § 5 (2d ed. 1920).

67. 10 F. Cas. 169, 170 (E.D. Mich. 1871) (No. 5,307).

68. Ruddiman v. A Scow Platform, 38 F. 158 (S.D.N.Y. 1889).

69. 119 U.S. 625 (1887).

70. *Id.* at 627.

propulsion, the platform was designed to function solely as a means of removing ships from the water for repairs.[71] Echoing Benedict's purposive language, the Court held that the dry-dock did not serve a navigational or water transportation purpose and thus was not a vessel: "The fact that [the dry-dock] floats on the water does not make it a ship or vessel."[72] The Court's findings in *Cope* indicate that a function of a vessel must be more substantially related to practical water transit than its mere ability to float and hold objects over water.

Early treatises and historically relevant cases show that general admiralty law paid much attention to a structure's purpose, giving little weight to exterior features. Therefore, "vessel," as originally codified in Section 3, was intended to incorporate a purposive or function-based inquiry that was broadly accepted within maritime law at that time.

B. *Twentieth Century Supreme Court Cases Continued the Purpose-Based Analysis of 1 U.S.C. § 3*

Throughout the 1900s, the Court stayed loyal to admiralty precedent by engaging in a purpose-based inquiry within its vessel analysis. In its approval of lower courts' applications of Benedict, the Supreme Court firmly reiterated:

> [N]either size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged. The application of this criterion has ruled out the floating dry dock, the floating wharf, the ferry bridge hinged or chained to a wharf . . . .[73]

Among one of the first cases to introduce the term "practically capable" to the definition of vessel was the bedrock case *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*[74] The Supreme Court held that a wharfboat was not a vessel subject to admiralty limited liability rules.[75] The wharfboat in question, a wooden rectangular structure on a floating platform, was used as an office, warehouse, and wharf.[76] It was attached to land by four or five cables, city water and electricity wires, and a telephone jack.[77] Every winter it was towed to a distant harbor where it was protected from ice damage.[78] Despite the

71. *Id.*
72. *Id.*
73. Perry v. Haines, 191 U.S. 17, 30 (1903).
74. 271 U.S. 19 (1926).
75. *Id.* at 22.
76. *Id.* at 21.
77. *Id.*
78. *Id.* at 20.

wharfboat's yearly tow over water, the Court determined that it was not used to transport cargo from place to place and did not serve a function that could not have been accomplished on land: "It was not *practically capable* of being used as a means of transportation."[79] *Evansville* represents the Supreme Court's unequivocal acceptance of the purpose-based test in determining vessel status by writing off infrequent water tows as incidental and insignificant in relation to the objective "non-maritime" purpose of the structure.

The purposive test proved to sustain its prevalence within admiralty jurisprudence in the 1961 Supreme Court case, *Roper v. United States*.[80] This case involved a deactivated World War II ship that was utilized as a storage facility for the country's surplus grain.[81] "It served as a mobile warehouse which was filled and then moved out the way to perform its function of storing grain until needed, at which time it was returned and unloaded."[82] The ship's instruments, gear, and supplies were completely removed, and the propeller and rudder were fastened in place.[83] Differentiating this structure from a common barge, the Court looked to its true and natural purpose to find that it was not a vessel.[84] Following *Evansville*, the Court gave little attention to the fact that the structure was towed over water twice before, and instead noted that the craft performed its function, storing grain, while stationary rather than while traveling across water.[85] The Supreme Court has strategically restricted Section 3's broad language ("capable of being used") by imposing a purposive qualification of a craft's practical capability.

C. *The Court's Decision in* Stewart v. Dutra Construction Co.

The Supreme Court's 2005 unanimous, and oft-cited, decision in *Stewart* attempted to clarify the purpose-based approach to vessel status.[86] There, the Court was faced with deciding whether Section 3's definition of "vessel" encompassed the Super Scoop, a dredge used in the "Big Dig" to dig trenches beneath Boston Harbor.[87] The Super Scoop was a floating platform with limited self-propulsion, moving slowly across the harbor every few hours.[88] To accomplish longer voyages, the

79. *Id.* at 22 (emphasis added).
80. 368 U.S. 20 (1961).
81. *Id.* at 21.
82. *Id.* at 22.
83. *Id.*at 21.
84. *Id.* at 21–23.
85. *Id.*
86. Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005). Chief Justice Rehnquist took no part in the decision.
87. *Id.* at 484.
88. *Id.*

dredge had to be transported by tugboat.[89]

The Court specifically looked to the dredge's function and purpose to conclude that the Super Scoop was indeed a vessel under Section 3.[90] The opinion cited a vast number of early admiralty cases all agreeing that dredges, like the Super Scoop, squarely fell under Section 3's definition of "vessel."[91] Referencing this extensive precedent, the Court stated that "then, as now, dredges served a waterborne transportation function, since in performing their work they carried machinery, equipment, and crew over water."[92] In recognizing a widespread and historical consensus that dredges were "vessels," the *Stewart* Court followed tradition and unanimously ruled in accordance.

Although the Court expressly focused on the multiple functions of the Super Scoop, it articulated that the Section 3 definition of "vessel" merely demands that the "craft be 'used or capable of being used' for maritime transportation, not that it be used *primarily* for that purpose."[93] By declining to consider the *predominant* function of a waterborne structure pertinent, in no way did the Court abolish or weaken the general purposive test used in traditional vessel analysis. The fact that the Super Scoop's main objective was to dig trenches, not carry people or things over water, did not bar it from vessel status.[94] Rather, the Court concluded that the Super Scoop's primary function of digging trenches was dependent on its ancillary use of transporting crew and equipment over the Boston Harbor.[95] Although the means of propulsion were manual and the distance covered was negligible, the Super Scoop's movement over water was sufficiently relevant to the purpose of the dredge.[96] Conversely, if the dredge were not equipped for aquatic transit, digging trenches along the harbor would be impractical and its primary purpose would be unfulfilled.[97] Therefore, the Court simply refined the purposive test, forcing courts to look at the structure's functions holistically and not base their decisions on one mutually exclusive purpose of the craft.

In further support of the purpose-based test, *Stewart* stated that a structure's use as a means of water transportation must be a "practical

89. *Id.*

90. *See generally id.*

91. *Id.* at 490–91.

92. *Id.* at 492.

93. *Id.* at 491 (emphasis added) (quoting 1 U.S.C. § 3 (2006)).

94. *Id.* at 495–96.

95. *Id.* at 495.

96. *Id.*

97. *Id.* "Indeed, it could not have dug the Ted Williams Tunnel had it been unable to traverse the Boston Harbor, carrying with it workers like Stewart." *Id.*

possibility, [not] merely a theoretical one."[98] This qualification narrows the scope of the phrase "capable of being used" in Section 3. By requiring a structure's *use* on water to be practical (not merely its floating *ability* to be practical), the Court ensures that "vessel" excludes inappropriate structures "not commonly thought of as capable of being used for water transport."[99] In conclusion, *Stewart*, in accordance with admiralty precedent, applied common historical understandings and upheld traditional purpose-based approaches to hold a dredge was a vessel under Section 3.

D. *Eleventh Circuit Decision in* City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length

Post-*Stewart* decisions created a distinctive circuit spilt. The Fifth and Seventh Circuits take the vessel owner's intent into account when determining if a structure is a vessel.[100] On the other hand, the Eleventh Circuit completely forecloses any inquiry into a structure's purpose or its owner's intent, and instead looks broadly to the basic floating and towing capabilities of a structure.[101]

The Eleventh Circuit in *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length* followed its Circuit's broad admiralty precedent to find that Lozman's floating home was a vessel under Section 3, thus subject to maritime liens and in rem proceedings.[102] In making this determination, the court set forth the Eleventh Circuit's unambiguous standard for vessel status: "[The] primary inquiry in determining whether a craft is a vessel is whether the craft was 'rendered practically incapable of transportation.' "[103]

The court began by analyzing maritime case law with a review of *Pleason v. Gulfport Shipbuilding Corp.*[104] and *Miami River Boat Yard,*

98. *Id.* at 496.

99. *Id.* at 494.

100. *Compare* De La Rosa v. St. Charles Gaming Co., 474 F.3d 185, 187 (5th Cir. 2006) ("Defendants do not intend to use it as [a seagoing vessel]. Rather, their intent is to use it solely as an indefinitely moored floating casino."), *with* Tagliere v. Harrah's Ill. Corp., 445 F. 3d 1012, 1016 (7th Cir. 2006) (Posner, J.) (contemplating that "maybe—by analogy to the difference between domicile and residence—a boat is 'permanently' moored when its owner intends that the boat will never again sail").

101. *See* Bd. of Comm'rs of Orleans Levee Dist. v. M/V/ BELLE OF ORLEANS, 535 F.3d 1299 (11th Cir. 2008).

102. 649 F.3d 1259, 1269 (11th Cir. 2011).

103. *Id.* at 1266 (quoting *Belle of Orleans*, 535 F.3d at 1312).

104. 221 F.2d 621 (5th Cir. 1955).

Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62[105]. In both cases, the structure in question lacked self-propulsion but was capable of being towed across water.[106] The court in *Pleason* reasoned that the gutted and moored ex-Navy ship turned shrimp processing plant was a vessel despite its connections to land and bare condition because it was still afloat, able to be towed, and "capable of being used a means of transportation."[107] Similarly, the *Miami River Boat Yard* court found that an inactive houseboat that served as its owner's residence was a vessel because "no motive power . . . does not deprive her of the status of a vessel."[108] Beyond considering the structure's capability of tow despite self-propulsion, the court also considered the houseboat's tows over water in its past and expected tows in the near future, implying that the frequency of planned voyages strengthened its argument for vessel status.[109]

Using a simplistic "capability of tow" test as fashioned by the Eleventh Circuit, and relying heavily on its 2008 *Belle of Orleans* opinion, the *Riviera* court unanimously found Lozman's home to be a vessel under Section 3.[110] The court rejected Lozman's first argument that his floating home was not practically capable of being towed over water because it sustained considerable damage from previous tows.[111] The court reasoned that because the home *was* actually towed substantial distances over water "albeit to her detriment," it was at the very least capable of such transport.[112]

Second, Lozman pointed to the fact that the floating home was constructed just as any land dwelling would be; it was built from land-based materials, complied with the State building code, and had more resemblance to a regular house than a boat.[113] Lozman asserted that these facts showed that the home was not practically capable of maritime transportation, neither in actuality nor by design.[114] Nonetheless, the court found his argument unconvincing because the *Belle of Orleans* court established that vessel status is in no way dependent on the "purpose for

105. 390 F.2d 596 (5th Cir. 1968).

106. *Pleason*, 221 F.2d at 623; *Miami River Boat Yard*, 390 F.2d at 597.

107. 221 F.2d at 622–23.

108. 390 F.2d at 597.

109. *Id.*

110. City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 694 F.3d 1259 (11th Cir. 2011).

111. *Id.* at 1268.

112. *Id.*

113. *Id.*

114. *Id.* Arguing to this point, Lozman also asserted that the home merely "was designed as a residence that just happened to float." *Id.* at 1269.

which the craft was constructed or its intended use."[115]

Lastly, Lozman argued that his home did not, and could not, have a Hull Identification Number or be Coast Guard certified.[116] Therefore, the home's inability to ever be legally navigable rendered it not practically capable of being used for water transit.[117] However, the court again cited *Belle of Orleans* and asserted that legal navigability is not the test, nor even a consideration, for vessel status.[118] Based on the basic premise that Lozman's floating home could be towed across water, and was twice before, the Eleventh Circuit found the structure to be a vessel recognized by federal admiralty law.[119]

E. *Oral Arguments for the Supreme Court of the United States*

Acknowledging a significant gap in the development of admiralty law, specifically in the determination of vessel status post-*Stewart*, among the circuits,[120] the Supreme Court agreed to hear Lozman's appeal of the Eleventh Circuit's ruling.[121] During oral arguments on October 1, 2012, one of Lozman's attorneys, Jeffrey Fisher, explained that vessel status for structures that were never vessels to begin with (evidenced by their inherent design and function) turns on a function test.[122] Providing support from the numerous early admiralty cases discussed above, Fisher urged the Court to focus not solely on the theoretical capabilities of the structure, as the "capability of tow" test dictates, but to rather look to its purpose and whether any practical function of moving people or things across water is served by its common use.[123]

Applying that standard to the facts of *Riviera*, Fisher claimed that floating homes, like Lozman's, do not serve any purpose when they are being towed because they cannot be a functional residence when at sea.[124] Without proper land connections that provide power, utilities and sewage, and without permanent towing cleats for easy water transit, Lozman's house cannot practically function as the home it was designed

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Compare* De La Rosa v. St. Charles Gaming Co., 474 F.3d 185 (5th Cir. 2006) (considering the owner's intent and craft's purpose in the analysis), *with* Bd. of Comm'rs of Orleans Levee Dist. v. M/V/ BELLE OF ORLEANS, 535 F.3d 1299 (11th Cir. 2008) (disregarding owner intent and only analyzing the craft's actual transit capability).
121. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 740 (2013).
122. Oral Argument at 00:35, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_11_626.
123. *Id.* at 2:25.
124. *Id.* at 4:30.

and solely used to be, and therefore is not a vessel under Section 3.[125]

The City's attorney, David Frederick, proposed a seemingly similar "practical capability" test.[126] However, the City offered a much more simplistic version of the test for the Court to apply: Lozman's structure floats, moves by tow, and carries things/people over water; therefore it is a vessel.[127] The Justices countered this rudimentary three-prong approach with imaginative hypotheticals. If a structure must merely float, and move, and carry things across water to gain vessel status, what would prevent an inner tube,[128] pennies pasted on an inner tube,[129] a very light cup,[130] a garage door,[131] a floating sofa,[132] all from being "vessels" and swept into federal jurisdiction? The City had a hard time overcoming the Justices' "de minimis hypotheticals" that satisfy its basic criteria; it instead focused the Court on *Stewart*'s demand that practical capability must be viewed in a "real world sense."[133] Implicitly conceding its own test's vast breadth, the City concluded by arguing the structure's lack of permanent fixtures to land rendered it a vessel.[134]

IV. Supreme Court Decision in *Lozman v. City of Riviera Beach, Fla.*

A. *Holding and Reasoning*

The Court issued its opinion on January 15, 2013, answering the question of whether the floating home fell within Section 3's definition of "vessel." It ruled in favor of Lozman, holding that his floating home was not a vessel subject to federal jurisdiction or maritime liens because "a reasonable observer, looking to the physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water."[135]

The Court explicitly disagreed with the Eleventh Circuit's interpretation of Section 3's phrase "capable of being used . . . as a means of transportation on water."[136] It found the district court's determination that Lozman's home was a vessel merely because it was able to float and

125. *Id.* at 4:40.
126. *Id.* at 28:19.
127. *Id.*
128. *Id.* at 28:30 (Chief Justice Roberts).
129. *Id.* at 29:12 (Justice Kagan).
130. *Id.* at 29:03 (Justice Breyer).
131. *Id.* at 29:07 (Justice Sotomayor).
132. *Id.* at 33:24 (Justice Breyer).
133. *Id.* at 29:22.
134. *Id.* at 49:11.
135. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 737 (2013).
136. *Id.* at 740.

be towed to be overly broad.[137] The Court recognized that the statute is not concerned with a structure's capability of tow, but rather its capability of being used as a *means of transportation* on water.[138] Therefore, for a craft to be considered a "vessel," it must have some purpose of water transit, yet its physical ability to float has no significant bearing on the purposive determination.[139]

By squaring *Evansville* with *Stewart*, the Court concluded that precedent supported its purposive approach.[140] It explained that regardless of the once-a-year tow, the wharfboat in *Evansville* was not a vessel because it was not used to transport people or things over water nor did it face the "perils of navigation to which craft used for transportation are exposed."[141] However, the dredge in *Stewart*, held to be a vessel, similarly lacked self-propulsion and was also only able to travel significant distances by tow.[142] The Court explained the discrepancy in terms of the two structures' functions: "[T]he dredge was regularly, but not primarily used (and designed in part to be used) to transport workers and equipment over water while the wharfboat was not designed (to any practical degree) to serve a transportation function and did not do so."[143] Thus, the Court recognized that the purpose of construct, integrity of design, and actual use are critical factors that distinguish dredge-like transit vessels from basic floating structures not privy to admiralty jurisdiction.[144]

B. Lozman's *Introduction of the "Reasonable Observer" Standard*

Once the Court established the fundamental criteria for vessel status based on its prior holdings, it turned to the objective characteristics of Lozman's home from a "reasonable observer's" perspective.[145] The Court considered the home's boxed shape, inability to generate electricity, similarities to land-based residences, and glass windows and doors to be important indicators of a nonvessel.[146] Despite *Perry*'s enduring principle that means of propulsion are not dispositive, the Court regarded the structure's lack of self-propulsion as a "relevant character-

137. *Id.* "Not every floating structure is a 'vessel.'" *Id.* "We find [the 'anything that floats'] approach inappropriate and inconsistent with our precedent." *Id.* at 743.

138. *Id.* at 740.

139. Despite the objects' physical abilities to float and be towed, the Court stated "a wooden washtub, a plastic dishpan . . . a door taken off its hinges, or Pinocchio (when inside the whale) are not 'vessels'. . . ." *Id.*

140. *Id.* at 742.

141. *Id.*

142. *Id.*

143. *Id.* at 743.

144. *Id.*

145. *Id.* at 741.

146. *Id.*

istic" in the vessel inquiry.[147] In viewing all of these physical attributes as a whole, the Court could find "nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for 'transportation on water.'"[148]

The Court explained that the term "reasonable observer" is an attempt to eliminate any consideration of the owner's subjective intent in vessel status determinations.[149] Although the Court noted that "it is difficult, if not impossible, to determine the use of a human 'contrivance' without some consideration of human purposes," it believes that vessel status should not turn on the owner's individual perspective, but rather on physical characteristics that would show a reasonable observer a practical purpose of water transportation.[150] A subjective analysis, the Court stated, is inconsistent with and markedly absent from early admiralty treatises.[151] Therefore, the "reasonable observer" standard keeps the analysis in line with history's use of an *objective* purposive test.

C. Lozman's *Dissent Also Approves of the Purposive Test*

In further disapproval of the Eleventh Circuit's overinclusive vessel standard, Justice Sotomayor in her dissent, joined by Justice Kennedy, agreed with the majority in accepting a purpose or function test.[152] However, the dissent opposed the majority's new formulation of the "reasonable observer" perspective in determining whether a craft is a vessel.[153]

The dissent referenced *Evansville* and *Stewart* to support its position that the basic standard for vessel status is "any watercraft practically capable of maritime transportation."[154] It further described the term "practically capable" as an objective inquiry that encompasses the obvious criterion such as ability to float and towing capability.[155] Rather than ending the vessel inquiry with the basic capability question, like the Eleventh Circuit, the dissent articulated a further step for courts: determine whether or not a vessel is *practically incapable* of maritime transit or *permanently moored.*[156] Lastly, if these two prongs point toward vessel status, the dissent asserted that a vessel's physical characteristics and usage history should then be analyzed.[157]

147. *Id.*
148. *Id.*
149. *Id.* at 744.
150. *Id.*
151. *Id.* at 745.
152. *Id.* at 748 (Sotomayor, J., dissenting).
153. *Id.*
154. *Id.* at 749.
155. *Id.*
156. *Id.* at 751.
157. *Id.*

According to the dissent, these three guidelines, firmly rooted in federal admiralty jurisprudence, make no mention of a "reasonable observer" standard.[158] As such, the dissent rejected the majority's test as unnecessarily adding a subjective component to vessel analysis.[159] The dissent further criticized the majority's reliance on the look and feel of the floating home in comparison to land-based homes.[160] Instead of employing the "I know it when I see it" test to the physical design of the structure, as the majority is charged with doing, the dissent would weigh the craft's objective features as to whether they lend a practical capacity for maritime transportation.[161] Finding the record to be incomplete, the dissent would have remanded the case for further fact-finding regarding the home's characteristics and history.[162]

V. ANALYSIS OF THE COURT'S DECISION IN *Lozman*

A. Lozman*'s Accurate Application of* Stewart

The Court in *Lozman* correctly interpreted *Stewart* as a case that endorsed the purposive test rather than abolished it. Because the Section 3 definition of "vessel" makes no explicit reference to a structure's purpose, design, or function, any test or court that considers such factors narrows the scope of the statute. Therefore, *Stewart*'s express references to early precedent and the Super Scoop's specific functions is evidence of the restricting principles guiding the Court's opinion.

Stewart can easily be read as enlarging vessel status from its expansive language such as, "Section 3 sweeps broadly," and "Section 3 requires *only* that a watercraft be used or capable . . . of transportation on water."[163] The Fifth Circuit's *De La Rosa* opinion offers a clear example of a court misinterpreting *Stewart* as extending the scope of Section 3.[164] There, the circuit court stated it has "recognized that *Stew-*

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 752.
162. *Id.* at 754–55.
163. Stewart v. Dutra Constr. Co., 543 U.S. 481, 495 (2005) (emphasis added).
164. There are numerous federal district court opinions that make the same mistake as *De La Rosa* by broadening *Stewart* beyond its intended application. *See, e.g.*, Holmes v. Atl. Sounding Co., 437 F.3d 441, 448 (5th Cir. 2006) (finding that *Stewart* "significantly broaden[ed] the set of unconventional watercraft that must be deemed vessels"); Arnold v. Luedtke Eng'g. Co., 196 Fed. App'x. 331, 336 (6th Cir. 2006) ("*Stewart* defined Section 3 broadly . . . ."). Even maritime law journals have claimed that *Stewart* opened the flood doors to Section 3: "Thus it seems obvious that *Stewart* has substantially broadened the meaning of the term "vessel" in any maritime context in which the pre-*Stewart* lower court jurisprudence had significantly restricted the term's meaning." David W. Robertson, *How the Supreme Court's New Definition of "Vessel" is Affecting Seaman Status, Admiralty Jurisdiction, and Other Areas of Maritime Law*, 39 J. MAR. L. & COM. 115, 121 (2008).

art expanded the definition of vessel to include more unconventional watercrafts than we had previously thought."[165] However, the *Stewart* court did not intend to allow lower courts to drag "unconventional" structures under admiralty jurisdiction. Rather, *Stewart* advocated that "[e]ven if the general maritime law had not informed the meaning of § 3, its definition would not sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport."[166] By limiting vessel status to floating structures with a "real world" practicality of water transportation, *Stewart* simply cannot be considered an expansion of admiralty jurisprudence.

To address this major inconsistency in district courts' interpretations of *Stewart*, the Court in *Lozman* emphasized *Stewart*'s adherence to historical admiralty law to highlight the restrictive undertones of the opinion. *Lozman* pointed out the various characteristics that the Super Scoop in *Stewart* shared with "traditional" or "ordinary" vessels, such as a captain, crew, navigational lights, and ballast tanks for stability.[167] By analogizing the dredge to conventional seaworthy vessels, as understood in the late 1800s, *Lozman* implicitly revealed *Stewart*'s straightforward application of traditional Section 3 considerations.[168] Furthermore, *Lozman* addressed *Stewart*'s thorough references to historical case law and treatises that commonly treated dredges as vessels.[169] This underscored *Stewart*'s deference to the historical consensus in admiralty law. By defining *Stewart*'s accurate and fair scope, *Lozman* provides lower courts with a clearer interpretation of the landmark case for future vessel status inquiries.

There was another improper interpretation—which *Lozman* has since dispelled—existing among the federal circuits regarding *Stewart*'s purported disapproval of the purposive test. In *Belle of Orleans*, an illustration of a court citing *Stewart* to eschew a purpose or function inquiry, the Eleventh Circuit concluded that "owner's intentions . . . are analogous to the boat's purpose, and *Stewart* clearly rejected *any* definition of 'vessel' that relied on such a purpose."[170] In actuality, *Stewart* merely stated that a craft practically capable of water transportation was a vessel regardless of its *primary* purpose.[171] Therefore, *Belle of Orleans* misconstrued *Stewart*'s disapproval of a primary purpose test as being a

165. De La Rosa v. St. Charles Gaming Co., 474 F.3d 185, 187 (5th Cir. 2006).

166. *Stewart*, 543 U.S. at 494.

167. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 742 (2013).

168. *Id.*

169. *Id.*

170. Bd. of Comm'rs of Orleans Levee Dist. v. M/V/ BELLE OF ORLEANS, 535 F.3d 1299, 1311 (11th Cir. 2008) (emphasis added).

171. *Stewart*, 543 U.S. at 491.

blanket disapproval of the entire purposive test.[172]

Lozman reinforced *Stewart*'s approval of the purposive test by citing it for the conclusion that courts should not abandon all criteria that is based on a craft's purpose when making a Section 3 vessel determination.[173] The majority in *Lozman* also used *Stewart* as primary support for its conclusion that the craft's objective purpose is the proper test for vessel determination.[174] Therefore, *Lozman* clarified that *Stewart* not only acknowledged the existence of a purposive test, but it also utilized the test in its own analysis of vessel status.[175]

B. *The Difficulties in Applying a "Reasonable Observer" Standard*

Although *Lozman* undoubtedly cleared up any confusion in the aftermath of *Stewart*, the opinion proves to add its own degree of uncertainty to the vessel analysis. As the dissent in *Lozman* points out, the majority's use of the term "reasonable observer" will inevitably add confusion and subjectivity to the vessel standard.[176] For clarity and uniformity reasons, the Court should have refrained from using a "reasonable observer" standard and applied the traditional, objective, purposive test. The "reasonable observer" is well-known within federal law for its application in First Amendment Establishment Clause jurisprudence and copyright law; both have shown to be difficult, or at least controversial, in application.

The endorsement test for First Amendment Establishment Clause cases, as developed by the Supreme Court, asks whether the disputed government action has the purpose or effect of endorsing religion, measured by a "reasonable observer" standard.[177] Although simple on its face, the scope and knowledge of the infamous "reasonable observer" soon unveiled disagreement among the Justices.[178]

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172. The district court in *Riviera* also misread *Stewart* as abandoning the purpose inquiry altogether when it concluded that Lozman's floating home was a vessel because its purpose as a stationary residence was irrelevant. City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 639 F.3d 1259, 1267 (11th Cir. 2011).

173. *Lozman*, 133 S. Ct. at 744.

174. "The Court's reasoning in *Stewart* also supports our conclusion." *Id.* at 742.

175. *Id.*

176. *Id.* at 754 (Sotomayor, J., dissenting).

177. Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 574, 620 (1989) ("The constitutionality of [the display's] effect must be judged according to the standard of a 'reasonable observer.'"). *See* Nathan P. Heller, *Context is King: A Perception-Based Test for Evaluating Government Displays of the Ten Commandments*, 51 VILL. L. REV. 379, 395 (2006) ("Acknowledgment [of religion] becomes improper when a reasonable observer would conclude that the challenged governmental practice conveys a message of endorsement of religion, provided that the observer was aware of the secular undertones of the specific display, the unique history of the specific display and the popular social attitudes toward religion.").

178. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778–81 (1995)

Moreover, even individual Justices over time have shifted their stances on who represents the "reasonable observer."[179] Paula Abrams poses additional questions regarding the First Amendment's "reasonable observer" in her article, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, making this vague standard even more ambiguous: "If the perspective of the reasonable observer differs from that of adherent and nonadherent, what is the basis for her perceptions? Does the reasonable observer represent a compromise between the views of adherent and nonadherent or an alternate reality?"[180] These abstract hypotheticals may seem to probe deeper than necessary for an objective review, but they evidence society's reluctance to accept such an elusive standard and the Court's inability to provide answers.

Similarly, in copyright law, federal courts have developed a "reasonable observer" standard, but have not established uniform guidelines on how to properly apply it. To make out a prima facie case of copyright infringement, courts have developed the "reasonable observer" standard to measure whether "substantial similarity" exists between two works of authorship.[181] This widely accepted standard articulated by Judge Learned Hand establishes that there is "substantial similarity" between two works where "the ordinary observer, unless set out to detect the disparity, would be disposed to overlook them, and regard their aesthetic appeal as the same."[182] As the standard began to take shape over time, some circuits have determined that the reasonable observer is the intended customer base of the work in question,[183] while others have taken the reasonable observer to mean any layperson or spectator, regardless of consumer status.[184] Added difficulties then arise when the intended customers of the litigated works are not average consumers but rather experts in that field. Would their ability to better discern differences with their trained eye abolish the need for the reasonable observer standard? Would it matter if the works being compared were something

(comparing Justice Stevens' belief that the reasonable observer is a nonmember of the religion in question and has limited knowledge with Justice O'Connor's stance that the reasonable observer has knowledge of both the display's history and tradition).

179. Justice O'Connor's reasoning in *Lynch v. Donnelly* implies that the reasonable observer must adhere to the religion allegedly endorsed by the government. 465 U.S. 668, 690 (1984). This, however, runs counter to her later opinion in *Capitol Square* where she asserts that the reasonable observer does not encompass the perceptions of an individual but rather reflects the collective beliefs of a political community. 515 U.S. 753, 772 (1995).

180. Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1544 (2010).

181. Connor Boyd, *The Bratz Trap: Ownership and Infringement at the Nexus of Copyright and Employment Law*, 45 U.C. DAVIS L. REV. 221, 232 (2011).

182. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

183. Dawson v. Hinshaw Music Inc., 905 F.2d 731, 732 (4th Cir. 1990).

184. Dam Things From Denmark v. Russ Berrie & Co., 290 F.3d 548, 562 (3d Cir. 2002).

more complex, such as computer codes or internet databases?[185] And if the products were children's toys, would the reasonable observer be from the perspective of the small child who is actually utilizing the product, or the parents who are purchasing it in the marketplace?[186] Although the reasonable observer was meant to implement a standard of uniformity in infringement suits, copyright case law shows that courts still differ on its application.

Based on the foregoing examples of the complexities involved in applying the "reasonable observer" in other areas of federal law, the Supreme Court's introduction of such an ambiguous standard in maritime jurisprudence triggers apprehension. Although intended to be an objective measure, *Lozman*'s adoption of an additional lens of analysis–the perspective of a "reasonable observer"–will inevitably open Pandora's box; subsequent legal questions and manipulations will thus threaten the uniformity of federal admiralty law. Is the "reasonable observer" of a floating structure in question one who uses it and knows its capabilities? Or is the reasonable observer of a floating craft one who is examining the structure for his or her first time? Because *Lozman* inserted this notoriously obscure standard into vessel analysis without precedent, the Court should have limited the analysis to a traditional purpose/function test, forgoing any mention of the "reasonable observer" perspective.

VI. Policy Considerations of Determining Vessel Status

The Court in *Lozman* found that the physical characteristics of Lozman's home (lack of rudder or steering mechanism, unraked bow, flat bottom, rectangular shape, French glass doors, and windows rather than circular portholes) served to keep the vessel analysis as objective as possible.[187] Although the mention of these attributes of the structure does help support the conclusion that the floating home falls outside Section 3, it should be emphasized that physical characteristics, viewed by a "reasonable observer," are merely incidental considerations in the larger purpose and/or function inquiry of a vessel. The Court rightly decided to exclude Lozman's home from admiralty jurisdiction due in

185. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 834–35 (10th Cir. 1993) (noting that expert testimony used to inform the "reasonable observer" is helpful in cases involving computer software); *see Dawson*, 905 F.2d at 735.

186. *Compare* Sid & Mary Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977) (determining that the kid-friendly characters in dispute were to be analyzed for substantial similarity from the viewpoint of a child) *with* Cavalier v. Random House, Inc., 297 F.3d 815, 824 (9th Cir. 2002) (analyzing the objective themes, story line, stock characters and scenes-a-faire of two children's books from a sophisticated perspective).

187. Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735, 744 (2013).

part to the structure's external appearance, yet the more critical rationale, which the Court only made passing note of, lies within the purpose and policy behind providing vessels special legal treatment.[188] For it is these policies serving seagoing ships that justify the necessity for a uniform body of federal law and reserved jurisdiction. The importance of such maritime concerns cannot be disregarded in deciding whether to apply the rules of the sea to the governance of one's floating home.

A. *Federal Maritime Lien Act*

The Federal Maritime Lien Act ("FMLA"),[189] a trademark statute in admiralty law, reveals how maritime laws function to serve the unique policies and practicalities of seagoing vessels and how their application to stationary structures is utterly illogical. FMLA is undoubtedly the most crippling consequence of classifying a floating home like Lozman's a "vessel." The act created a debt-collection regime specifically designed and tailored for vessels and their creditors. Once a business or person provides a vessel with "necessities," such as repairs, fuel, supplies, etc., FMLA allows for a lien to automatically attach, by operation of law, to that vessel.[190] Subsequently, upon default, the respective creditor has the power to unilaterally seize the collateralized vessel by U.S. Marshals and deprive the owner of the vessel an opportunity to be heard or even present at trial.[191] Furthermore, maritime liens can automatically attach even if the owner of the vessel was not the one who personally contracted to receive the "necessities."[192]

The concept of maritime liens was developed during the beginning of the shipping industry boom.[193] Often times, vessels far from their home ports or owners need to obtain vital repairs and supplies but do not have the adequate funds on board.[194] With servicemen wary of unfamiliar ships, whose inherent mobility poses a flight risk, commerce is

188. As the Court in *Evansville* explicitly reasoned regarding the maritime rule of limited liability of vessel owners, "[o]ur statutes establishing the rule were enacted to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries. The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests." Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 21–22 (1926).

189. 46 U.S.C. §§ 31341–43 (2006).

190. Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864 868 (11th Cir. 2010).

191. *Id.* at 870. FMLA provides for an in rem action, meaning that the suit is not against the owner of the vessel himself; rather the statute personifies the actual vessel into the named defendant. *Id.*

192. 46 U.S.C. § 31341(a) (2006) establishes the creation of a maritime lien if the owner or the master of a vessel, *or* a person appointed or entrusted with a vessel secures supplies for that vessel.

193. *Crimson*, 603 F.3d at 871.

194. *Id.* at 870.

stunted. Therefore, maritime liens encourage business transactions by enabling seamen in command of the ship to pledge the value of the vessel to its service providers.

Given its historical context, maritime lien legislation encompasses the principle that a vessel only serves its purposes of engaging in trade to generate profit when it is in motion.[195] Facilitating the ongoing transit of ships between ports is thus easily accomplished by giving vessel creditors the exceptional security of a maritime lien to automatically collect bad debts.

Clearly, the reasoning and application of FMLA is only appropriate for vessels engaged in navigation.[196] But for floating structures that remain virtually stationary, such as Lozman's home, maritime liens are utterly inapplicable, creating a detriment to both homeowners and creditors.

In its amicus curiae brief in support of the Petitioner, Lozman, the Seattle Floating Homes Association noted that "the [reasoning behind maritime liens] has no reasonable application to floating homes, which cannot move at all without significant burden, danger, and equipment."[197] The brief further detailed that a move often involves the hiring of several trained professionals: "Towing a floating home can be an expensive project. A floating home owner must engage the services of a tugboat, or another vessel with sufficient power to pull the home through the water. There are also labor costs . . . . All told, moving a floating home over a relatively short distance can cost thousands of dollars."[198]

As the Court in *Lozman* concedes, neither Lozman nor his floating home posed a flight risk to creditors. Moving the residence involved the employment of not only contractors to install proper towing cleats, but also two tugboats. The structure also suffered damage from being awkwardly dragged across the water. It would be virtually impossible for Lozman to secretly "sail away" from his dockage debts in any meaningful degree of discretion or speed. Therefore, the Marina did not need the

195. Raymond P. Hayden & Kipp C. Leland, *The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens*, 79 TUL. L. REV. 1227, 1233 (2005) ("The law of maritime liens acknowledges that a vessel only makes money when it is in motion and is structured so the vessel can do so in the short term without hindrance.").

196. The Rock Island Bridge, 73 U.S. 213, 216 (1867) ("A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters."); *see also* Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 9 (1920) (emphasizing the necessity for maritime liens because the function of a vessel "is to move from place to place").

197. Brief for the Seattle Floating Homes Association and the Floating Homes Association of Sausalito as Amici Curiae Supporting Petitioner at 31, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626).

198. *Id.* at 20.

added security of a maritime lien; Lozman's contractual obligations and the permanency of his residence offered the same security of payment as any land-based mortgagor to a mortgagee or tenant to a landlord.

Beyond typical "necessities," maritime liens are also used to secure the crew's wages.[199] Consequently, if a floating home owner employs a live-in maid or nanny and misses payment, that employee can bring an in rem action against the house and win a court order to have the residence seized and sold to recover back pay. The idea of a nanny or maintenance-person circumventing traditional contract and tort claim procedures to unilaterally force a sale of an employer's home was certainly not entertained during the enactment of the FMLA. Employees of floating residences have sufficient legal remedies under state law to reclaim what is rightfully owed without initiating federal in rem proceedings against residences.

B. *Homestead Exemption Protection*

Admiralty law's disregard of the sacred protection offered to homes is a strong justification for the *Lozman* Court's holding that the Court failed to address. Whereas the Marina had alternate remedies against Lozman to receive payment or decline renewal of the lease, there was no alternate remedy for Lozman to obtain his home once it was ordered to be destroyed. The Seattle Floating Home Association nicely summarized the importance of such a consideration to cases like this:

> In addition to lacking any basis in the Act's purpose, allowing maritime liens against floating homes would undermine state interests and violate the sanctity of the home. Floating homes, as residences, would otherwise be protected by state homestead exemptions, which allow individuals to protect their residences from creditors in certain circumstances.[200]

As previously mentioned, Lozman received Florida homestead exemption status on his floating home upon arriving at Riviera Beach Marina in 2006. Florida homestead protection is a constitutionally protected right in Florida.[201] It is in place to ensure that homeowners and their families, regardless of financial position, are secure in their residences.[202] In determining homestead status of a particular dwelling, Florida requires "actual intent to live permanently in a place, coupled with actual use and occupancy."[203] Florida courts have increasingly

199. Hayden & Leland, *supra* note 195, at 1235.

200. Brief for the Seattle Floating Homes Association and the Floating Homes Association of Sausalito as Amici Curiae Supporting Petitioner at 31, *Lozman*, 133 S. Ct. 735 (No. 11-626).

201. FLA. CONST. art. IV, § 4; *see also* art. VII, § 6.

202. *In re* Mead, 255 B.R. 80, 83 (Bankr. S.D. Fla. 2000).

203. *In re* Brown, 165 B.R. 512, 514 (Bankr. M.D. Fla. 1994).

granted homestead exemptions to floating residences, relying on the broad language of the Florida Statutes for protection against forced sales of "*any* dwelling, including a mobile home used as a residence."[204]

Because Lozman's unique floating home was afforded homestead protection from the state, he carried a certain expectation that his house, despite it being atop water, would be safe from government or creditor meddling. Lozman's floating home was his sole and main residence; it was listed on his driver's license and voter registration, and it served as his primary mailing address. Riviera Beach had no justification for disregarding Florida's homestead protections when it initiated proceedings for the arrest and sale of Lozman's home for an alleged unpaid debt. Applying maritime liens to structures that serve as a citizen's residence subverts and dilutes the great protection the homestead exemption was designed to provide. The importance of homestead in not only securing a housing market, but also securing people's expectations, certainly outweighs any slight benefit of debt collection that FMLA adds over traditional creditor remedies.

C. *Jurisdictional and Federalism Concerns*

Beyond undermining Florida's homestead justification, the City's invocation of federal jurisdiction under FMLA was a needless waste of federal court resources. The City first brought suit against Lozman in Florida state court under the state's landlord-tenant laws, but the City later claimed that the suit for back dockage needed to be brought in federal court to foreclose a maritime lien on a "vessel."[205] The strategic switch in venue after the City's state court proceeding was unsuccessful cuts against the City's argument that federal admiralty law was its sole remedy against Lozman.

Furthermore, bringing this issue into federal court and applying admiralty law would jeopardize many state statutes and regulatory

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204. FLA. STAT. § 222.05 (2012) (emphasis added). The court in *Mead* concluded that homestead exemption statutes intended to cover all types and kinds of homes: "The legislature obviously sought to extend the homestead protection not only to mobile homes but to other, perhaps unforeseeable, types of living quarters." *Mead*, 255 B.R. at 83.

205. During oral argument, Justice Ginsberg asked City's counsel, David Frederick, if it could have brought the action for back dockage and regulation compliance (trespass) in regular state court. The City's attorney replied, "no." Oral Argument at 39:15, *Lozman*, 133 S. Ct. 735 (No. 11-626), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_11_626. Mr. Lozman strongly disagrees with that answer, and for valid reasons. If the City truly believed that Lozman's floating home constituted a "vessel," it still could have litigated the matter in state court under Section 318.17 of the Florida Statutes, which governs the "nonjudicial sale of any vessel held for unpaid costs, storage charges, or dockage fees." Because Florida law provides a proper remedy for the Marina, the City's invocation of admiralty law and federal jurisdiction against the floating home was avoidable. Lozman Interview, *supra* note 13.

schemes established for floating homes. The Court in *Lozman* briefly commented on the importance of maintaining and respecting state and local regulations, noting that if floating homes were "vessels" under Section 3, then there would be a large inconsistency in the reading of state and local laws governing the same kinds of structures.[206] "Consistency of interpretation of related state and federal laws is a virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and nonlawyers alike."[207]

However, the Court failed to thoroughly address the true implications of federal admiralty law displacing state and local regulations regarding floating homes. The Seattle Floating Home Association pointed to two states that have devised a comprehensive set of regulations specifically for the construction and maintenance of floating homes.[208] Washington's Shoreline Management Act requires floating homes to follow the land building code for the safety of the residents and integrity of the structure itself.[209] The building code also calls for certain location, height, square footage, access points, and dockage space restrictions for floating homes, all serving the aesthetic goals of the state.[210]

Similarly, in Sausalito, California, floating home owners are subjected to an extensive local code that dictates maximum dimensions of homes,[211] length and type of water hose use,[212] electrical restrictions,[213] stability levels,[214] and presence of life saving equipment.[215][216] Local regulations also include oversight of the marinas that harbor floating homes, requiring marinas to maintain certain distances between the floating residences and to keep a specific vessel-per-acre density.[217] The state of California, on a state level, has also taken action to protect the special relationship specifically between floating home owners and tenants.[218]

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206. *Lozman*, 133 S. Ct. at 744.

207. *Id.*

208. Brief for the Seattle Floating Homes Association and the Floating Homes Association of Sausalito as Amici Curiae Supporting Petitioner at 23, *Lozman*, 133 S. Ct. 735 (No. 11-626).

209. *Id.*

210. *Id.* at 25.

211. Marin County Code § 19.18.050–51.

212. MARIN CNTY., CAL., BLDG. CODE § 19.18.150 (2010).

213. MARIN CNTY., CAL., BLDG. CODE § 19.18.290 (2010).

214. MARIN CNTY., CAL., BLDG. CODE § 19.18.320 (2010).

215. MARIN CNTY., CAL., BLDG. CODE § 19.18.350.36 (2010).

216. Brief for the Seattle Floating Homes Association and the Floating Homes Association of Sausalito as Amici Curiae Supporting Petitioner at 27, Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) (No. 11-626).

217. MARIN CNTY., CAL., BLDG. CODE § 22.32.101(C) (2010).

218. Floating Home Residency Law, CAL. CIV. CODE § 800.20-.26 (2012).

State and local representatives base floating home codes on the degree of urbanization, resources, demographic of residents, availability of the courts, and specific weather, and safety implications that their particular state faces.[219] The individual states, not broad federal admiralty laws, are in the best position to know the particularized nuances of floating home living. Thus, localized regulations efficiently serve the needs of those owning, harboring, and constructing such structures. There is no substitute in federal admiralty statutes for the kind of detailed attention states are providing to floating homes; therefore, it follows that any decision tending to incorporate floating homes into federal jurisdiction will serve an injustice to the states' best determinations.

VII. CONCLUSION

The *Lozman* case is a fundamental addition to the body of admiralty jurisprudence. By dissecting the bedrock maritime cases from early decisions such as *Evansville* to more modern decisions like *Stewart*, the Court gave a well-rounded and practical opinion for courts to apply in future cases where vessel status falls in murky water. Despite the potentially problematic "reasonable observer" standard *Lozman* added into maritime law, lower courts now have clearer guidance on their vessel status analysis. In taking a more narrow view of Section 3 than its plain language suggests, the Court stayed true to the common law principle that the purpose and function of a vessel are determinative considerations. And although the Court in *Lozman* did not provide a thorough discussion of the policy underlying admiralty law, its final ruling reflects those important societal implications of preempting state laws.

With the increased popularity of floating casinos, hotels, and restaurants, *Lozman* now gives owners of modern floating structures a stronger sense of predictability and comfort for future endeavors. Floating home owners can put full trust into their states to create and enforce a localized statutory regime without the unnecessary worry of being swept into federal regulation and jurisdiction. As such, the Coast Guard and the federal judiciary can be relieved from micromanaging local disputes over stationary structures on water and instead focus on national security, uniform maritime trade, and efficient commerce, which are the core reasons for admiralty law in the first place.

219. Brief of Maritime Law Professors as Amici Curiae Supporting Petitioner at 15, *Lozman*, 133 S. Ct. 735 (No. 11-626).