

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FANE LOZMAN, :

4                      Petitioner                      :    No. 11-626

5 v. :

6 THE CITY OF RIVIERA BEACH, FLORIDA:

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8 Washington, D.C.

9 Monday, October 1, 2012

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11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:04 a.m.

14      APPEARANCES:

15 JEFFREY L. FISHER, ESQ., Stanford, California; on  
16 behalf of Petitioner.

17 CURTIS E. GANNON, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.;

19 for United States, as amicus curiae, supporting

20           Petitioner.

21 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of  
22 Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 11-626, Lozman v. The City of Riviera  
5 Beach.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Mr. Chief Justice, and may it  
10 please the Court:

11 To be a vessel, a structure must be  
12 practically capable of maritime transportation, and this  
13 case turns on how to assess such practical capability.

14 And that's a question this Court answered  
15 over a century ago in Cope and Perry, explaining that  
16 practical capability depends not on any physical  
17 attribute the structure might have, but rather, on "its  
18 purpose," that is, whether its function is to move  
19 people or things across water.

20 And that test has been applied numerous  
21 times before and since, across decades, providing  
22 stability and overall coherence to general maritime law.

23 And of course --

24 JUSTICE SCALIA: You should have phrased the  
25 test that way then, because it really --

1 MR. FISHER: Pardon me?

2 JUSTICE SCALIA: That doesn't seem to me a  
3 very felicitous description of what -- of what the test  
4 is -- is enunciated to be.

5 MR. FISHER: Well, I think --

6 JUSTICE SCALIA: The test is whether it's,  
7 what, practically able?

8 MR. FISHER: Practically capable.

9 JUSTICE SCALIA: Practically capable. Well,  
10 you could be practically capable of doing something,  
11 even though the purpose of -- of setting the thing up  
12 has nothing to do with that.

13 MR. FISHER: Well, that's not what this  
14 Court -- case is saying --

15 JUSTICE SCALIA: I understand. I'm just  
16 saying we ought to get a different test, and let's --  
17 let's get rid of this. If we agree with you, let's get  
18 rid of this practically capable test, because  
19 practically capable, frankly, would make us come out the  
20 other way in this case.

21 MR. FISHER: With all due respect, I don't  
22 think that's correct. In Evansville in 1926, this Court  
23 used that exact phrase, practical capability. And it  
24 assessed that practical capability by looking at "the  
25 function of the structure."

1           Again and again, in Evansville and other  
2 cases, this Court asked, was the function of the  
3 structure to carry people or things across water.

4           CHIEF JUSTICE ROBERTS: Well, that just  
5 has -- I understand that argument. It's got no  
6 connection whatever to the statutory language, right?

7           MR. FISHER: Well, I think the word capable  
8 obviously is in the statute. And what this Court said  
9 as recently as Stewart is that capable --

10          CHIEF JUSTICE ROBERTS: Capable is in the  
11 statute, purpose is not, right?

12          MR. FISHER: Correct.

13          And what this Court said in Stewart is that  
14 capable means practically capable, not theoretically  
15 capable. There's a range of how broad the word capable  
16 can be.

17          And again, going back over a century, every  
18 single time this Court's been confronted with that  
19 question, it's used the term function to describe  
20 whether or not something is practically capable of  
21 carrying people or things over water.

22          JUSTICE GINSBURG: You -- you described  
23 cases with this purpose -- or function, the briefs cited  
24 the district court decision, Sea Village Marina, that  
25 says floating homes like the one here that can be towed

1 and are not in the business of carrying people or goods,  
2 but can be towed miles across the water, that those  
3 constitute vessels.

4 And this district court decision,  
5 Sea Village Marina, cited many, many cases. And you say  
6 that that district judge got it wrong, or the cases were  
7 wrong?

8 MR. FISHER: Justice Ginsburg, I think  
9 there's a confusion of terminology that I hope I can --  
10 that I hope I can straighten out at the outset.

11 The term floating home is generally  
12 described to mean a residence that is designed to sit  
13 still and is not designed to carry people or things over  
14 water.

15 The term houseboat is something that is  
16 self-propelled, generally moves people or things over  
17 water.

18 What happened in the Sea Village Marina  
19 case, to my understanding, is the Court simply used the  
20 wrong term. It cited a lot of cases that held that  
21 houseboats, as we describe a houseboat as something that  
22 is designed to move its owner and the owner's things  
23 from here to there, are vessels. And we don't dispute  
24 that.

25 But on the other hand, you have something

1 called floating homes, which the brief filed by the  
2 Seattle and Sausalito floating homes associations give a  
3 very thorough description of what a floating home is and  
4 how it's different.

5 And a primary way that it's different is  
6 that, as opposed to a houseboat, which is doing its  
7 function, it's doing its job when it's moving things  
8 from place to place, a floating home can't function when  
9 it's out in the water being towed. None of the  
10 utilities work, none of the power, no equipment is  
11 aboard to do anything --

12 JUSTICE KENNEDY: Well, but in -- in your  
13 brief, I really lost count, but I think it's six times  
14 on the first two pages, you talk about indefinitely  
15 moored.

16 Now, the facts are in dispute, and we're not  
17 quite clear of the facts, but let's assume that this  
18 magnificent structure is -- which was mercifully  
19 destroyed -- let's assume that it was attached to the  
20 dock by a rope, a garden hose and an extension cord, and  
21 that it could leave within 30 minutes notice. Is that  
22 indefinitely moored? And if the answer is yes, is that  
23 because of subjective intent of the owner?

24 MR. FISHER: Justice Kennedy, it would be  
25 indefinitely moored. That's the term this Court used in

1     Stewart to describe whether something was being used to  
2     transport people or goods.

3             It had said -- I have to emphasize that some  
4     of the assumptions we do in fact dispute in your  
5     hypothetical. But the fact that it sat still for three  
6     years performing its function as a stationary residence  
7     shows that it was indefinitely moored.

8             The importance of indefinite mooring,  
9     though, I want to emphasize, is actually less important  
10    in this case than it might be if this were a dead ship  
11    case, where you had something that was concededly a  
12    vessel --

13            JUSTICE KENNEDY: But suppose --

14            MR. FISHER: -- in the question --

15            JUSTICE KENNEDY: -- you know the law school  
16    game, suppose it was moved every month.

17            MR. FISHER: It would still not be a vessel.  
18    And you don't have to look any further than this Court's  
19    Evansville case.

20            JUSTICE KENNEDY: That would be indefinitely  
21    moored, in your view?

22            MR. FISHER: Well, I'm not sure if you'd use  
23    the term indefinitely moored at that point, but it  
24    certainly wouldn't be transformed into a vessel because  
25    look at this Court's Evansville case. The structure --



1 CHIEF JUSTICE ROBERTS: Before you get to  
2 Evansville, let's say it moved around, which is one  
3 thing, but also it had a raked bow; it wasn't square.  
4 Then -- then it starts to look more like a boat. It  
5 moves around more frequently.

6 Its mooring -- I mean, if you have a  
7 sailboat and you pull it up to a dock, you hook up for  
8 water and plug in for power. It doesn't seem to me to  
9 be terribly significant.

10 MR. FISHER: I think that's right if you  
11 start with something that is a vessel; the fact that you  
12 simply leave it at the dock for a long time doesn't take  
13 away vessel status. That's what this Court held in  
14 Stewart.

15 But if you start with something that isn't a  
16 vessel -- and I give you the Roper case, which did have  
17 a raked bow; it was an old Liberty ship that everybody  
18 agreed had been decommissioned and turned into a  
19 non-vessel. Then, they brought it in, they towed  
20 it -- Justice Ginsburg, they towed it -- they loaded it  
21 up with grain. Towed it again, let it sit still for a  
22 couple years, towed it back, unloaded the grain. And  
23 this Court said, it's not a vessel.

24 And why did this Court say it's not a  
25 vessel? And I will quote from the opinion. It said:

1 "Because unlike a barge, the Harry Lane was not moved in  
2 order to transport commodities from one place to  
3 another; it served as a mobile warehouse performing its  
4 function of storing grain." In the Evansville's case --

5 JUSTICE SOTOMAYOR: Counselor, can I -- can  
6 I -- I have been lost even as I have read the briefs,  
7 because there's a lot of terminology that I'm not sure  
8 -- and standards that have been proposed that -- what  
9 concepts they're tied to, okay?

10 As I see our cases, I'm -- I'm not quite  
11 sure where indefinitely moored came from. I've seen the  
12 word permanently moored.

13 You seem to be suggesting a difference  
14 between the two things, and I'm not sure where you get  
15 the latter, indefinitely moored, from, and how that ties  
16 to the concept of purpose.

17 Does it -- does the permanent status or  
18 indefinite mooring of a vessel not make it -- of a  
19 structure not make it a vessel, and/or does purpose get  
20 layered on top of mooring?

21 MR. FISHER: No. Purpose is the overall  
22 question. The way where --

23 JUSTICE SOTOMAYOR: But it applies to  
24 whether something is permanently moored or floating on  
25 the sea?

1           MR. FISHER: That helps you determine its  
2 purpose. So the word -- where the word indefinite comes  
3 from, Justice Sotomayor, is from the Stewart case, where  
4 this Court cited the Fifth Circuit's Pavone case with  
5 approval, which had held that an indefinitely moored  
6 floating casino was not a vessel.

7           JUSTICE ALITO: I just don't see how you can  
8 get purpose into this statutory language. It says  
9 nothing about purpose. It says, capable of being used  
10 as a means of transportation on water. How does purpose  
11 get in there? Whose purpose are we talking about?

12           MR. FISHER: We're talking about an  
13 objective purpose, Justice Alito --

14           JUSTICE KAGAN: Well, then you're not  
15 talking about purpose; you're talking about function,  
16 right? You're just using purpose as a kind of strange  
17 synonym for function.

18           But you're not talking about purpose of  
19 either the homeowner or the manufacturer of the boat.  
20 You're just saying what does this -- or what does this  
21 thing, this floating home, do.

22           MR. FISHER: Exactly. And I'm doing -- if I  
23 can just say this directly, I'm trying to do exactly  
24 what this Court did in Cope and Evansville and Roper.  
25 The exact analysis this Court applied in those cases is

1 precisely what we want this Court to apply here. But I  
2 think what we're --

3 JUSTICE SCALIA: Can I ask about that  
4 definition? That definition comes from the Rules of  
5 Construction Act, right --

6 MR. FISHER: Yes.

7 JUSTICE SCALIA: -- which provides the  
8 meaning of all -- of the word vessel as used in the  
9 United States Code. Okay?

10 MR. FISHER: Correct.

11 JUSTICE SCALIA: What -- what meaning of  
12 vessel in the United States Code is at issue here?

13 MR. FISHER: The word vessel in the Maritime  
14 Lien Act, which is what provides the Federal forum,  
15 assertedly, for the plaintiff, the City, to bring this  
16 case. So the word vessel is -- is its jurisdictional  
17 and substantive hook.

18 Justice Sotomayor, if I can return to your  
19 question about indefinite mooring, the importance of  
20 indefinite mooring in this case, where you have  
21 something that was not a vessel to begin with, is simply  
22 to ask whether it's been transformed into a vessel,  
23 exactly as this Court asked in Roper. So is it being  
24 used for its function for which it was created and --

25 CHIEF JUSTICE ROBERTS: Aren't you just

1 begging the question? You keep saying it was not a  
2 vessel to begin with. Why -- doesn't it just restate  
3 the question?

4 MR. FISHER: I'm not trying to beg the  
5 question; I'm just trying to describe our argument to  
6 you. There are some cases where --

7 CHIEF JUSTICE ROBERTS: Well, doesn't your  
8 argument beg the question?

9 MR. FISHER: I hope not. I'm trying to  
10 distinguish between two lines of cases, one being where  
11 you have things that were -- like the Roper case, that  
12 were made as boats, as vessels undisputedly, and now the  
13 question is whether they've been pulled out of  
14 navigation; as opposed to another set of cases, which we  
15 believe this falls into, where the question itself is  
16 whether this was ever a vessel. In those kinds of  
17 cases, the indefinite mooring shows that it's being used  
18 for its function.

19 It hasn't -- for example, if I could give a  
20 hypothetical, maybe it would help, imagine a piece of  
21 floating dock. Now, under their test, that would be a  
22 vessel because you can unhook the dock, load it up with  
23 stuff and tow it around, if a company wanted to use that  
24 as a makeshift barge.

25 But no maritime case has ever held that a

1 floating dock is a vessel. But if somebody did that,  
2 then it would no longer be indefinitely moored and would  
3 be using a different function and might be transformed  
4 into a --

5 JUSTICE ALITO: I think you may -- you may  
6 very well have a good argument, but if you're relying  
7 either on purpose or on indefinite mooring, then you've  
8 lost me. I don't see how they get -- how you get those  
9 into the words of the statute.

10 Suppose you have a boat, and it's tied up at  
11 the harbor here in Washington. It hasn't been moved for  
12 five years. It's indefinitely moved -- or 10 years or  
13 20 years. But if it's capable, if you could untie it  
14 and sail it out into the river, doesn't it fall within  
15 the definition?

16 MR. FISHER: It absolutely does because the  
17 function of a boat is to move people or things over  
18 water. So when it's sitting still, Justice Alito, it's  
19 not performing its function.

20 JUSTICE KAGAN: Right. So you are really  
21 talking about a function test. And you are using  
22 strange words, because they come out of our opinions --  
23 kind of not your fault. But you're really saying that  
24 what should apply here is a function test.

25 We are looking at this floating home. What

1 does it do? Is it just a thing that sits, or is it a  
2 thing that transports things over water.

3 Isn't that your test?

4 MR. FISHER: Yes, it is. In addition --

5 CHIEF JUSTICE ROBERTS: So it changes -- one  
6 -- the same thing is not a boat sometimes, and it is a  
7 boat. You've got a casino that's tied up for a month.  
8 During that time, it's not a boat. And then they move  
9 it around to go to the other side of the river, and  
10 during that time it is a boat?

11 MR. FISHER: No, this Court in Stewart  
12 rejected the snapshot test that I think is what you just  
13 described.

14 The question is whether what -- whether it  
15 has the function of moving people and things over water  
16 or not. Now, some casinos go up and down the river --

17 CHIEF JUSTICE ROBERTS: But -- but I'm just  
18 -- the hypothetical -- the hypothetical I've posed was  
19 meant to pose the question, well, sometimes things do  
20 both, and how do we tell which it is --

21 MR. FISHER: If it actually does the latter  
22 and is performing its function while moving, then it is  
23 a vessel. And that's what this Court held in Stewart.  
24 There's not a primary purpose test.

25 If one of its purposes is to move people or

1 things over water, then it's a vessel. But that's not  
2 the purpose of a floating home. That's not the purpose  
3 of a floating restaurant or something else that might  
4 be float --

5 JUSTICE KAGAN: Well, how do we know that.

6 MR. FISHER: But you could tie it up and  
7 move it.

8 JUSTICE KAGAN: How do we know that, Mr.  
9 Fisher? I mean, maybe these floating homes are just a  
10 poor man's houseboat, right? That the point of getting  
11 a floating home is actually to have a home that you can  
12 hook up to a boat and move from place to place, and so  
13 you don't have to, you know, have the motor running all  
14 the time or have the capacity to move it all the time,  
15 but when you want to move it on water and when you want  
16 to move your possessions on water, you have the capacity  
17 to do so.

18 MR. FISHER: Well, with all due respect,  
19 Justice Kagan, that's not why people have floating  
20 homes. The amicus brief explains that. Don't look  
21 at -- but you don't have to look any further than the  
22 history of this. The only two times it moved any  
23 significant distance were: One, when it changed  
24 ownership; and two, when a hurricane struck, so it had  
25 to be moved.



1                   And look at your own cases. In Pavone,  
2   which this Court cited with approval in Stewart, that  
3   structure moved hundreds of miles over several years.  
4   This Court said not a vessel. The structure in  
5   Evansville moved three different ways. It moved up and  
6   down the Mississippi-Ohio River as it changed ownership  
7   several times over the course of 14 years. It also  
8   moved every winter to avoid the ice that would come in.  
9   And thirdly it was repositioned on literally almost a  
10   daily basis to accord with the stages of the river. And  
11   again, applying this Court's well settled function test,  
12   this Court said that's not a vessel.

13                   JUSTICE KENNEDY: But it was still -- it was  
14   still tied to the land with roads and ramps and so  
15   forth. Here you've got the hose and the extension cord  
16   and the rope.

17                   MR. FISHER: Well, the important --

18                   JUSTICE KENNEDY: And it seems -- and it  
19   seems to me, suppose you -- you want us to make some  
20   universal definition of we know what a floating home is.  
21   Suppose this -- suppose there were -- another owner of a  
22   structure like this, and it moved to a different slip  
23   every week to get more shade or more wind or something.  
24   Then that would be different?

25                   MR. FISHER: It would sound to me just like

1 the floating warehouse and office in Evansville as I  
2 just described that case. But Justice Kennedy, let me  
3 say one more thing before I reserve my time.

4 JUSTICE KENNEDY: And suppose it moved --  
5 suppose it moved up and down the canal to get better or  
6 worse weather during different seasons.

7 MR. FISHER: If it's simply being  
8 repositioned and not being used for a transportation  
9 purpose, that is to move people or things, then it's not  
10 a vessel. And that's exactly what this Court --

11 JUSTICE KENNEDY: Well, I have the same  
12 problem Justice Kagan says. The whole point is that it  
13 can move. That's the whole -- that's the reason you  
14 have it.

15 MR. FISHER: That is not the point,  
16 Justice Kennedy, with all due respect. There's a  
17 difference between a floating home and a houseboat, and  
18 I urge you to look at the briefs on this point.

19 And this comes right back to your  
20 question --

21 JUSTICE SOTOMAYOR: Counsel, outside of your  
22 floating home, what other structures would be kept out  
23 of your definition of purpose or function and the city's  
24 definition of practically capable? Can you imagine any  
25 other function that's out there floating around?

1 MR. FISHER: Other floating commercial --

2 JUSTICE SOTOMAYOR: Because they disavow  
3 water skis and garage doors and say they're practical,  
4 capable tests with --

5 MR. FISHER: Well, I'm not sure they can  
6 actually disavow that on their tests, but --

7 JUSTICE SOTOMAYOR: Well, I know. But --

8 MR. FISHER: Floating commercial  
9 establishments, floating pieces, floating docks,  
10 floating trampolines and play structures.

11 And, Justice Kennedy, if I could just answer  
12 your question and reserve the rest of my time. The  
13 importance of the connecting of the utilities and the  
14 water hose, which was actually a specialized water hose,  
15 not a garden hose, but the importance of those  
16 connections is found in State codes across the country  
17 that distinguish between floating homes and houseboats,  
18 asking whether they're dependent on those connections to  
19 operate.

20 A floating home cannot function if it's not  
21 tied to land. It doesn't matter how many amps we want  
22 to fight about, it's whether it needs that power from  
23 land, whether it needs those connections to land. A  
24 houseboat, like any other vessel, can fully function  
25 away from port.

1           If I can reserve the remainder of my time.

2           CHIEF JUSTICE ROBERTS: Thank you, counsel.

3           Mr. Gannon.

4           ORAL ARGUMENT OF CURTIS E. GANNON,

5                       FOR UNITED STATES,

6           AS AMICUS CURIAE, SUPPORTING THE PETITIONER

7           MR. GANNON: Mr. Chief Justice and may it  
8 please the Court:

9           I think if I could start with Justice  
10 Kagan's questions, the government's position is that  
11 this is an objective function test and in evaluating  
12 when a structure is practically capable of being used as  
13 a means of transportation this Court has repeatedly  
14 recognized that function is important to that inquiry.

15           It did so as recently as Stewart, when it  
16 recognized that the function of the dredge there was to  
17 carry crew and equipment across Boston Harbor in the  
18 course of dredging a trench.

19           It also did so in the cases that  
20 Petitioner's counsel has already talked about,  
21 Evansville, Roper --

22           CHIEF JUSTICE ROBERTS: Can I -- can I  
23 interrupt you just there on the dredging? You say the  
24 function of the dredge was to carry people and  
25 equipment. I would have said the function of the -- the

1 dredge is to dredge in the middle of the river.

2 MR. GANNON: Well, the Court --

3 CHIEF JUSTICE ROBERTS: Right? And so --

4 and I don't know which of us would be right, so it seems  
5 to me that that function test is a very difficult one to  
6 apply.

7 MR. GANNON: Well, the Court in Stewart said  
8 that "dredges" -- and I'm quoting from page 492 --  
9 "serve a waterborne transportation function, because  
10 they carry crew and equipment across" --

11 CHIEF JUSTICE ROBERTS: Well, I know what it  
12 said. I guess I would say, obviously, it serves a  
13 waterborne function, but I'm not sure the first thing I  
14 would say when I see one of these dredges in the middle  
15 of the river is its purpose is to move people and  
16 equipment. I would say its purpose is to dredge.

17 MR. GANNON: Well, but in general, it needs  
18 to dredge not just in one place, because it's not just  
19 dredging a hole, it's dredging a trench. It usually  
20 needs to move in order to do that.

21 CHIEF JUSTICE ROBERTS: No, I know but  
22 that's saying that it has to be able to move, and I  
23 agree with that. But its purpose is still to dredge,  
24 not to move.

25 MR. GANNON: Well, I think that the Court --

1 CHIEF JUSTICE ROBERTS: You could use it if  
2 you had a -- you know, a transportation boat, right?  
3 Any equipment you need to move, you put it on another  
4 boat and drop it off. The people who work, you bring  
5 them over and drop it off.

6 MR. GANNON: Yeah, I think that you could do  
7 that. I think that's typically not the way the dredges  
8 that -- not the way the superscoop works in Stewart and  
9 it's not the way historic dredges worked in the case  
10 of --

11 CHIEF JUSTICE ROBERTS: Sure it is, isn't  
12 it? I mean, the superscoop doesn't go to the -- maybe  
13 it does -- go to the shore every morning, then come  
14 right out again? They move people back and forth with  
15 other boats, don't they?

16 MR. GANNON: Oh, but I -- what I meant is  
17 that there are people and equipment on the superscoop  
18 when it is moving across Boston Harbor. They didn't  
19 sort of take it out there all empty every morning and  
20 then load other things on to it that they -- that they  
21 brought out there.

22 And in Evansville, the Court recognized that  
23 the wharf boat there, which is a large structure -- it  
24 was 240 feet long, 48 feet wide -- it served as an  
25 office, a warehouse, and a wharf on the side of the

1 river, and the Court said that it performed no function  
2 that might not have been performed as well by structures  
3 permanently attached to the --

4 JUSTICE ALITO: Suppose someone builds a  
5 replica of an historic watercraft, a Viking boat, the  
6 kind of outrigger canoes that the Polynesians used  
7 throughout the Pacific Ocean, and the purpose of this is  
8 to display it in a museum, no one has any intention  
9 whatsoever of ever putting it in the water, but it's  
10 built so that if they did, it would -- it would function  
11 just like its historic antecedent, is that a vessel?

12 MR. GANNON: I think that that would be a  
13 vessel, because it really -- its objective function, if  
14 you look at its design and its natural function --  
15 that's just the phrase that the -- even Respondent's law  
16 professor amici used. They acknowledged that the  
17 function and purpose test is appropriate if it takes  
18 account of the craft's own design and natural function.

19 JUSTICE BREYER: What about the -- I thought  
20 there was a -- a kind of caveat in one of these cases,  
21 maybe Stewart, that said take a thing that looks just  
22 like a boat, the Queen Mary, but if it is permanently --  
23 they use the word "indefinite." I think they mean  
24 "permanently."

25 MR. GANNON: Well, the Court --

1 JUSTICE BREYER: But if it is permanently  
2 moored to the shore and is never going to sea again,  
3 then it isn't a vessel.

4 MR. GANNON: That's true. That's because  
5 it's no --

6 JUSTICE BREYER: Then if the Polynesian boat  
7 is permanently in the museum, there's a lot of objective  
8 evidence of that, it would not be a vessel. But if it's  
9 something they really could well take out on the sea,  
10 then it is, is that right?

11 MR. GANNON: It is true that the Court  
12 recognized in Stewart and the Coast Guard's craft  
13 routinely operated dockside policy is based upon the  
14 presumption that something that used to be a vessel can  
15 cease to be a vessel if it is semi-permanently or  
16 indefinitely moored. That's the phrase that the Court  
17 quoted in Stewart. And the Court recognized that even  
18 something that's anchored to the seabed could --

19 JUSTICE BREYER: That doesn't come up here.  
20 That concerns the Queen Mary being sent to Long Beach  
21 and used as a hotel.

22 MR. GANNON: And the Queen Mary is behind  
23 a -- is essentially behind a cofferdam. It doesn't have  
24 ready access to open water. It's connected to shore in  
25 all sorts of permanent ways. We don't think that that's



1 the type of case that we have here, because nobody is  
2 saying that this once was a vessel and it is now no  
3 longer one just because it's tied up to the dock in the  
4 way that it was tied up here.

5 And so, Justice Kennedy, we think that this  
6 isn't really a case about indefinite mooring as making  
7 the difference. This is a case where you need to start  
8 with the question of was it ever a vessel. And  
9 if the --

10 JUSTICE SOTOMAYOR: So I was right. So that  
11 permanent mooring is a different inquiry in your mind?

12 MR. GANNON: Well, permanent mooring is  
13 usually going to be relevant to the question of whether  
14 something ceases to be a vessel, as it's no longer  
15 practically capable of being used as a means of  
16 transportation. That's the way the Court discussed the  
17 point in Stewart. And -- and that's true even for a  
18 case like Roper, which was a former Liberty ship that  
19 was towed up and down the James River.

20 JUSTICE SOTOMAYOR: Well, that's a -- that's  
21 a somewhat easy case, because the hull, I think, was  
22 removed or something was removed that made it --

23 MR. GANNON: Well, there were things that  
24 had been removed when it had been decommissioned  
25 originally. But if the court of appeals test were used

1 here and the court were to conclude that something is a  
2 vessel, if it is merely capable of being towed across  
3 water even to its detriment, then you can't explain the  
4 answer in cases like Evansville or in Roper where --  
5 because the Evansville wharf boat was towed at least ten  
6 times, as described in pages 21 and 22 of the Court's  
7 opinion, and nobody was asking whether it had all  
8 the office furniture and light fixtures and things like  
9 that removed when it was towed at least twice a year for  
10 the seven years before that suit began.

11 JUSTICE KAGAN: So, Mr. Gannon, you think  
12 that even at the moment that the thing is being  
13 transported, and let's say that the thing has, you know,  
14 various furniture and things on it, you think even at  
15 that moment under section 3, it's not a -- it might not  
16 be a vessel?

17 MR. GANNON: That's generally going to be  
18 true, yes. If the purpose of the structure, the  
19 function, the objective function of the structure is to  
20 operate, just to be stationary beside the dock, then  
21 it's not going to be a vessel even when it's being towed  
22 behind another vessel. There may still be rules about  
23 how it needs to be lit at night and things like that,  
24 but --

25 JUSTICE ALITO: What if it was more

1 seaworthy so that it could be towed 200 miles without  
2 suffering any damage, even if there are, you know, small  
3 waves, let's say?

4                   And the reason why it was built that way was  
5 so that when the person moves the person wouldn't have  
6 to hire a moving company to come with a van and take out  
7 all the person's personal belongings and ship those  
8 by -- by land. This -- this is capable of moving and  
9 moving all the stuff that's in it without having  
10 anything damaged. Would it be the same? What would be  
11 the result there?

12                   MR. GANNON: Well, I -- I understand the  
13 point. I think that, under a case like Evansville, that  
14 there does seem to be a difference between relocating  
15 the structure and using the structure to transport  
16 people and things.

17                   But under an objective function test, if it  
18 really is designed to be mobile, and we look at it and  
19 we say it really looks like a boat and it's designed to  
20 move through water efficiently, it would probably look  
21 different from this particular craft.

22                   But if ultimate mobility is part of the  
23 function of it, then -- then the answer could well be  
24 different.

25                   But, for the most part, I think my answer is

1 the same as I was trying to give to Justice Kagan, which  
2 is that this is either going to be a vessel all the time  
3 until it becomes so permanently moored that it should no  
4 longer be deemed a vessel.

5 JUSTICE ALITO: I really just don't  
6 understand your answer. Mobility surely was a -- was a  
7 purpose of this because it was moved.

8 MR. GANNON: Well, I --

9 JUSTICE ALITO: It can be moved.

10 MR. GANNON: There is a question about  
11 practical capability of being used and --

12 JUSTICE ALITO: Okay. Well, that's  
13 something different.

14 MR. GANNON: And before, you were asking  
15 about the hook in the statute here. We do think that  
16 the word contrivance does indicate that it's something  
17 that has a function that's determinable.

18 And there are lots of other areas in  
19 maritime law where the function of a vessel is a  
20 relevant question, and this is not an unanswerable  
21 inquiry. The court uses purpose and function when it's  
22 deciding whether somebody is a Jones Act seaman --

23 JUSTICE GINSBURG: Mr. Gannon, would you  
24 have said sounds like this structure is not a vessel,  
25 period. But your bottom line in your brief is that, if

1 we disagree with the Court of Appeals, we shouldn't say  
2 this contrivance is not a vessel, we should send it back  
3 -- for what?

4 What finding?

5 MR. GANNON: We think that the record here  
6 was not really compiled with an object of answering  
7 these questions, the things that we think are relevant,  
8 because the district court and the Court of Appeals  
9 flatly rejected any inquiry into the purpose or function  
10 of the vessel. And --

11 JUSTICE GINSBURG: So what would we tell  
12 them they should look into?

13 MR. GANNON: That they should look into the  
14 purpose and function of the vessel. They should also  
15 consider whether it would be damaged when it was towed.  
16 That was something that petitioner tried to get. He was  
17 proceeding pro se in the district court, offered to  
18 present evidence about --

19 JUSTICE KENNEDY: On the first question,  
20 purpose or function, what did they know that we can't  
21 know by looking at this picture and listening to these  
22 arguments?

23 MR. GANNON: Well, I think that they could  
24 hear more about --

25 JUSTICE KENNEDY: I mean, I would be willing

1 to stipulate they are better at this than we are, but  
2 let's -- let's assume.

3 MR. GANNON: Well, I -- I think that  
4 somebody -- if somebody -- I can't tell everything about  
5 the structure. We have these pictures, and we know that  
6 it has a ten-inch draft, but we don't really know how --  
7 how well it is that --

8 JUSTICE KENNEDY: I want to be fair to the  
9 Court of Appeals, well, now, you tell us what the  
10 purpose and function is.

11 MR. GANNON: And I -- if --

12 JUSTICE KENNEDY: Don't we know that?

13 MR. GANNON: Well, I think that you -- in --  
14 this is going to be a somewhat idiosyncratic case. I  
15 think that this is an unusual structure. That's why the  
16 surveyor on page J-43 of the Joint Appendix found that  
17 there were no comparables for sale in the state of  
18 Florida. And so I think that most cases aren't really  
19 going to -- to be like this.

20 But if I wanted to put on evidence about  
21 that, I would probably compare -- decide whether this is  
22 more like the floating homes that are described in the  
23 Seattle floating homes brief, that are really designed  
24 just to function in place near the shore. I think that  
25 there would be more evidence about its capabilities

1 while it was actually out on the water and things like  
2 that.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

4 Mr. Frederick.

5 ORAL ARGUMENT OF DAVID C. FREDERICK

6 ON BEHALF OF THE RESPONDENT

7 MR. FREDERICK: Thank you Mr. Chief Justice,  
8 and may it please the Court:

9 The City brought this In Rem action against  
10 Mr. Lozman's uninsured houseboat to enforce maritime  
11 liens. The houseboat was in violation of the wet slip  
12 agreement, and it posed a hazard to other vessels in the  
13 marina if, because of its flimsy moorings, it came  
14 unmoored during a storm.

15 The houseboat was located very close to the  
16 navigable channel of the Atlantic Intercoastal Waterway  
17 and next to a yacht-building facility next to the  
18 marina. So the city faced a very real specter of being  
19 sued if the uninsured houseboat came unmoored and caused  
20 damage.

21 Our position is that the houseboat is a  
22 vessel under section 3 because it floats, moves, and  
23 carries people or things on water, as the statutory --

24 CHIEF JUSTICE ROBERTS: Just like an inner  
25 tube, right?

1                   MR. FREDERICK: No. An inner tube actually  
2 does not --

3                   CHIEF JUSTICE ROBERTS: Floats, can be  
4 towed, can carry a person.

5                   MR. FREDERICK: Well, a person actually --  
6 most of the body parts of a person would be underwater  
7 and would be through the water, Mr. Chief Justice.

8                   CHIEF JUSTICE ROBERTS: One of those  
9 inflatable rafts where most of the parts of the  
10 people --

11                  MR. FREDERICK: The test would be what's the  
12 practical capability, and a raft that has a bottom  
13 actually could very well be a vessel under the  
14 appropriate standard of practical capability.

15                  JUSTICE BREYER: This cup. What about the  
16 cup?

17                  MR. FREDERICK: Cup is not because a cup  
18 doesn't float.

19                  JUSTICE BREYER: Oh, well, this is lighter  
20 than you think.

21                  JUSTICE SOTOMAYOR: No. How about a garage  
22 door?

23                  JUSTICE KAGAN: Take the inner tube and, you  
24 know, paste a couple of pennies on the inner tube. Now  
25 it carries things. There are things on the inner tube,



1 and it floats.

2 MR. FREDERICK: Justice Kagan, I -- I think  
3 we could imagine all kinds of de minimis types of  
4 hypotheticals that would satisfy the basic criteria.  
5 But what the Court in Stewart said was practical  
6 capability as viewed in a real world sense. And I'm not  
7 aware of any case -- and they've certainly not pointed  
8 to anything -- that identifies anything with those kind  
9 of practical attributes that would be subject to  
10 litigation.

11 CHIEF JUSTICE ROBERTS: Well, practical  
12 capability viewed in a real-world sense -- and you're  
13 about transportation -- you're talking about things that  
14 were built for transportation, right?

15 MR. FREDERICK: You're -- yes. You're --  
16 that is true in the sense that one of the purposes, as  
17 manifested through its physical characteristics, is the  
18 ability to be moved across water.

19 And just as Mr. Lozman's houseboat here was  
20 moved 200 miles in the first towage after the hurricane  
21 wiped out every other vessel in the docks in the north  
22 bay marina, and he had it towed with a speed boat  
23 70 miles to the city of Riviera Beach, those physical  
24 characteristics and attributes were recognized by the  
25 Court of Appeals when it applied the practical

1 capability test.

2 And it said on page 15(a) of the petition  
3 appendix that certainly living, a domicile, is a purpose  
4 of a floating home, but mobility is also a purpose, and  
5 then demonstrated that mobility here.

6 JUSTICE SOTOMAYOR: Under your definition,  
7 how do you deal with Evansville?

8 MR. FREDERICK: Evansville is a case with  
9 many layers, but let me just start first start with the  
10 fact that the Court announced a practical capability  
11 test in Evansville itself. That's what it applied. It  
12 reviewed a district court record that had found no  
13 practical capability on the basis of the driveways and  
14 the more permanent connections to the utility system of  
15 the city, and it reviewed that factual record for clear  
16 error, which, of course, it didn't find, by --

17 JUSTICE SOTOMAYOR: What you are basically  
18 saying, we reached the wrong conclusion because the  
19 wharf boat floated, and it regularly was moved, and  
20 there was nothing to suggest that it couldn't carry  
21 people or things. It happened not to because they would  
22 empty it, I understand, before they moved it, but it  
23 could have.

24 So if it was practically capable of  
25 floating, whether it was semi-tied to land or not, it

1 was released from land on somewhat of a regular basis.  
2 So are you suggesting that in Stewart we change the  
3 Evansville rule?

4 MR. FREDERICK: No. In Stewart you said  
5 what the holding of the case was, which was that it was  
6 not practically capable of movement at the time that it  
7 sank.

8 Now, I would like to just step back for a  
9 second because I think Evansville needs to be understood  
10 in the time in which it was decided. At that time, many  
11 courts, including this one, at times, applied a snapshot  
12 test, what is happening to this particular watercraft at  
13 the moment in time where an admiralty tort occurs, where  
14 the contract ensues, and the like.

15 This Court subsequently disavowed the  
16 snapshot test; but, in Stewart, what the Court did was  
17 to describe Evansville and Cope as cases about not  
18 practically capable of movement or carriage because of  
19 their connections to the land.

20 In Evansville, the owner of the wharf boat  
21 also owned the adjoining land and had control over the  
22 dock and built driveways so that trucks could come on  
23 and off, and had an eight-inch concrete lining on the  
24 houseboat which are not typically -- sorry, on the wharf  
25 boat, which are not typically attributes one would think

1 of as ordinarily for vessels.

2 JUSTICE BREYER: I -- I got stopped here,  
3 back at Stewart. "Practically capable of maritime  
4 transport." Now, those are words I thought you have to  
5 interpret with some degree of common sense, and the  
6 reason for that is because each of us can of course  
7 imagine all kinds of things, from Styrofoam sofas to --  
8 to just dozens of absurd things that have nothing to do  
9 with ships or vessels and really could be used  
10 theoretically to carry something on the water.

11 So what we think of is that practical  
12 capability means that there must -- this must really  
13 have as a function, as one of its functions -- I'd like  
14 to say purpose, but some people apparently don't like  
15 that --

16 (Laughter.)

17 JUSTICE BREYER: -- because it - it has some  
18 other implication that I don't understand. Okay.

19 So call it the function or the capacity, and  
20 it really does as a significant matter of carrying  
21 things, and not just accoutrements like nails in its  
22 walls, but -- but things from place to place to some  
23 significant degree, okay? So I've just taken the words  
24 of the test and through voice -- and trying to focus  
25 your mind, I've said you have to do that really as a --

1 it has to be some significant degree there, which this  
2 one doesn't seem to have, all right?

3 So you see what I'm trying to do, and really  
4 it's a way of getting you to respond to that.

5 MR. FREDERICK: I think it certainly did  
6 have that. It had that capability, Justice Breyer,  
7 because it was actually moved on multiple occasions.

8 JUSTICE BREYER: But it wasn't carrying  
9 things.

10 MR. FREDERICK: It was carrying his personal  
11 effects.

12 JUSTICE BREYER: Well, that's true. And of  
13 course a Styrofoam sofa is -- is carrying the holes, or  
14 it's carrying the -- you know, the -- the coffee can or  
15 something that is on top. But when you have a thing  
16 that carries itself, that isn't good enough.

17 MR. FREDERICK: I --

18 JUSTICE BREYER: It has to be something to  
19 do with transporting a thing, transporting some stuff.

20 MR. FREDERICK: It transported his  
21 computers; it transported his clothes. Except for the  
22 fact that his guns were confiscated before the marshals  
23 took it --

24 JUSTICE BREYER: That's what part of the  
25 house.

1                   MR. FREDERICK:  -- it was moved, that -- no,  
2   they're not part of the house.  They're part of the  
3   personal effects, just as someone had personal effects  
4   in his or her dwelling.  And when the marshal towed it,  
5   it carried two people as part of the crew for the  
6   transit between --

7                   JUSTICE BREYER:  All right.  Think of what  
8   it's doing and compare that with the dredge that every  
9   day the workmen get on, they go into the middle of  
10  Boston Harbor, and then they start to work, and they  
11  dredge.

12  And so you'd say, well, I see one of the purposes of  
13  this boat is to carry those people out there.

14                  Now think of this one.  This one is carrying  
15  things, but that which it carries is just what is part  
16  of a normal house which has nothing to do with  
17  transporting things on water.

18                  MR. FREDERICK:  Well, actually, I think Mr.  
19  Fisher conceded that if this had a motor and it was  
20  carrying exactly the same personal effects, it would be  
21  a vessel.

22                  JUSTICE BREYER:  Okay.  How do you then  
23  distinguish -- I see where you're -- you're just saying  
24  my distinction is not going to work, and so then I'd ask  
25  you to say what one you want to come up with that will

1 get rid of all the absurd examples that are lurking in  
2 the back of my mind, which I will avoid -- and yet  
3 include --

4 (Laughter.)

5 MR. FREDERICK: I think that a vessel that  
6 has practical capability, a watercraft that has  
7 practical capability to float, move and carry goods or  
8 people, that's a vessel.

9 JUSTICE BREYER: The floating sofa? The  
10 floating sofa? Somebody is retired, he likes to see it  
11 float around in the water, and you know, and it carries  
12 a cushion. I mean, really that's absurd. So -- so how  
13 do you distinguish -- I gave you an absurd example. I  
14 don't need to think of more.

15 MR. FREDERICK: I think I've given up the  
16 absurd hypos because there are no litigation on them.

17 JUSTICE BREYER: Well --

18 JUSTICE KAGAN: Well, suppose, Mr.  
19 Frederick, this. Suppose we had a trial on the question  
20 of whether these floating homes or this floating home  
21 was a vessel, and we found out that actually 99 percent  
22 of people who buy floating homes move it exactly once.  
23 They purchase the floating home and then they move it to  
24 the place where they want the home to be, and then it  
25 sits there. And this was just a clear evidence that,

1     you know, except if there's a hurricane or a tornado,  
2     people do not move floating homes. They buy it, they  
3     move it to where they want to live, and then it sits.

4                 In that case, do you think the thing is a  
5     vessel?

6                 MR. FREDERICK: Yes, if it has the practical  
7     capability. That's what the statute says, Justice  
8     Kagan. It depends on if you want to rewrite the statute  
9     to have subjective intent --

10                JUSTICE KAGAN: Well, it's a statute --

11                MR. FREDERICK: -- of lots of vessel owners.

12                JUSTICE KAGAN: You're reading the statute  
13     -- you're reading the statute as if it says something  
14     can be transported over water. But the statute doesn't  
15     say that. It says something can be used or capable of  
16     being used as a means of transportation on water. So  
17     that -- that the question is whether this thing is  
18     transporting other things over water, and whether that's  
19     its function; and in my hypothetical it's not its  
20     function. Its function is to serve as a house. That  
21     house happens to be on water, but it's just a house.

22                MR. FREDERICK: Justice Kagan, the fact that  
23     a vessel only moves once doesn't mean that it's not a  
24     vessel if it has -- if it meets the attributes of the  
25     statute, as explained by this Court in Stewart, of



1 practical capability. The Titanic, of course, is a  
2 perfect example of that.

3           The fact that a person may choose mobility  
4 as a -- as one of the attributes and not exercise that  
5 attribute of course goes to subjective intent, and as  
6 the Maritime Law Association's brief points out here,  
7 you do not want to apply an intent standard that goes to  
8 what the owner intends to -- which function the owner  
9 intends to exercise, because that leads to manipulation.  
10 And the casino --

11           JUSTICE GINSBURG: Mr. Frederick, the city's  
12 position, it is whatever we want it to be. That is the  
13 first time Lozman was sued by the city. It was not  
14 under admiralty jurisdiction, it was a plain old  
15 landlord/tenant suit in State court, right?

16           MR. FREDERICK: Yes, but there are some  
17 exceptions and if -- I will let you finish your  
18 question.

19           JUSTICE GINSBURG: Yes, well, my question  
20 is, is it -- is it a vessel when you want it to be, and  
21 just an ordinary landlord/tenant situation when you want  
22 it to be that way?

23           MR. FREDERICK: No. I would answer that  
24 question as no.

25           JUSTICE GINSBURG: Well, let's take this

1 very incident, that is he failed to comply with the  
2 revised rules and he was behind in his payment of  
3 dockage fees. Could the city have brought that case in  
4 an ordinary State court for the arrears?

5 MR. FREDERICK: No.

6 JUSTICE GINSBURG: Why not?

7 MR. FREDERICK: Because it's a vessel and  
8 the exclusive admiralty jurisdiction of the United  
9 States courts means that it has to be litigated in the  
10 United States courts.

11 JUSTICE GINSBURG: What about --

12 MR. FREDERICK: That's why in the first one,  
13 if I could just explain about the State court, because I  
14 think that there is some misapprehension about what  
15 happened.

16 His dog was not complying with the  
17 ordinances, and he was not complying with the city  
18 ordinances; that's why -- that's why the city brought  
19 the in personam action against him in State court.  
20 There was no admiralty basis there. He was still paying  
21 all of his dockage services and fees. It became an in  
22 rem action when the lien was not being discharged  
23 through his payment on the dockage fees, and the city  
24 had a basis under the wet slip agreement to assert a  
25 maritime lien, which is a classic admiralty action under

1 Federal jurisdiction.

2           So they are very different actions. Under  
3 the State court action he could still stay at the  
4 marina, but he had to be on a houseboat that complied  
5 with the marina's rules. He had two house boats at the  
6 marina, and this one was not in compliance, and that is  
7 why the city brought action against it. It was the only  
8 one of the 500-plus vessels and boats in this marina  
9 that wasn't in compliance with the rules.

10           JUSTICE KENNEDY: We -- we want I suppose to  
11 give the courts of appeals a test that works. I -- see  
12 if this is, sums up your argument, or your position.

13           You look to see the objective  
14 characteristic, the physical capacity of the -- of the  
15 structure, and then you look not to purpose but to its  
16 objective function: Does it carry goods under the  
17 statute. And then I suppose you could under that say  
18 that this is a vessel, but that this presumption is  
19 overcome if it's permanently moored in a way the  
20 Evansville dredge was. Is -- is that your argument?

21           MR. FREDERICK: I think that sums up in a  
22 nutshell what we would regard as a proper statement of  
23 the law, of what this Court has already said, and that  
24 is that if it's got practical capability, those  
25 practical characteristics, Justice Kennedy, will

1 manifest itself in the functions. If somebody wants to  
2 buy a domicile on land, one buys a house or a condo. If  
3 you buy a floating home, that has the attribute, the  
4 physical characteristics of floating, movage -- and  
5 moving and carriage --

6 JUSTICE BREYER: That's where - that's  
7 exactly -- I mean, I think that works pretty well; and  
8 you think that works pretty well, but I don't agree with  
9 you at the moment hypothetically. So something's wrong  
10 somewhere. And what I'm thinking is that you could have  
11 very odd things, you know, like an advertising sign,  
12 floating advertising sign and tow it around. Is that  
13 floating advertising sign a vessel? No, it doesn't  
14 carry goods but it does carry, say, the eyes on the  
15 figure which might move around; and then it does -- and  
16 Justice Kennedy said carrying goods. All right. Does  
17 this structure, this houseboat have a function of  
18 carrying goods? You're tempted to say yes, because his  
19 personal effects are in it. I'm attempted to say no,  
20 because there is nothing special about those personal  
21 effects that isn't exactly similar to their being in a  
22 similar structure on land.

23 That's where I am wondering if there is a  
24 distinction. That's -- do you see what I -- what's  
25 bothering me?

1                   MR. FREDERICK: Justice Breyer, there is no  
2 basis, I mean, with all due respect, there is no basis  
3 in your cases to -- to hold that there is something  
4 about transportation that makes it somehow uniquely  
5 nautical or maritime as opposed to --

6                   JUSTICE BREYER: No, it's nothing --

7                   MR. FREDERICK: -- household effects or  
8 other goods or services or people that are transported  
9 over land. And that's why when the normal definition of  
10 transportation is to convey a person or a thing from one  
11 place to another, that's perfectly satisfied under the  
12 facts of this case. And it is an undisputed record as  
13 Petitioner says, on page 27 of the cert petition, they  
14 ask for cert here for you to decide whether Mr. Lozman's  
15 state of mind about his indefinite mooring is somehow  
16 relevant to the definition of a vessel. It clearly  
17 isn't.

18                  JUSTICE SOTOMAYOR: I guess the problem is  
19 the list of absurdities that they point to, not the  
20 least of which is a dry dock, which you talk about  
21 whether it's permanently moored or not, but most dry  
22 docks are held in place by, you know, heavy ropes but  
23 you can cut them and you can stick something on them and  
24 they can float away. Under -- so how do you --

25                  MR. FREDERICK: I don't accept the premise

1 of your argument. The --

2 JUSTICE SOTOMAYOR: For the --

3 MR. FREDERICK: The dry docks with which I  
4 am familiar are anchored to the bottom so that they can  
5 stay in one place and they don't carry anything, so they  
6 don't meet the part of the test that requires carriage.

7 JUSTICE SOTOMAYOR: So what do you do with  
8 the --

9 MR. FREDERICK: They are simply physical  
10 structures --

11 JUSTICE SOTOMAYOR: -- trampoline and the  
12 other examples your adversary gave? Is a trampoline  
13 that floats on water capable of moving -- it's moving  
14 the trampoline.

15 MR. FREDERICK: I don't think it's  
16 practically capable of carrying anything.

17 JUSTICE SOTOMAYOR: It's carrying the  
18 Trampoline.

19 MR. FREDERICK: And again --

20 JUSTICE SOTOMAYOR: So is the difference  
21 whether I attach something permanently or temporarily to  
22 the top of the floating thing, the floating board, the  
23 floating whatever?

24 MR. FREDERICK: Well, it would not be  
25 subject to towage. Here the houseboat had -- this is

1 important because the houseboat under the testimony Mr.  
2 Lozman elicited at trial had four towing cleats that  
3 were welded into the structure of his houseboat so that  
4 it could be towed without torquing and twisting the  
5 houseboat and causing it to sink. The hypotheticals  
6 that the other side has suggested don't have that  
7 additive feature of towing cleats that are used for the  
8 purpose of being able to convey the houseboat --

9 CHIEF JUSTICE ROBERTS: Counsel, your  
10 example of the towing cleats highlights one of the  
11 difficulties I have; one, because obviously the question  
12 of, well, what if they didn't have the towing cleats,  
13 and then what if they had the towing cleats and then  
14 took them off, what if they were temporary towing  
15 cleats. One of the things, this is a jurisdictional  
16 statute and we like jurisdictional statutes to be clear  
17 and easy of application. Why do you think your test is  
18 easier than your friend's test?

19 MR. FREDERICK: Because the physical  
20 characteristics of this houseboat all point to the  
21 attributes of being a vessel. It floats, it moves, it  
22 carries. It's got nothing to do --

23 CHIEF JUSTICE ROBERTS: It's got -- it  
24 doesn't have -- the thing that makes something look most  
25 like a boat in my view is a raked bow. That tells you

1     that that's what they want to use it for, to move  
2     through the water. This is straight up and down.

3                 MR. FREDERICK: Well, Mr. Chief --

4                 CHIEF JUSTICE ROBERTS: It doesn't have a --  
5     what are the things called on the side, the elevated  
6     sides that you'd look for in a boat.

7                 MR. FREDERICK: We would submit that  
8     Congress did not intend a you-know-it-when-you-see-it  
9     test. House barges, barges have been vessels since the  
10    time of Cleopatra. The fact that it is flat-bottomed  
11    and it floats and it moves and it carries things does  
12    not make it not a vessel.

13                JUSTICE GINSBURG: Mr. Frederick, this is  
14    kind of an idiosyncratic case. There are many cases I  
15    think in the courts now about floating casinos. I take  
16    it on your definition the floating casino would be a  
17    vessel subject to maritime jurisdiction.

18                MR. FREDERICK: Yes, unless it has a  
19    physical impediment that takes it out of one of the  
20    three attributes that doesn't make it a vessel. If --

21                JUSTICE GINSBURG: As long as the vessel  
22    stays in one place and the gambling goes on in one  
23    place, then it may be towed to a different location, and  
24    it stays there. You -- you say because it is able to be  
25    moved from one place to another it qualifies as a



1 vessel?

2 MR. FREDERICK: Yes.

3 JUSTICE KENNEDY: Even if it's rather  
4 permanently moored with a, with a -- like the Intrepid  
5 on the Hudson River --

6 MR. FREDERICK: I'm not familiar --

7 JUSTICE KENNEDY: With about -- aircraft  
8 carrier. But it's really fixed in there with regular  
9 walkways and so forth. Very -- it would cause a lot of  
10 work in order to move it.

11 MR. FREDERICK: We suggest that the way the  
12 court should think about that problem is as a physical  
13 impediment. Are physical impediments preclude its moat  
14 movement or carriage or floating capacity --

15 JUSTICE KAGAN: Mr. Frederick, if that is  
16 the case, then your test really comes down to how  
17 securely is something fastened. I mean, you have to  
18 deal with Evansville's wharf boat and you have to deal  
19 with Cage's dry dock, and you have to deal with all  
20 these floating casinos and restaurants. And you're  
21 saying that in all these cases we are supposed to look  
22 to is it a rope or is it a cable, how many cables, how  
23 quickly can it be disengaged, and that that's going to  
24 end up being the test that you would have us adopt which  
25 is how easy it is to get out of the port.

1           MR. FREDERICK: I think that's a fair way to  
2 view it, Justice Kagan, and it's a perfectly appropriate  
3 one. The Belle of Orleans case --

4           JUSTICE KAGAN: That really does become a  
5 jury question -- a question of fact for everything,  
6 right? You know, are there six cables, are there nine  
7 cables, what are they made of, you know, how long is it  
8 going to take to rip up the -- the I-beams, whatever?

9           MR. FREDERICK: Well, I think that as a  
10 practical matter, this arises in only a couple of  
11 instances and those are the casino boats, many of which  
12 were vessels and they traversed the rivers allowing  
13 people to gamble because that's how state laws required  
14 them to perform. And they have since stopped trying to  
15 be vessels because of state law changes that they were  
16 able to make. And so the question as a practical matter  
17 is are there physical impediments to the ability of that  
18 boat to -- to use the capability to move? The Star of  
19 India, which was referenced in the Belle of Orleans  
20 case, was not -- was a vessel, a sailing vessel from the  
21 19th century. In 1926 they took it out of commission as  
22 a sailing vessel and they towed it to San Diego, where  
23 it sat for 50 years tied to the dock, and for the  
24 bicentennial, they decided let's get the boat out and  
25 sail it and they sailed it for the bicentennial. The

1 Ninth Circuit held that's a vessel because it has the  
2 capability of being used as a vessel. And the fact that  
3 something is moored for a long time, if it has the  
4 physical attributes to be a vessel, it is a vessel. The  
5 United States -- the USS Constitution, the famous USS  
6 Constitution would be shocked to have heard Mr. Gannon's  
7 statement about vessel because there are 200 Navy  
8 service members who service the USS Constitution and  
9 take it out periodically for sail.

10 JUSTICE BREYER: Is there any problem here,  
11 which I think maybe the Coast Guard and the other people  
12 who are responsible for vessels, say once we start  
13 thinking that everything in the house is a vessel -- I  
14 overstate -- we're going to have an impossible time  
15 doing our job. I mean, you know, you are going to see  
16 some kind of a log next to a beach somewhere and  
17 somebody's going to start calling it a vessel. We've  
18 got to limit this somehow to things that really are used  
19 as vessels.

20 MR. FREDERICK: Yes --

21 JUSTICE BREYER: Is that a problem, and if  
22 so, how would you deal with it?

23 MR. FREDERICK: If it were a problem the  
24 Coast Guard would have signed the Solicitor General's  
25 brief in this case which they have done in other cases

1 in which transportation and vessel status have been  
2 relevant like in *Sprietsma v. Mercury Marine, United*  
3 *States v. Locke*, in which the Coast Guard --

4 JUSTICE SOTOMAYOR: This is not very  
5 compelling in this case because they have regulations  
6 that pretty much echo what the Solicitor General is  
7 saying, so it's not as if they were going to take a  
8 different position. The Solicitor General is basically  
9 saying follow the Coast Guard regulations.

10 MR. FREDERICK: And the statute underlying  
11 those regulations, Justice Sotomayor, is found at 46 USC  
12 4302, and it provides the secretary very broad  
13 discretion on what to include within the regulations and  
14 what not to. After this court decided the *Stewart* case,  
15 the secretary suspended many regulations for dockside  
16 vessels until the Coast Guard could issue new  
17 regulations. There is a hint, there is a suggestion  
18 that there might be a problem, but there is not anything  
19 that is really given in practical terms.

20 CHIEF JUSTICE ROBERTS: Well, but, I mean,  
21 there is some easy things to visualize as a problem. If  
22 this is a vessel, then the maid that comes on twice a  
23 week is a seaman under the Jones Act, right?

24 MR. FREDERICK: No. And the reason why is  
25 because as this court recognized in *Stewart*, the in

1 navigation requirement is something that has been used  
2 for limiting the reach of Jones Act seamen in those  
3 circumstances in which a vessel is taken out of  
4 navigation. So I think that it would be appropriate in  
5 a case like this where this is a classic instance of a  
6 maritime lien, dockage --

7 CHIEF JUSTICE ROBERTS: I'm sorry, taken out  
8 of navigation, but not every time it's docked, right?

9 MR. FREDERICK: No. But no -- and in fact,  
10 I think the question of who is a Jones Act seaman is a  
11 different test that this Court last discussed in the  
12 Chandris case, in terms of its substantial connection to  
13 the mission of the vessel. And that -- I think that the  
14 Court could safely leave the Jones Act issues aside,  
15 because they bring in an entirely different regime that  
16 focuses on the worker's connection to the vessel as  
17 opposed to the definition of vessel itself.

18 The definition of vessel itself here is, as  
19 Justice Scalia pointed out, part of the Dictionary Act,  
20 and it is something that does apply more broadly. But  
21 as we briefed in this case, there are two provisions  
22 that take that definition and then they add an intent  
23 requirement as specific language in different parts. So  
24 that if that idea, function, or intent or purpose is  
25 something that is germane to that particular statutory

1 function, than that is a question that becomes a  
2 question for jurisdiction.

3 But I'd also like to point out that both, I  
4 think, the district court and the court of appeals here  
5 assumed that there was jurisdiction here because there  
6 had not been evidence that contested the basic  
7 principles that the City brought when it profiled this  
8 in rem action.

9 And because the case then moved into the  
10 merits phase, the district judge here initially denied  
11 the motion to dismiss for want of jurisdiction without  
12 prejudice. And then as the evidence came in, revisited  
13 the question to provide a fuller explanation, and at  
14 that time made the ruling that Mr. Lozman had not put in  
15 record evidence that affected the practical capability  
16 of the test.

17 The only thing Mr. Lozman argued in the  
18 court of appeals as a reason for error was that because  
19 he intended to live there indefinitely, even though he  
20 had no contractual or property right to do so, and he  
21 had signed a wet slip agreement that provided the marina  
22 complete discretion to move his houseboat within any of  
23 the slips, or to order of the houseboat to leave on 3  
24 days' notice, the question of whether or not there was  
25 any record of evidence on practical capability got to

1 the Eleventh Circuit, and the Eleventh Circuit, in  
2 applying a practical capability test, said the things  
3 that Mr. Lozman had argued, he didn't offer record  
4 evidence.

5 So, Justice Kennedy, to your point, I think  
6 that with respect to the Court of Appeals and how it did  
7 do its job here is an important facet of the case as it  
8 comes.

9 They initially asked you in the cert  
10 petition, grant cert because the Fifth Circuit and the  
11 Seventh Circuit have applied an onerous intent test.  
12 They've not defended that test. And it is abjectly  
13 erroneous because you can't have vessel status be so  
14 easily manipulated by an individual's intent. And now  
15 by trying to morph it into some kind of function or  
16 objective purpose standard, they've essentially done  
17 exactly what the Eleventh Circuit said they had offered  
18 no evidence in the district court to try to prove.

19 If there are no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Fisher, you have 3 minutes left.

22 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

23 ON BEHALF OF THE PETITIONER

24 MR. FISHER: Thank you.

25 I think Mr. Frederick's best argument that

1 I've heard, and some of this Court has echoed it, is  
2 that this is a vessel because it was moved around and it  
3 carried his personal effects. The difficulty is that  
4 argument runs absolutely headlong into Evansville and  
5 Roper; it cannot be squared with those cases. And I  
6 would be willing to rest my entire case on simply this  
7 Court reading and applying those cases.

8 In Evansville, this Court dealt with  
9 something that carried around the effects of a business  
10 office. In Roper, this Court dealt with something that  
11 carried around grain and was far more seaworthy than the  
12 structure in this case.

13 Both instances, the Court said they're not  
14 vessels because the function was not to carry those  
15 things around, it was merely -- they were merely  
16 incidental relocations.

17 Now -- so for that reason, the Eleventh  
18 Circuit simply cannot be right when it says that  
19 function is irrelevant. And the City can't be right on  
20 its test either. The only way the City has proposed to  
21 deal with those cases is to look at how securely the  
22 structure is fashioned.

23 And Justice Kagan, you're exactly right. If  
24 you want a recipe for disaster on jurisdictional  
25 questions, start asking whether it's chains or ropes.



1 And not only that, if you want something that's utterly  
2 manipulable, just tell the yacht owner who has his yacht  
3 down in the harbor that all he has to do is hook it up  
4 to the dock with chains instead of ropes and now he's  
5 out of maritime jurisdiction.

6 So this Court's cases for almost a century  
7 have applied the exact test we're asking this Court to  
8 apply. And even if you're not 100 percent persuaded  
9 that that's what the statute is best read as doing, that  
10 is what we have done for over 100 years, and that is how  
11 maritime law has built up and guaranteed on those -- on  
12 those understandings.

13 And it's not just the questions we've been  
14 talking today -- it's employment law, tort law, all the  
15 rest are built on this test. And we're asking this  
16 Court simply to reaffirm what it's done in the past.

17 So I think that leaves the question of, when  
18 you know the Eleventh Circuit applied the wrong test and  
19 you know the City's test can't be right, do you vacate  
20 or do you send -- or do you simply reverse? And we  
21 think -- Justice Kennedy, we think that you can simply  
22 reverse. You have everything in the record you need,  
23 most notably in the surveyor's report.

24 And you can look at four things. Look at  
25 the -- look at the materials used, the shape of the

1 structure, its equipment and the utilities. The  
2 materials used were plywood and ordinary land-based  
3 structures.

4 CHIEF JUSTICE ROBERTS: That is -- what was  
5 used in the Higgins boats in World War II.

6 MR. FISHER: I'm -- I'm not saying any of  
7 these are determinative, Mr. Chief Justice, but it's a  
8 totality that tells you what it is.

9 And the next thing is the shape. Exactly as  
10 you referred. This is a rectangle that sits 10 inches  
11 under the water, is not meant to be moved around. Look  
12 at the -- look at its features. It has French doors on  
13 three sides a few feet above the water line. That's not  
14 what a vessel -- not how a vessel is designed.

15 And finally, its utilities. Again, at Joint  
16 Appendix 40, for example, it says this thing has no  
17 batteries. It is utterly dependent on being hooked up  
18 to land. That's the only way it can function.

19 So if this Court does nothing else between  
20 now and casting its vote and writing its opinion,  
21 revisit this Court's prior cases and reassert the rule  
22 that this Court has always applied.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
24 Counsel.

25 The case is submitted.

1                   (Whereupon, at 12:03 p.m., the case in the  
2   above-entitled matter was submitted.)  
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