Florida Law Review

Volume 65 | Issue 3 Article 6

May 2013

If It Looks Like a Vessel: The Supreme Court's "Reasonable Observer" Test for Vessel Status

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CASE COMMENT

IF IT LOOKS LIKE A VESSEL: THE SUPREME COURT'S "REASONABLE OBSERVER" TEST FOR VESSEL STATUS

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

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What is a vessel? In maritime law, important rights and duties turn on whether something is a vessel. For example, the owner of a vessel can limit his liability for damages caused by the vessel under the Limitation of Shipowners' Liability Act,[1] and an injured seaman who is a member of the crew of a vessel can claim remedies under the Jones Act.[2] Under the general maritime law, a vendor who repairs or supplies a vessel may acquire a maritime lien over the vessel.[3] In these and other areas, vessel status plays a crucial role in setting the limits of admiralty jurisdiction. Clear boundaries are important because with admiralty jurisdiction comes the application of substantive maritime law—the specialized body of statutory and judge-made law that governs maritime commerce and navigation.[4]

The Dictionary Act[5] defines "vessel" for purposes of federal law. Per the statute, "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[6] The statute's language sweeps broadly, and courts have, at times, interpreted the statute to apply even to unusual structures that were never meant for maritime transport. "No doubt the three men in a tub would also fit within our definition," one court acknowledged, "and one probably could make a convincing case for Jonah inside the whale."[7] At other times, however, courts have focused on the structure's purpose, excluding structures that were not designed for maritime transport.[8] In *Stewart v. Dutra Construction Co.*,[9] the

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* J.D., 2013, University of Florida Levin College of Law; A.B., 2009, Princeton University. Thanks to the members and staff of the *Florida Law Review*, and to our dedicated faculty advisor, Professor Dennis Calfee. Thanks also to Professors Mark Fenster and Anthony Cuva for helpful comments and encouragement.

1. 46 U.S.C. §§ 30501–30512 (2006).

2. *Id.* § 30104(a).

3. *See, e.g.*, Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864, 869, 2010 AMC 1414, 1418–19 (11th Cir. 2010).

4. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65, 1986 AMC 2027, 2032 (1986).

5. 1 U.S.C. § 3 (2006).

6. *Id.*

7. Burks v. Am. River Transp. Co., 679 F.2d 69, 75, 1983 AMC 2208 (5th Cir. 1982).

8. *See, e.g.*, Blanchard v. Engine & Gas Compressor Servs., Inc., 575 F.2d 1140, 1142 (5th Cir. 1978) (citing The Robert W. Parsons, 191 U.S. 17, 30, 2010 AMC 542, 549 (1903))

United States Supreme Court embraced the statutory definition and held that a vessel need only be "practically capable" of maritime transport.[10] But *Stewart* left open an important question: Should courts consider the owner's intended use for the structure in determining whether it counts as a vessel under the statute?

Earlier this Term, in *Lozman v. City of Riviera Beach*,[11] the Supreme Court answered that question and held that courts should consider only objective facts about the structure's design and activities.[12] In the process, the Court announced a new test for vessel status based on the concept of the reasonable observer.[13] This Comment begins by outlining the case's facts and procedural history, then pulls back to survey the law of vessel status. Against this background, this Comment discusses the Supreme Court's decision, and criticizes the Supreme Court's new test for vessel status as misguided and unworkable.

This case began with a confrontation between a city government and the owner of an unusual floating structure. Fane Lozman bought the floating, gray, two-story structure in 2002, then had it towed from near Fort Myers, Florida, to North Bay Village, Florida.[14] There Lozman lived in the structure until a hurricane struck in 2005, and then in March 2006 he had it towed again to Riviera Beach, Florida.[15] Beginning in March 2006, Lozman lived in the structure while docking at the city marina in Riviera Beach.[16] The city marina lies on the Intracoastal Waterway near the Port of Palm Beach and offers about ninety slips.[17] In June 2007, the Riviera Beach City Council passed a resolution adopting a new dockage agreement and new rules for the city marina.[18]

("In determining what is a vessel, we consider the purpose for which the craft is constructed and the business in which it is engaged.").

9. 543 U.S. 481, 2005 AMC 609 (2005).

10. *See id.* at 488–95, 2005 AMC at 613–20.

11. 133 S. Ct. 735, 2013 AMC 1 (2013).

12. *Id.* at 740–41, 744–45, 2013 AMC at 4–5, 11–12.

13. *See id.* at 741, 2013 AMC at 5.

14. City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259, 1262, 2011 AMC 2891, 2892 (11th Cir. 2011).

15. *Id.* at 1262, 2011 AMC at 2892.

16. *Id.* Lozman and the city had a contentious history. Some praised him as a dedicated community activist, but city officials and some residents regarded him as a nuisance. *See* Liz Balmaseda, *Ex-Marine Has Waged Long, Obsessive One-Man War over City Marina, and Has No Plans to Quit*, PALM BEACH POST, Apr. 15, 2010, http://www.palmbeachpost.com/news/news/ex-marine-has-waged-long-obsessive-one-man-war-ove/nL6Jn. Lozman sometimes appeared at council meetings to complain about city policies and harangue city officials until police removed him from the podium. *Id.*

17. *See Amenities*, THE CITY OF RIVIERA BEACH MARINA, http://rivierabeachmarina.com/?page_id=8 (last visited Apr. 18, 2013).

18. *Unnamed Gray Vessel*, 649 F.3d at 1263, 2011 AMC at 2893–94.

Lozman never signed the new dockage agreement and he did not comply with the new rules.[19]

On April 20, 2009, the City brought an action in rem against the structure in the United States District Court for the Southern District of Florida and moved for an arrest warrant under Rule C.[20] The district court issued the warrant and Lozman's structure was removed from the marina.[21] In its complaint, the City sought to enforce maritime liens against the structure.[22] Maritime liens evolved with special attachment and priority rules to serve the needs of maritime commerce.[23] In these cases, the district court's admiralty jurisdiction over an in rem proceeding depends on there being a maritime lien, and for there to be a lien, there must be a vessel to which the lien can attach.[24] Without a vessel, there can be no lien, and no admiralty jurisdiction.[25] Lozman, therefore, tried to defeat the federal court's jurisdiction by arguing that his floating residence was not a "vessel" within the meaning of the statute.[26] On the City's motion for summary judgment, however, the district court held that the structure was a vessel and, therefore, the court's exercise of admiralty jurisdiction was proper.[27]

In its decision, the district court analogized Lozman's floating structure to the structure in *Pleason v. Gulfport Shipbuilding Corp.*,[28] which was held to be a vessel.[29] The structure in *Pleason* was originally built by the Navy as a salvage vessel, but a later owner converted it into a stationary shrimp-processing facility.[30] Although the structure had no propulsion and no steering, the *Pleason* court held that it was still a vessel because it could be used as a means of maritime transport under

19. *Id.* at 1263–64, 2011 AMC at 2894–95.

20. City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length, No. 09-80594-CIV, 2009 WL 8575966, at *1 (S.D. Fla. 2009); *see* FED. R. CIV. P. C.

21. *Unnamed Gray*, 2009 WL 8575966, at *1.

22. The City sought to enforce maritime liens for necessaries, including dockage fees; and maritime trespass, for damages stemming from Lozman's failure to remove the structure from the marina. *See id.* at *2.

23. *See* Crimson Yachts v. Betty Lyn II Motor Yacht, 603 F.3d 864, 869–72, 2010 AMC 1414, 1418–21 (11th Cir. 2010) (discussing the purpose of maritime liens and the history of maritime-lien legislation).

24. *See id.* at 872, 2010 AMC at 1423 ("Because a district court's authority to arrest a ship and to adjudicate an *in rem* proceeding against it requires the attachment of a maritime lien, both the lien and the district court's jurisdiction depend on a ship's status as a 'vessel.'").

25. *Id.*

26. *See Unnamed Gray*, 2009 WL 8575966, at *3.

27. *Id.* at *4.

28. 221 F.2d 621, 1955 AMC 794 (5th Cir. 1955).

29. *Id.* at 623, 1955 AMC at 796; *Unnamed Gray*, 2009 WL 8575966, at *4.

30. *Pleason*, 221 F.2d at 622, 1955 AMC at 795.

tow.[31] The district court in this case believed that Lozman failed to distinguish his floating residence from that structure, pointing out characteristics the two structures shared. "Like the vessel in *Pleason*, the Defendant vessel here was moored to the dock with cables, received power from the land, and needed to be towed in order to be moved."[32]

The United States Court of Appeals for the Eleventh Circuit agreed, holding that the structure fit the statutory definition as interpreted by that circuit's decisions.[33] The court rejected Lozman's argument that the structure would not qualify as a vessel under state law as misplaced.[34] The existence of federal admiralty jurisdiction does not depend on vessel status under state law but on the federal statutory definition.[35] The court pointed to *Pleason* as well as to another decision in which the former Fifth Circuit held that a houseboat without propulsion used as a residence in a marina was still a vessel.[36] The Eleventh Circuit rejected three of Lozman's arguments against vessel status. First, Lozman argued that the structure was not practically capable of transportation because it could not be towed without suffering serious damage.[37] The court found no factual support for this argument.[38] Second, Lozman argued that the structure's design and materials made it more like a traditional residence than a vessel.[39] The court found that despite its unusual design the structure had maritime capability.[40] Third, Lozman argued that the structure was not certified by the state or the U.S. Coast Guard.[41] The court held that this was not a prerequisite for vessel status.[42] Having rejected Lozman's arguments, the court held that the structure was a vessel.[43] Thus, both the district court and the Eleventh

31. *Id.* at 623, 1955 AMC at 796–97.

32. *Unnamed Gray*, 2009 WL 8575966, at *4.

33. City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259, 1269, 2011 AMC 2891, 2892 (11th Cir. 2011).

34. *See id.* at 1266 n.6, 2011 AMC at 2898 n.6.

35. *Id.*

36. *Id.* at 1266–67, 2011 AMC at 2899–2900 (discussing *Pleason*, 221 F.2d 621, and *Miami River Boat Yard, Inc. v. 60' Houseboat, Serial #SC-40-2860-3-62*, 390 F.2d 596, 1968 AMC 336 (5th Cir. 1968)).

37. Brief for Claimant-Appellant at 13–14, 23–24, City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259 (11th Cir. 2011).

38. *Unnamed Gray*, 649 F.3d at 1268, 2011 AMC at 2902–03.

39. Brief for Claimant-Appellant, *supra* note 37, at 16–17.

40. *Unnamed Gray*, 649 F.3d at 1268–69, 2011 AMC at 2903–04.

41. Brief for Claimant-Appellant, *supra* note 37, at 17–18.

42. *Unnamed Gray*, 649 F.3d at 1269, 2011 AMC at 2904.

43. *Id.* The court also criticized the owner's reliance on the Fifth Circuit's decision in *Pavone v. Mississippi Riverboat Amusements Corp.*, 52 F.3d 560, 1995 AMC 2038 (5th Cir. 1995), noting that the Eleventh Circuit had rejected that decision's reasoning in *Board of Commissioners v. M/V Belle of Orleans*, 535 F.3d 1299, 1311 (11th Cir. 2008), as inconsistent

Circuit agreed that Lozman's structure was a vessel within the meaning of the statute. To fully explain how the Supreme Court resolved this case, this Comment now discusses the legal background of vessel status.

The *Lozman* Court would not be writing on a clean slate. Before *Lozman*, the Supreme Court last addressed vessel status in *Stewart v. Dutra Construction Co.*[44] *Stewart* involved a massive dredge hired by the Commonwealth of Massachusetts as part of Boston's "Big Dig" construction project.[45] Although the dredge possessed "certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area," it had "only limited means of self-propulsion," relying on tugs to travel long distances.[46] Nonetheless, the Court held unanimously that the dredge was a vessel because it was "practically capable of maritime transportation."[47] The fact that the dredge generally stayed in one place unless it was moved did not negate its status as a vessel.

The *Stewart* Court rejected a more restrictive interpretation of the statute based on two earlier cases, *Cope v. Vallette Dry Dock Co.*[48] and *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*[49] *Cope* and *Evansville* denied vessel status to a drydock and a wharfboat because they were fixed structures.[50] But the Court distinguished the dredge in *Stewart* on the basis that it was only temporarily stationary, while the drydock and wharfboat were permanently rooted in place.[51] Thus, the *Stewart* Court explained, the earlier cases stand for a narrow proposition. "*Cope* and *Evansville* did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor."[52] The latter are not vessels because they cannot be used for transportation.[53] "Simply put, a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement."[54]

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with *Stewart*. *Unnamed Gray*, 649 F.3d at 1267, 2011 AMC at 2901; *see also infra* notes 56–69 and accompanying text.

44. 543 U.S. 481, 2005 AMC 609 (2005).

45. *Id.* at 484, 2005 AMC at 610.

46. *Id.*

47. *Id.* at 497, 2005 AMC at 620.

48. 119 U.S. 625, 2002 AMC 2694 (1887).

49. 271 U.S. 19, 1926 AMC 684 (1926).

50. *Cope*, 119 U.S. at 627–30, 2002 AMC at 2696–98; *Evansville*, 271 U.S. at 22, 1926 AMC at 686–87.

51. *Stewart*, 543 U.S. at 493, 2005 AMC at 617.

52. *Id.* at 493–94, 2005 AMC at 617.

53. *Id.*

54. *Id.* at 494, 2005 AMC at 617.

Although *Stewart* analyzed vessel status in the context of seaman claims, the decision influenced many areas of maritime law.[55]

In sum, *Stewart* tied the vessel status inquiry more closely to the words of the statute, shifting the focus of the inquiry from purpose to capability. But *Stewart* failed to answer an important question: Should courts consider the owner's intended use for the structure in determining vessel status? The only clue came in the form of an ambiguous citation to a Fifth Circuit case, *Pavone v. Mississippi Riverboat Amusements Corp.*[56] In *Pavone*, the Fifth Circuit held that a floating casino was not a vessel because it was either removed from navigation, or employed as a work platform, or both.[57] In its opinion, the court attached some weight to the fact that the structure was built and used as a floating restaurant and casino.[58] Even though it was moved once to avoid a hurricane, the Fifth Circuit reasoned, that "movement was purely incidental to [its] primary purpose of physically supporting a dockside casino structure."[59] Thus, the structure was not a vessel.[60] The problem was that *Stewart* seemed to reject any test based on the structure's "primary purpose."[61] Therefore, although *Stewart* cited *Pavone*, it was unclear how much of *Pavone*'s reasoning the *Stewart* Court actually endorsed.[62] After *Stewart*, lower courts reached

55. *See* 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, 152–56 (2008).

56. 52 F.3d 560, 1995 AMC 2038 (5th Cir. 1995); *see also* Ross I. Landau, Comment, *A Theoretical Possibility of Navigation: An Analysis of the Vessel Status of Watercraft-Casinos in the Wake of* Stewart v. Dutra Construction Co., 32 TUL. MAR. L.J. 249, 257 (2007) ("Perhaps no aspect of the *Stewart* opinion has proven more problematic than its citation, seemingly with approval, to *Pavone v. Mississippi Riverboat Amusement Corp.*").

57. *Pavone*, 52 F.3d at 568–70, 1995 AMC at 2043–48.

58. *Id.* at 570, 1995 AMC at 2047–48.

59. *Id.* at 570, 1995 AMC at 2048.

60. *Id.*

61. Stewart v. Dutra Constr. Co., 543 U.S. 481, 495, 2005 AMC 609, 618 (2005) ("Section 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose."). The primary purpose test was well-established in Fifth Circuit jurisprudence, *see, e.g.*, Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 293, 1991 AMC 506, 511 (5th Cir. 1990), and support for it can be found in early Supreme Court precedent. *See* The Robert W. Parsons, 191 U.S. 17, 30, 2010 AMC 542, 549 (1903) ("In fact, neither size, form, equipment nor means of propulsion are determinative factors upon the question of [admiralty] jurisdiction, which regards only *the purpose for which the craft was constructed*, and the business in which it is engaged.") (emphasis added).

62. One student commentator argues that the citation should be interpreted narrowly to approve *Pavone*'s result, but not its reasoning. *See* Landau, *supra* note 56, at 260 (describing *Pavone*'s reasoning as "patently incompatible" with *Stewart*). Another defends *Pavone*'s broader consistency with *Stewart*. *See* Stephen W. Grant, Jr., Comment, *Calling All Bets on Gaming Boat Vessel Status: An Analysis of How the Fifth Circuit Is Consistent with* Stewart v.

very different results about the meaning of this citation.

In *De La Rosa v. St. Charles Gaming Co.*,[63] the Fifth Circuit interpreted the citation to its *Pavone* decision as an approval of that circuit's consideration of the owner's intent.[64] *De La Rosa* held that a moored casino boat was not a vessel even though it was "physically capable" of transportation because the boat's owners intended to use it exclusively as a platform for gaming.[65] In other words, the owner's intent outweighed the existence of physical characteristics that would have supported vessel status.[66]

The Eleventh Circuit drew the opposite conclusion. In *Board of Commissioners v. M/V Belle of Orleans*, that court specifically rejected the Fifth Circuit's purposive approach as inconsistent with *Stewart*.[67] The Eleventh Circuit held that *Stewart* left no room for considering the owner's intended use for the structure or, indeed, anything else about the structure's purpose.[68] "The owner's intentions with regard to a boat are analogous to the boat's 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose."[69]

Thus, the Fifth and Eleventh Circuits staked out different positions on the owner intent issue, even though both claimed to be following *Stewart*. With lower courts split over how to apply *Stewart*, the stage

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Dutra Construction Co., 34 TUL. MAR. L.J. 331, 340–44 (2009).

63. 474 F.3d 185, 2006 AMC 2997 (5th Cir. 2006).

64. *See id.* at 188 & n.2, 2006 AMC at 2999 & n.2 (arguing that the *Pavone* citation justified denying vessel status to a moored casino boat based in part on the owner's intent). *But see* Holmes v. Atl. Sounding Co., 437 F.3d 441, 449, 2006 AMC 182, 191 (5th Cir. 2006) (recognizing that *Stewart* mandated changes in the Fifth Circuit's more restrictive vessel jurisprudence in the context of seaman status); Larissa N. Sanchez, Note, *Following the "Vessel Status" Quo: The Fifth Circuit Reluctantly Modifies Its Vessel Jurisprudence in* Holmes v. Atlantic Sounding Co., 30 TUL. MAR. L.J. 435, 443 (2006) ("In *Holmes v. Atlantic Sounding Co.*, the Fifth Circuit recognized that its prior vessel jurisprudence was inconsistent with the *Stewart* decision.").

65. *De La Rosa*, 474 F.3d at 187, 2006 AMC at 2998–99.

66. *De La Rosa* has received strong criticism for its consideration of the owner's intent. *See* Robertson, *supra* note 55, at 139 ("*De La Rosa*—holding that a physically operational casino boat is a non-vessel as a matter of law merely because of the owner's announced intentions to sail no more—was wrongly decided.") (footnote omitted). Another commentator defends *De La Rosa*, however, pointing out that the Fifth Circuit only considered the owner's intent as one among many factors. *See* Grant, *supra* note 62, at 351 ("The *De La Rosa* court performed a factual analysis of the casino's physical characteristics and considered owner intent only as further evidence that the vessel was indeed withdrawn from navigation.").

67. Bd. of Comm'rs v. M/V Belle of Orleans, 535 F.3d 1299, 1311 (11th Cir. 2008). *Belle of Orleans* also declined to follow an interesting approach suggested in dicta by the U.S. Court of Appeals for the Seventh Circuit. *Id.* at 1311. That approach would have considered owner intent as a factor based on an analogy to the distinction between domicile and residence. *See* Tagliere v. Harrah's Ill. Corp., 445 F.3d 1012, 1016, 2006 AMC 1290, 1295–96 (7th Cir. 2006).

68. *Belle of Orleans*, 535 F.3d at 1311.

69. *Id.*

was set for vessel status to return to the United States Supreme Court.

In *Lozman v. City of Riviera Beach*,[70] the Supreme Court held 7–2, in an opinion by Justice Stephen Breyer, that Lozman's structure was not a vessel because a "reasonable observer" would not consider the structure "to be designed to any practical degree for carrying people [and] things on water."[71] The *Lozman* Court began by rejecting the Eleventh Circuit's test as overbroad.[72] In the Court's view, that test would embrace essentially all floating structures.[73] But some floating structures are not vessels because those structures are neither designed for maritime transport nor actually used for that purpose. Therefore, a more discriminating test was needed.

Instead of applying the *Stewart* test, however, the Supreme Court introduced a new test based on the concept of the reasonable observer.[74] Would a reasonable observer consider the structure to be "designed to [any] practical degree for carrying people [and] things over water?"[75] Applying this test to Lozman's structure, the Court found no objective characteristics that would indicate to a reasonable observer that the structure was designed for maritime transport.[76] The structure had no means of steering or propulsion.[77] It could travel only under tow, and even then with difficulty.[78] Its living spaces were not adapted to maritime needs; it had doors and windows, not hatches and portholes.[79] In sum, Lozman's structure lacked sufficient objective characteristics to persuade a reasonable observer that the structure was "designed to [any] practical degree for carrying people [and] things over water."[80] Therefore, it was not a vessel.[81] Of course, the Court acknowledged that a structure that was *actually used* for maritime transport could qualify as a vessel even though a reasonable observer would not consider the structure to be designed for that purpose.[82] The Court nonetheless held that any actual use in this case—two trips under tow, on which the structure carried, at most, a few people and some furniture—was insufficient to make the structure a vessel.[83]

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70. 133 S. Ct. 735, 2013 AMC 1 (2013).
71. *Id.* at 739, 2013 AMC at 2.
72. *See id.* at 740–41, 2013 AMC at 4–5.
73. *Id.*
74. *Id.* at 741, 2013 AMC at 5.
75. *Id.* at 741, 2013 AMC at 6.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 740, 2013 AMC at 5.
82. *See id.* at 746, 2013 AMC at 13–14.
83. *Id.* As the dissent argued, however, this holding is in tension with the practical

The Court then explained why the reasonable observer test fits the statute's text, precedent, and purposes. First, the reasonable observer test respects the statute's text because the words of the statute point toward the structure's function or purpose.[84] A "contrivance" is something designed for a purpose, and a "watercraft" is something designed specifically to carry people and things on water.[85] The reasonable observer test similarly focuses on the structure's purpose. Second, the reasonable observer test validates existing precedents because most cases have held that structures that are neither designed for maritime transport nor actually used for that purpose are not vessels.[86] In *Stewart*, for example, the Supreme Court held that the dredge was a vessel because it was used at least sometimes to transport workers and equipment.[87] But in *Evansville*, the Court held that the wharfboat was not a vessel because it was neither designed for transportation nor used for that purpose.[88] "The basic difference, we believe, is that the 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."[89] The reasonable observer test makes sense of these cases. Third, the reasonable observer test serves the statute's underlying purposes because it extends admiralty jurisdiction to cases in which reasons exist for applying maritime law.[90] For example, maritime law includes special attachment procedures to guard against the risk that a vessel will flee to avoid arrest.[91] But a structure that is not designed for maritime transport presents little risk of escape; therefore, there is less reason to apply maritime law to that structure.[92] Thus, the Court argued, the statute's text, precedent, and purposes all support the reasonable observer test.[93]

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capability test. *Id.* at 752, 2013 AMC at 22 (Sotomayor, J., dissenting) ("The majority fails to explain how a craft that apparently did carry people and things over water for long distances was not 'practically capable' of maritime transport.").

84. *Id.* at 741, 2013 AMC at 6–7.

85. *Id.* at 741–42, 2013 AMC at 6–7.

86. *Id.* at 742, 2013 AMC at 7.

87. *Id.* at 742, 2013 AMC at 7–8 (citing Stewart v. Dutra Constr. Co., 543 U.S. 481, 484–85, 2005 AMC 609, 610, 614–19 (2005)).

88. *Id.* at 742, 2013 AMC at 8 (citing Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 20–22, 1926 AMC 684 (1926)).

89. *Id.* at 743, 2013 AMC at 8–9.

90. *Id.* at 743–44, 2013 AMC at 10.

91. *Id.* at 744, 2013 AMC at 10.

92. *See id.*

93. The Court also noted that its holding was consistent with state laws governing floating homes. *Id.* at 744, 2013 AMC at 10–11 (quoting WASH. REV. CODE ANN. § 90.58.270(5)(b)(ii) (West 2012)). Therefore, the reasonable observer test has the additional benefit that it promotes harmony between related state and federal laws. *Id.* at 744, 2013 AMC at 11.

Finally, the Supreme Court defended the reasonable observer test against two serious objections. First, the reasonable observer test does not inject a subjective element, the Court explained, because the test considers only objective facts about the structure's physical characteristics and activities.[94] The test leaves no room for debate about the owner's private intentions. Second, the reasonable observer test will not create uncertainty in admiralty jurisdiction because the test resolves borderline cases at least as well as any other test.[95] It may not be perfect, the Court conceded, but the reasonable observer test is both workable and consistent with the statute.[96]

Justice Sonia Sotomayor dissented, joined by Justice Anthony Kennedy.[97] While the dissent agreed with the majority's reading of the Court's precedents, it objected to the majority's formulation of the reasonable observer test and the majority's application of that test to the facts in this case.[98] The dissent accepted that the Eleventh Circuit's test was overbroad, that the owner's subjective intentions should not matter, and that what does matter is the structure's objective purpose.[99] The dissent parted ways with the majority, however, when it came to the reasonable observer test.[100] In the dissent's view, that test would make vessel status more subjective and uncertain.[101] Moreover, as applied by the majority, the reasonable observer test threatened to upset settled lower court precedents.[102] Aside from the reasonable observer test, the dissent's more basic concern was that the Court did not have enough information about the structure to make a decision.[103] Rather than remand the case, the majority chose to focus on the limited information available, and in the process it distorted the vessel status inquiry.[104]

As the dissent pointed out, no prior decision had suggested that courts should evaluate vessel status from the standpoint of a reasonable observer.[105] In fact, the majority's reasonable observer test closely resembles the "objective function" test urged by the United States in its

94. *Lozman*, 133 S. Ct. at 744–45, 2013 AMC at 11–12.

95. *See id.* at 745, 2013 AMC at 12–13.

96. *Id.* The Court also rejected calls to remand the case for more fact-finding. The only specific factual issue raised by the dissent concerned the extent of the damage suffered by the structure under tow, which would only have reinforced the Court's finding that the structure was not a vessel. *Id.* at 754, 2013 AMC at 25 (Sotomayor, J., dissenting). Therefore, the majority argued, remand was unnecessary. *Id.* at 745–46, 2013 AMC at 13 (majority opinion).

97. *Id.* at 748, 2013 AMC at 17 (Sotomayor, J., dissenting).

98. *Id.*

99. *Id.*

100. *Id.* at 751, 2013 AMC at 21.

101. *Id.* at 751–52, 2013 AMC at 21–23.

102. *Id.* at 753, 2013 AMC at 24–25.

103. *Id.* at 752–53, 2013 AMC at 23–24.

104. *Id.* at 754–55, 2013 AMC at 25–26.

105. *Id.* at 748–49, 2013 AMC at 17.

brief as amicus curiae supporting petitioner. In its brief, the Government argued that the statute and the Court's precedents show that a structure's purpose or function is relevant to vessel status, but only to the extent that purpose is evident in the structure's objective characteristics.[106] Thus, purpose can be determined without considering the owner's subjective intent. "Just as the owner's state of mind is not needed to determine how a structure is actually 'used,' neither does it govern what the structure is 'capable' of being used as. Instead, a structure's capabilities are inherent in its own attributes and circumstances."[107] The reasonable observer test embodies this objective function approach because it focuses on the structure's purpose but abstracts away the owner's subjective intent. It makes sense that when the Court set out to describe this approach it reached for a familiar common law device—that "excellent but odious character"[108]—the reasonable person. The reasonable observer serves a similar objectifying purpose in other areas of the law. For example, in contract law, courts evaluate manifestations of assent from the perspective of a reasonable observer.[109] Whatever his private wishes, did the person's actions show an intent to be bound by the contract?[110] Here, the reasonable person similarly excludes the owner's private wishes. Thus, although it does not expressly disapprove *De La Rosa*, which emphasized the owner's intended use for the structure, the *Lozman* Court's analysis makes clear that the owner's subjective intent should play no role in determining vessel status. Instead, *Lozman* directs courts to look at the structure's objective characteristics, but with an eye to purpose.

Although the test it proposed is new, *Lozman*'s effects on admiralty

106. *See* Brief for United States as Amicus Curiae Supporting Petitioner at 24–26, Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013) (No. 11-626), 2012 WL 1708727, at *24–26 .

107. *Id.* 24 (citations omitted); *see also* Landau, *supra* note 56, at 274 ("[T]he objective manifestations of an owner's intent . . . can serve as reliable indicia of the owner's intent. . . . . Thus, by first filtering out watercraft that are physically incapable of maritime transportation and second, filtering out watercraft that, based on the owner's objective manifestations, will not engage in maritime transportation, courts can construe vessel status in conformity with both *Stewart* and general maritime law.").

108. 1 A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 16 (1st Am. ed. 1930).

109. The reasonable person first appeared in the law of torts before being enlisted by the proponents of objectivity in contract interpretation. *See* Ricketts v. Penn. R. Co., 153 F.2d 757, 761 (2d Cir. 1946) ("The objectivists transferred from the field of torts that stubborn anti-subjectivist, the 'reasonable man'; so that, in part at least, advocacy of the 'objective' standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses.") (footnotes omitted). A similar desire for legal symmetry seems to have motivated the transfer of the reasonable person into maritime law.

110. *See, e.g.*, Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.").

jurisdiction may be relatively limited. First, the Supreme Court did not overrule *Stewart*. Instead, the reasonable observer test built on *Stewart* by "offer[ing] guidance in a significant number of borderline cases where 'capacity' to transport over water is in doubt."[111] This statement suggests that lower courts should continue to focus on practical capability and should apply the reasonable observer test only when capability cannot readily be determined. The *Lozman* Court also emphasized that its criterion was neither necessary nor sufficient for vessel status.[112] Some structures that look like vessels have been altered to make maritime transport practically impossible, and some strange-looking structures are actually used for maritime transport.[113] These examples show that satisfying the reasonable observer test is not essential for vessel status. This raises the possibility that someone who loses on the reasonable observer test can fall back and argue practical capability under *Stewart*, although the factual showing required to establish practical capability for a structure that fails the reasonable observer test may be very high. As one district court has already observed, *Lozman* "sent a shot across the bow of those lower courts that have 'endorse[d] the "anything that floats" approach' to defining vessels."[114] Although *Lozman* suggested a more restrictive approach, it remains to be seen how far-reaching its effects will be.

Unfortunately, even if its effects are limited, the reasonable observer test is seriously flawed. Most importantly, it fails to give effect to the plain meaning of the statute. Moreover, the test threatens to complicate admiralty jurisdiction and invite needless litigation over vessel status. For these reasons, the Supreme Court should abandon the reasonable observer test and return to the unmodified practical capability test.

First, the reasonable observer test goes against the plain meaning of the statute. The statute reads: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[115] As the Court noted, the word "contrivance" connotes something designed for a purpose, and the context—"watercraft or other artificial contrivance"—suggests that the purpose must be maritime transport.[116] But the crucial phrase "capable of being used"[117] makes clear that the structure's

111. Lozman v. City of Riviera Beach, 133 S. Ct. 735, 745, 2013 AMC 1, 13 (2013). It seems clear that "capacity" should be read here as synonymous with "capability."

112. *Id.* at 745, 2013 AMC at 12.

113. *See id.* at 745–46, 2013 AMC at 12–13.

114. Fireman's Fund Ins. Co. v. Great American Ins. Co. of N.Y., No. 10-1653, 2013 WL 311084, at *3, 2013 AMC 567, 572 (S.D.N.Y. Jan. 25, 2013) (quoting *Lozman*, 133 S. Ct. at 743, 2013 AMC at 10).

115. 1 U.S.C. § 3 (2006).

116. *Id.*; *Lozman*, 133 S. Ct. at 741–42, 2013 AMC at 7.

117. 1 U.S.C. § 3 (2006).

intended purpose does not have to be maritime transport as long as the structure *can* be used for that purpose. In short, the statute clearly focuses on the structure's capability. On the other hand, the reasonable observer test focuses only on the structure's intended purpose. Common sense tells us that there is a difference between being *designed* for something and being *capable of doing* something. A heavy book is designed for reading but it is capable of being used as a doorstop. A distinguished commentator observes that in *Stewart* the Court read "the word 'practically' into the statute."[118] That reading was defensible based on the statutory definition's roots in general maritime law.[119] In this case, the Court rewrote the statute, in effect, by replacing the words "capable of being used" with "designed for use." Even if some early authorities point toward the structure's design or purpose, the text of the statute simply cannot bear this meaning.

Second, applying the reasonable observer test broadly could make admiralty jurisdiction more uncertain and open new possibilities for wasteful litigation. The test raises more questions than it answers. For example, how much does the reasonable observer know about vessel design? Is she a naval architect or a layperson? Can she see below the waterline or through decks and bulkheads? In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, the Supreme Court emphasized the need for clear rules for determining admiralty jurisdiction.[120] In *Grubart*, the Court rejected a proposed multifactor test because it "would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal."[121] The reasonable observer test shares the multifactor test's uncertainty and manipulability. In fact, the reasonable observer is worse than a multifactor test, because while a multifactor test at least specifies what factors to take into account, the reasonable observer test invites speculation about what factors an observer would consider important. And the *Lozman* Court's consideration of aesthetic as well as functional criteria suggests that the range of factors is wide. As the dissent notes, this wide-ranging approach "gives [the majority's] vessel test an 'I know it when I see it' flavor."[122] Simply put, the reasonable observer test does not give courts enough guidance to determine vessel status efficiently.

If the Court had applied the practical capability test in this case, it

118. *See* Robertson, *supra* note 55, at 135.

119. *See* Grant, *supra* note 62, at 338–39.

120. 513 U.S. 527, 1995 AMC 913 (1995).

121. *Id.* at 547, 1995 AMC at 929.

122. Lozman v. City of Riviera Beach, 133 S. Ct. 735, 752, 2013 AMC 1, 22 (2013) (Sotomayor, J., dissenting) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

would have asked how much the structure was able to carry under tow, whether it could carry more than its own furniture and appliances, whether it could carry people, and if so, how many—that is, whether the structure was *practically capable* of transporting people and things on water. Answering these questions may have required additional fact-finding.[123] Moreover, in cases where there was no actual use—or where, as here, the extent of any actual use was unclear—answering these questions may involve some speculation. Even so, the practical capability test provides sufficient guidance for courts to conduct the factual inquiry into a structure's capability for maritime transport. The reasonable observer test may seem to conserve judicial resources because it allows the court to make a holistic determination based only on the structure's appearance. If all the court needs is a photograph of the structure, then there is no need for detailed fact-finding. But that kind of superficial determination may have little or nothing to do with the structure's actual capabilities. On the other hand, the practical capability test's more intensive factual inquiry is both manageable and faithful to the statute.

In *Lozman v. City of Riviera Beach*, the United States Supreme Court answered the question left open in *Stewart* about owner intent. Lower courts had split on that question. The Fifth Circuit continued to consider owner intent as an important factor,[124] while the Eleventh Circuit refused to consider owner intent—or anything else regarding the structure's purpose.[125] *Lozman* held, in short, that the Eleventh Circuit was right in refusing to consider the owner's subjective intent, but wrong in refusing to consider the structure's objective purpose.[126] The question is whether a reasonable observer would consider the structure to be designed to any practical degree for maritime transport.[127] Unfortunately, the reasonable observer test does not square with the text of the statute. Moreover, the test will make admiralty jurisdiction more uncertain by complicating the vessel status inquiry.

123. Thus, the dissent would have remanded the case. *See id.* at 754–55, 2013 AMC at 25–27.

124. *See* De La Rosa v. St. Charles Gaming Co., 474 F.3d 185, 2006 AMC 2997 (5th Cir. 2006).

125. *See* Bd. of Comm'rs v. M/V Belle of Orleans, 535 F.3d 1299 (11th Cir. 2008).

126. *See Lozman*, 133 S. Ct. at 744–45, 2013 AMC at 11–12.

127. *See id.* at 741, 2013 AMC at 5.