No. 11-626

In the Supreme Court of the United States

FANE LOZMAN, PETITIONER

v.

THE CITY OF RIVIERA BEACH, FLORIDA

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

STUART F. DELERY
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

CURTIS E. GANNON
Assistant to the Solicitor General

THOMAS M. BONDY
MICHAEL E. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce, constitutes a "vessel" under 1 U.S.C. 3, thus triggering federal maritime jurisdiction.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a floating residential structure that is indefinitely moored and receives power and other utilities from shore is a "vessel" under 1 U.S.C. 3. Although the case arises in the context of a residential structure, and the interpretation of the statutory definition of "vessel" is relevant in this case for purposes of establishing admiralty jurisdiction and the existence of the particular maritime lien asserted by respondent, this Court's construction of the definition of "vessel" could affect the activities of a number of federal agencies.

For instance, the Secretary of Labor administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* See 33 U.S.C. 939. As

this Court has recognized, the LHWCA and the Jones Act, 46 U.S.C. 30104-30106 (2006 & Supp. IV 2010), are "mutually exclusive compensation regimes," *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 355-356 (1995), and coverage under the Jones Act depends in part on whether an employee is a "master or member of a crew of any vessel," 33 U.S.C. 902(3)(G). See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 345-346 (1991). For that reason, among others, the United States participated as amicus curiae in *Stewart* v. *Dutra Construction Co.*, 543 U.S. 481 (2005), which construed the definition of "vessel."

By virtue of delegation from the Secretary of Homeland Security, the Coast Guard has various responsibilities associated with vessels, including an obligation to inspect many categories of vessels to ensure that they comply with safety regulations, see 46 U.S.C. 3301, and an obligation to prescribe safety regulations for both inspected and uninspected categories of vessels, see, *e.g.*, 46 U.S.C. 4102 (2006 & Supp. IV 2010), 4105, 4302, 4502 (2006 & Supp. IV 2010). After this Court's decision in *Stewart*, the Coast Guard adopted a policy of declining to inspect "craft that routinely operate dockside and do not normally get underway" when they "cannot be considered a vessel." 74 Fed. Reg. 21,814-21,815 (May 11, 2009). The extent of the Coast Guard's regulatory authority also affects the enforcement of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, which does not apply to working conditions with respect to which another federal agency exercises authority over occupational safety and health, see 29 U.S.C. 653(b)(1).

The Court's decision could also affect operations of the Maritime Administration (MarAd), within the Department of Transportation. MarAd oversees policies and programs intended to support and encourage a via-

ble and healthy maritime transportation industry, see 46 U.S.C. 50101 (2006 & Supp. IV 2010), 50103, and thus has an interest in greater certainty about the scope of admiralty jurisdiction. MarAd also owns and operates the National Defense Reserve Fleet, comprising formerly active vessels that may be moored for extended or indefinite periods of time and maintained in various states of readiness. 46 U.S.C. 57101.

STATEMENT

1. Section 3 of the Rules of Construction Act provides that "[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." 1 U.S.C. 3. This Court has recognized that Section 3's definition, which "has remained virtually unchanged from 1873 to the present," "codified the meaning that the term 'vessel' had acquired in general maritime law," and it "continues to supply the default definition of 'vessel' throughout the U.S. Code, 'unless the context indicates otherwise.'" *Stewart* v. *Dutra Constr. Co.*, 543 U.S. 481, 489-490 (2005) (quoting 1 U.S.C. 1).

In *Stewart*, the Court explained that "a 'vessel' is any watercraft practically capable of maritime transportation," as opposed to one for which "use 'as a means of transportation on water' is * * * merely a theoretical [possibility]." 543 U.S. at 496, 497. *Stewart* held that the *Super Scoop*—a large dredge that was used to dig a ¾-mile-long trench across Boston Harbor—was a "vessel" because, notwithstanding its "limited means of self-propulsion," the dredge had routinely "transport[ed] equipment and workers over water" in the course of its work. *Id.* at 484, 495. The Court contrasted that result with earlier cases in which a floating drydock and a float-

ing wharfboat were correctly found not to be vessels because they were permanently moored to a dock or "affixed to shore," and were therefore "not *practically* capable of being used to transport people, freight, or cargo from place to place." *Id.* at 493 (discussing *Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625 (1887), and *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19 (1926)).

2. Respondent brought an *in rem* action in federal district court against petitioner's floating home, seeking to enforce a maritime lien and seeking damages for an alleged maritime trespass. Pet. App. 2a, 7a-8a. The district court's admiralty jurisdiction and the existence of respondent's asserted lien both depend on whether respondent has established that petitioner's floating home was a "vessel." See 28 U.S.C. 1333(1) (providing federal district courts with jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction"); *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534-535 (1995) (admiralty jurisdiction over a tort claim depends in part on the injury's being "caused by a vessel on navigable water"); 46 U.S.C. 31342(a) (providing that a maritime lien is established when a person "provid[es] necessaries to a vessel").

The structure at issue in this case was a floating, two-level residence built primarily of plywood. J.A. 38. It was approximately 60 feet long and 12 feet wide and had a draft of approximately 10 inches. J.A. 37. The structure had no motive power or steering of its own. Pet. App. 18a. At least three of its four sides featured a pair of glass-paned double doors. J.A. 44-45. The first level of the interior included a main living room, a hallway, a kitchen, a bedroom, a closet, a "bathroom with domestic sink, medicine cabinet, domestic style toilet, tub [and]

shower," and several domestic-style appliances (an air conditioner, a stove and oven, a dishwasher, and a refrigerator/freezer). J.A. 39-40, 42, 55-56, 58-63. The second level included an office that opened onto a sun deck. J.A. 39.

Petitioner purchased the structure in 2002, and had it towed at least 200 miles from a location near Fort Myers, Florida, to North Beach Village, Florida. Pet. App. 3a; J.A. 71. He lived in the structure in two different marinas in North Bay Village until October 2005, when a hurricane destroyed the docks next to which it was moored. J.A. 73-74, 77-78. In March 2006, petitioner had it towed approximately 70 miles to the City of Riviera Beach, where he continued to use it as his primary residence until April 2009. Pet. App. 3a, 19a n.9. During those three years, the structure was moored by cables to a dock in a marina owned by respondent City of Riviera Beach. *Id.* at 3a, 18a. It received electrical power from land and was "connected continuously to city water." *Id.* at 18a; J.A. 31, 33.

Between August 2006 and March 2009, respondent repeatedly contended that petitioner was in violation of conditions contained in their original dockage agreement or a revised agreement that petitioner refused to sign, and that petitioner had fallen behind in his dockage-fee payments. J.A. 5-6; Pet. App. 5a-6a. Ultimately, in March 2009, respondent informed petitioner that he must pay his account in full, sign the new agreement, and bring the structure into compliance with its terms, or face legal proceedings for trespass and foreclosure on respondent's asserted maritime lien on the structure. Pet. App. 7a.

3. On April 20, 2009, respondent initiated the promised legal proceeding by filing an *in rem* complaint in

admiralty against the structure in the United States District Court for the Southern District of Florida. Pet. App. 7a-8a. The first count of the complaint sought to enforce a "statutory maritime lien for the provisioning of necessaries, specifically safe harbor and dockage, to the Defendant Vessel in the total amount of $1,464.38 for past due charges." J.A. 8. The second count sought damages for the maritime tort of trespass because petitioner failed "to remove the Vessel from its berth by April 1, 2009." J.A. 8-9. On the day the complaint was filed, the district court issued a warrant for the arrest of the defendant structure, and it was towed approximately 80 miles to Miami, Florida. Pet. App. 8a.

In August 2009, respondent moved for partial summary judgment on its trespass claim. As relevant here, petitioner opposed the motion on the ground that the district court lacked jurisdiction over the case "because his floating residential structure is not a vessel." Pet. App. 38a. The district court granted respondent's motion, holding in relevant part that the structure was a "vessel" for purposes of admiralty jurisdiction. *Id.* at 40a-42a.

Following a bench trial, the district court entered judgment in favor of respondent on both counts. Pet. App. 9a. With respect to the maritime lien, the court found that petitioner had been delinquent in the amount of $3039.88, and with respect to the trespass, it awarded nominal damages of $1. *Ibid.* The court entered final judgment on February 25, 2010, and ordered that the defendant structure be sold to satisfy the judgment. *Id.* at 9a-10a. On March 4, 2010, respondent purchased the structure. *Id.* at 10a.

4. On appeal, petitioner contended, as relevant here, that his floating home was not a "vessel" subject to fed-

eral admiralty jurisdiction. Pet. App. 11a. The court of appeals affirmed. *Id.* at 1a-32a.

The court of appeals concluded that, under "binding [Circuit] precedent," Pet. App. 12a, petitioner's floating structure was a "vessel." The Eleventh Circuit had previously held that "any definition of 'vessel' that relies on [a boat's] purpose" was inconsistent with *Stewart*. *Board of Comm'rs* v. *M/V Belle of Orleans*, 535 F.3d 1299, 1311 (2008) (*Belle of Orleans*). Applying that test, the court of appeals concluded that it is irrelevant whether the structure is "moored to a dock by cables, receive[s] power from land, and ha[s] no motive power or steering of its own." Pet. App. 18a. As long as the structure is "capable of moving over water, *albeit to her detriment*, and [is] capable of being transported under tow," then it "is a 'vessel' for purposes of admiralty jurisdiction." *Ibid.* (quoting and adding emphasis to *Belle of Orleans*, 535 F.3d at 1312). The court found that petitioner's floating home not only was capable of being towed, but "*was* towed several times over considerable distances." *Ibid.* It thus concluded that the structure "was practically capable of transportation over water by means of a tow, despite having no motive or steering power of its own." *Id.* at 21a.

In reaching its decision, the court of appeals explained that it had already "rejected the reasoning" of decisions by the Fifth and Seventh Circuits, which it construed as improperly "focus[ing] on the intent of the shipowner." Pet. App. 16a (quoting *Belle of Orleans*, 535 F.3d at 1311; discussing *Pavone* v. *Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), and *Tagliere* v. *Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006)). The court also deemed it "of little moment" that petitioner claimed his structure "was designed as a resi-

dence that just happened to float," because, in the court's view, vessel status "does not depend in any way on either the purpose for which the craft was constructed or its intended use." *Id.* at 19a.[1]

SUMMARY OF ARGUMENT

The term "vessel" is defined as including an "artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. In applying that definition, this Court has repeatedly distinguished between structures with a transportation function and fixed structures, whose function involves remaining in place on the water. Whether a structure is a "vessel" depends in significant part on its purpose or function, as indicated by objective criteria, including whether it remains essentially stationary while it is in use, and is therefore not practically capable of being used for maritime transportation.

A. The mere ability to float and be towed across water is not sufficient to establish that a structure is a "vessel." The court of appeals' contrary conclusion is inconsistent with several of this Court's decisions. In *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19 (1926), the Court held that a floating wharfboat that was moored to a dock on the shore of the Ohio River was "not practically capable of being used as a means of transportation," because, while in service there, it "remained at the same point" and "did not en-

[1] The court of appeals also upheld the district court's "factual findings regarding the amount [petitioner] owed under [respondent's] maritime lien for necessaries," Pet. App. 25a; sustained the district court's rejection of petitioner's affirmative defense that respondent's suit was impermissibly motivated by retaliation, *id.* at 25a-29a; and concluded that respondent's claims were not barred by estoppel, *id.* at 29a-32a.

counter perils of navigation to which craft used for transportation are exposed." *Id.* at 21, 22. It was therefore not a vessel, notwithstanding the Court's acknowledgment that, during its life, it had been repeatedly towed among three locations where it was used as a wharfboat, one location where it was repaired, and another location where it spent every winter. *Id.* at 20-21. The Court recently reaffirmed that the Evansville wharfboat was not a vessel under 1 U.S.C. 3, and endorsed other cases in which non-vessels had been towed. See *Stewart* v. *Dutra Constr. Co.*, 543 U.S. 481, 493-494, 496 (2005).

B. A structure's purpose or function should be considered when analyzing whether it is practically capable of being used for marine transportation. The text of 1 U.S.C. 3 presumes that a vessel has a discernible function because it uses the term "contrivance," which refers to something that was made or adapted with a design or purpose. In *Stewart*, the Court held that a dredge was a vessel because its "function was to move through Boston Harbor" as it dug a trench and it was therefore "used to transport" equipment and workers across the harbor. 543 U.S. at 495 (citation and internal quotation marks omitted). And the Court explained long ago that a chief consideration in determining vessel status is "the purpose for which the craft was constructed, and the business in which it is engaged." *The Robert W. Parsons*, 191 U.S. 17, 30 (1903). Moreover, a vessel's purpose or function is relevant to other common maritime-law questions.

C. In determining whether a structure is a vessel, its purpose or function should be considered on the basis of objective criteria, rather than the owner's subjective intentions. That is consistent with the statute's reference to what the structure is "capable" of being used as and with this Court's focus on "practical[]" capability. *Stew-*

art, 543 U.S. at 496. Evaluating purpose and function on the basis of objective criteria—which change less quickly than subjective intentions—will also minimize the likelihood that a "watercraft [will] pass in and out of" vessel status, *id.* at 495, or that its status will be subject to manipulation.

D. When a floating structure's function is to remain stationary near the shore, it is often not practically capable of being used for maritime transportation. In implementing this Court's decision in *Stewart*, the Coast Guard has established a policy to identify when "Craft Routinely Operated Dockside" are not "vessels" and thus not required to be inspected. That policy identifies several relevant, objective factors, including whether the structure has "practical access to navigable water," how it is "affixed to the shore," whether it would be "endangered because of its construction" if it "were operated in navigation," whether it can "get underway" in less than eight hours, and its "purpose, function, or mission." 74 Fed. Reg. 21,814-21,815 (May 11, 2009). The court of appeals erred in denying the relevance of virtually all of those factors.

E. The district court and court of appeals focused inordinately on whether it could be "mov[ed] over water, albeit to her detriment." Pet. App. 18a, 42a (citation omitted). Although some evidence tends to support petitioner's contention that his home was not a vessel, there are no determinations (and little evidence) about its purpose or function, its design, or how suitable it was for being towed or for being used as a means of transporting people, freight, or cargo. This Court should vacate the decision of the court of appeals and remand to allow the courts below to determine in the first instance whether there are any genuine disputes of material fact bearing

on the vessel-status question, on which respondent bears the burden of proof.

ARGUMENT

WHETHER A STRUCTURE IS A "VESSEL" DEPENDS IN SIGNIFICANT PART ON ITS OBJECTIVE PURPOSE OR FUNCTION, INCLUDING WHETHER IT REMAINS ESSENTIALLY STATIONARY NEAR THE SHORE WHILE IN USE

Section 3 of the Rules of Construction Act defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. That definition, which is essentially unchanged since 1873, was and is consistent with the term's established meaning in general maritime law. See *Stewart* v. *Dutra Constr. Corp.*, 543 U.S. 481, 489-490, 492 (2005). Because the definition applies in myriad federal statutes—except where "the context indicates otherwise," 1 U.S.C. 1; see *Stewart*, 543 U.S. at 490—its construction affects the scope of admiralty jurisdiction and the application of various statutory schemes in ways that sometimes benefit civil plaintiffs (*e.g.*, by providing generous protections for crew members under the Jones Act, 46 U.S.C. 30104 (Supp. IV 2010)) and sometimes benefit civil defendants (*e.g.*, by capping certain liabilities at the value of a vessel and its freight, 46 U.S.C. 30505). The scope of the definition also affects the border between non-overlapping regulatory authorities of different federal agencies (see p. 2, *supra*), and, in some instances, the border between the applicability of federal and state law, see *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513

U.S. 527, 545-546 (1995).[2] See generally 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-6, at 109 (4th ed. 2004) (Schoenbaum).

The various rules that turn on the presence or absence of a "vessel" are predicated on the long-settled background understanding that a vessel is "a means of maritime transportation," *Stewart*, 543 U.S. at 491, that therefore exposes itself and its crew, passengers, or cargo to the many "perils of navigation," *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) (*Evansville*); see also *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 368 (1995) (explaining that the purpose of requiring Jones Act seamen to have a "connection to a vessel" is to single out those whose employment "regularly expose[s] them to the perils of the sea"); *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920) (explaining that maritime liens are necessary because a vessel's "function is to move from place to place"). In this case, the court of appeals adopted an unduly broad construction of the term "vessel" because it lost sight of the fundamental distinction—recently reiterated in *Stewart*—between structures with a transportation function and those whose function involves remaining in place on the water.

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[2] Even when a structure is not a vessel, that does not necessarily mean that admiralty jurisdiction cannot attach to any incident in which it is involved. Some "fixed structures completely surrounded by water" are navigational aids that may trigger admiralty jurisdiction. See *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 360 (1969). And when a non-vessel is being towed by a vessel, an accident involving it could well be "on navigable water" or "caused by a vessel on navigable water" and have a sufficient "relationship to traditional maritime activity" for there to be admiralty jurisdiction over an alleged tort. *Jerome B. Grubart*, 513 U.S. at 534 (citation omitted); see 28 U.S.C. 1333(1); 46 U.S.C. 30101(a).

A. The Mere Ability To Float And Be Towed Across Water Is Not Sufficient To Establish That A Structure Is A "Vessel"

The court of appeals concluded that petitioner's floating home was a "vessel" for essentially one and only one reason: because it "was towed several times over considerable distances." Pet. App. 18a (emphasis omitted). In the court of appeals' view, that fact sufficed to establish that the structure had a "practical capacity for transportation over water." *Id.* at 19a. The court thus dismissed evidence of the floating home's design as being "of little moment," *ibid.*, and it even indicated that evidence that the home "sustained serious damage" when it was towed would be immaterial, in light of a previous case holding that a riverboat casino, the *Belle of Orleans*, "was capable of moving over water, *albeit to her detriment*," and was therefore a vessel. *Id.* at 18a (quoting and adding emphasis to *Board of Comm'rs* v. *M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)). While the court of appeals' test may have the virtue of relative simplicity, it is flatly inconsistent with several cases whose viability was reaffirmed in *Stewart*.

In the context of construing 1 U.S.C. 3, *Stewart* discussed and embraced "the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore." 543 U.S. at 493. In the latter category were, *inter alia*, the wharfboat in *Evansville*, *supra*, and the floating drydock in *Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625 (1887), neither of which was a "vessel." As those decisions recognized, a floating structure is not a "means of transportation" merely because the structure itself is capable of being transported over water.

1. The wharfboat in *Evansville* provides an especially clear illustration of the court of appeals' error here, because this Court found that the wharfboat was not a vessel even though it had been repeatedly towed from one location to another.

When the wharfboat was in use in Evansville, Indiana, "it was secured to the shore by four or five cables and remained at the same point except when moved to conform to the stage of the river" (*i.e.*, moved closer to or farther from the center of the river as the river rose or fell). *Evansville*, 271 U.S. at 21. "It served at Evansville as an office, warehouse and wharf," storing freight and enabling people and freight to move between riverboats and docks leading to the shore. *Id.* at 22.[3] Local water, electricity, and telephone lines all ran from shore to the wharfboat. *Id.* at 21. Observing that the wharfboat "was not taken from place to place" and that it "performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land," the Court held that the floating wharfboat was not a "vessel" because "[i]t was not practically capable of being used as a means of transportation." *Id.* at 22.

As relevant here, however, the Court focused exclusively on what the wharfboat did "*at Evansville*" when stating that it "was not taken from place to place." 271 U.S. at 22 (emphasis added). For, as the Court explained in detail, the wharfboat had been towed repeatedly from one location to another. Between 1884 and 1922, it had been used at locations in Hopefield, Arkansas; Louisville,

[3] Pictures of the wharfboat at issue appear in the Transcript of Record, *Evansville*, *supra* (No. 127) (between pages 38 and 39); see also *id.* at 37, 59 (testimony about docks situated between the wharfboat and the shore).

Kentucky; and Evansville, Indiana. *Id.* at 20. It had twice been towed to Madison, Indiana, for repairs. *Ibid.* Even after it was put in use at Evansville, it was towed every winter between 1915 and 1922 from its location in the Ohio River "to Green River harbor to protect it from ice." *Id.* at 20-21.[4] The opinion in *Evansville* also cites (*id.* at 22) two other cases that expressly observed or held that a structure's ability to be towed does not make it a "vessel." See *Patton-Tully Transp. Co.* v. *Turner*, 269 F. 334, 337 (6th Cir. 1920) (assuming that a wharfboat with a derrick that was "firmly moored to the land[] would be outside the maritime jurisdiction, even though it was contemplated that it might, on occasion, be towed to another location"); *Ruddiman* v. *A Scow Platform*, 38 F. 158, 158 (S.D.N.Y. 1889) (holding that a floating platform was not a vessel; noting it "was mainly stationary, and rarely moved," though "it was capable of being towed from one wharf to another").

Stewart concluded that *Evansville* is consistent with, and not a "narrow[ing]" of, Section 3's definition of "vessel," 543 U.S. at 493, thus demonstrating that the ability to be towed across water cannot suffice to make a structure practically capable of being used as a means of transportation.

2. Other cases cited by *Stewart* are consistent with that conclusion. In *Cope,* the Court held that a floating drydock that had been chained for 20 years in the same place on the bank of the Mississippi River was not a vessel. 119 U.S. at 627; see *ibid.* ("A fixed structure * * * is[] not used for the purpose of navigation * * * . The

[4] The opinion in *Evansville* does not mention whether the structure was used as a wharfboat during its winters in the Green River harbor, but the parties' briefs stated that it was not in use at those times. Appellant's Br. at 3 and Appellees' Br. at 3, *Evansville*, *supra* (No. 127).

fact that it floats on the water does not make it a ship or vessel."). The Court noted that the drydock had "been put in position by being permanently moored," but it did not attach any significance to how the drydock had come to be in that place, or whether it could be moved somewhere else if it were unchained. *Ibid.*; see *Patton-Tully Transp. Co.*, 269 F. at 337 (noting that the drydock in *Cope* was "doubtless * * * capable of being towed from place to place"). Instead, *Cope* categorically compared the drydock to "a floating-bridge, or meeting-house, permanently moored or attached to a wharf," 119 U.S. at 630—even though such structures often would have been transported over water to their mooring. See *id.* at 627 (describing "[a] sailor's floating bethel, or meeting-house, moored to a wharf[] and kept in place by a paling of surrounding piles" as a "fixed structure").

Stewart also approvingly cited the Fifth Circuit's decision in *Pavone* v. *Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (1995), as an example of a structure that was "no longer a vessel where it 'was moored to the shore in a semi-permanent or indefinite manner.'" 543 U.S. at 494 (quoting *Pavone*, 52 F.3d at 570). This Court's use of the phrase "semi-permanent or indefinite" —rather than words such as "permanent" or "irreversible"—implicitly recognized that a structure's susceptibility to *some* future movement does not necessarily make it a vessel.[5] Moreover, *Pavone* explained that the barge at issue there had been used as a floating restaurant and bar or as a casino in three different locations

[5] *Stewart* acknowledged that not even "permanent" means unalterably so. See 543 U.S. at 496 ("A ship * * * [that is] *permanently* moored to shore or the ocean floor can be cut loose and made to sail.") (emphasis added).

(two in Texas and one in Mississippi), and that it had been towed among them. 52 F.3d at 563-564.

Finally, another passage in *Stewart* (543 U.S. at 496) referred to formerly active ships in two cases as examples of structures that had "los[t] their character as vessels," even though they were towed between different locations during their non-vessel phase. See *Roper* v. *United States*, 368 U.S. 20, 21, 23 (1961) (deactivated Liberty ship towed between its moorings and a grain-loading facility); *West* v. *United States*, 361 U.S. 118, 119-120 (1959) (deactivated Liberty ship towed from Norfolk, Virginia, to Philadelphia).

In short, the narrow focus of the decision below on whether a structure can be towed over water cannot be reconciled with the holdings of the foregoing cases, each of which *Stewart* considered to be consistent with Section 3's definition of "vessel."[6]

B. The Purpose Or Function Of A Structure Should Be Considered When Analyzing Whether It Is Practically Capable Of Being Used For Marine Transportation

As part of its focus on whether a craft can be towed across water, the court of appeals rejected any consideration of "either the purpose for which the craft was con-

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[6] Of course, the fact that a structure does not have its own means of propulsion and can engage in transportation only when towed does not prevent it from being a "vessel." See, *e.g.*, *Stewart*, 543 U.S. at 484 (noting that the *Super Scoop* was "moved long distances by tugboat" and negotiated "short distances by manipulating its anchors and cables"); *Norton* v. *Warner Co.*, 321 U.S. 565, 571 (1944) ("A barge is a vessel * * * even when it has no motive power of its own, since it is a means of transportation on water."); *The Robert W. Parsons*, 191 U.S. 17, 31-32 (1903) (noting that canal boats on the Erie Canal, which were vessels, were drawn by horses to Albany and then "taken by a steamer in tow to New York or Jersey City").

structed or its intended use." Pet. App. 19a. It believed that this Court had "clearly rejected any definition of 'vessel' that relies on such a purpose," *id.* at 16a (quoting *Belle of Orleans*, 535 F.3d at 1311), because *Stewart* specified that Section 3 "does not require that a watercraft be used *primarily*" as a means of transportation, 543 U.S. at 495.

While *Stewart* did decline to require that transportation be a vessel's *primary* purpose, it did not disavow any inquiry into purpose. Indeed, a refusal to consider a structure's purpose or mission is inconsistent with the text of 1 U.S.C. 3, with this Court's application of that statute in *Stewart*, and with maritime law's long-established approach to defining the term "vessel." Nor can it be said that searching for a vessel's purpose is folly, as resolution of other maritime-law questions necessarily takes account of a vessel's purpose, function, or mission.

1. The statutory text presumes that a "vessel" has a discernible purpose or function

The text of 1 U.S.C. 3 itself strongly implies that a "vessel" has a discernible purpose or function, because it recognizes that a vessel is an "artificial contrivance." Since the statute was first enacted, the plain meaning of the words in that phrase has indicated that the thing in question is man-made ("artificial") and that, as a "contrivance," it was made (or adapted) with a design or purpose. See 3 *Oxford English Dictionary* 850 (2d ed. 1989) (defining "contrivance" as "something contrived for, or employed in contriving to effect a purpose"); 2 *Oxford English Dictionary* 926 (1933) (same); *Webster's New International Dictionary* 580 (2d ed. 1958) (defining "contrive" as "[t]o fabricate as a work of art or ingenuity; design; invent"; and defining "contrivance" as "state of

being contrived; disposition of parts or causes by design; adaptation"); 1 Noah Webster, *An American Dictionary of the English Language* s.v. contrive (1828) (illustrating "contrive" with the following: "Our poet has always some beautiful design, which he first establishes, and then *contrives* the means which will naturally conduct him to his end.").

Moreover, whether a structure is "used, or capable of being used, as a means of transportation on water" (1 U.S.C. 3) itself focuses on how the structure is capable of functioning (*i.e.*, achieving the purpose of transportation). That text plainly requires more than that the structure have the capacity to float or to *be* transported over water. It requires that the structure be practically capable of *doing* the transporting of persons or goods (*i.e.*, that it be a suitable "means" of transportation).

2. This Court has often considered a structure's purpose or function in determining whether it was a "vessel"

Consistent with those textual indications, this Court has often considered a structure's purpose or function in determining whether it was a "vessel."

Although the court of appeals read *Stewart* as precluding *any* inquiry into a potential vessel's "purpose," Pet. App. 16a, this Court specifically referred to the dredge at issue in *Stewart* as a "special-purpose vessel[]," 543 U.S. at 494, and it affirmatively invoked the dredge's function in explaining that it had been used to transport things. It explained that "the *Super Scoop*'s *function* was to move through Boston Harbor, . . . digging the ocean bottom as it moved," and that it had in fact been "used to transport" equipment and workers as it "traverse[d]" the harbor. *Id.* at 495 (emphasis added; citation and internal quotation marks omitted). Thus, the

dredge's operations were inherently waterborne, and transportation across the water was critical to its ability to function and achieve its purpose.

Such express consideration of a putative vessel's purpose or function has a long pedigree. In *The Robert W. Parsons*, 191 U.S. 17 (1903), the Court held that a canal boat was a vessel and was distinct from land-like structures such as a "dry dock," "ferry bridge or sailors' floating meeting house," which were "no more used for the purposes of navigation than a wharf or a warehouse projecting into or upon the water." *Id.* at 34. It summarized its standard as follows: "neither size, form, equipment nor means of propulsion are determinative factors upon the question of [admiralty and maritime] jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged." *Id.* at 30.

That sentiment closely echoed an earlier treatise on admiralty law, which had stated as follows: "It is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes the jurisdiction, but the purpose and business of the craft, as an instrument of naval transportation." Erastus C. Benedict, *The American Admiralty* § 218, at 117 (3d ed. 1894); see Erastus C. Benedict, *The American Admiralty* § 218, at 121 (2d ed. 1870) (same). And subsequent treatises have repeated the same maxim. See 1 Steven F. Friedell, *Benedict on Admiralty* § 164, at 10-6 (7th ed. rev. 2011); 1 Erastus C. Benedict, *The American Admiralty* § 53, at 74 (5th ed. 1925); Schoenbaum § 3-6, at 110 ("The most basic criterion used to decide whether a structure is a vessel is the *purpose* for which it is constructed and the business in which it is engaged.").

Many of the other decisions discussed above affirmatively invoked a structure's purpose or function when analyzing whether it was a "vessel." For instance, in *Evansville*, the Court cited *The Robert W. Parsons* and concluded that the Evansville wharfboat "performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land." 271 U.S. at 22. In *Roper*, the Court concluded that the S.S. *Harry Lane* was not a vessel at the relevant time because its "function" was to "stor[e] grain until needed," not "to transport commodities from one location to another." 368 U.S. at 23. The Court found those structures not to be vessels, based on their functions, without inquiring into whether the wharfboat had its furnishings or any personnel on it when it was being towed, and despite the fact that the *Harry Lane* had grain and personnel on it while it was being towed. *Ibid.* In *Cope*, the Court concluded that structures "attached to a wharf" were not vessels and contrasted them with a barge that "was a navigable structure used *for the purpose* of transportation." 119 U.S. at 630 (emphasis added); see also *Ruddiman*, 38 F. at 158 (holding that floating platform was not a vessel "because it was not designed or used for the purpose of navigation * * * nor in the transportation of persons or cargo").

Because *Stewart* itself considered the *Super Scoop*'s "function" and reaffirmed that *Evansville*, *Roper*, and *Cope* are consistent with 1 U.S.C. 3, the court of appeals erred in concluding that it was foreclosed from considering any evidence of the purpose or function of petitioner's floating home.

3. Resolution of other maritime-law questions also turns on a vessel's purpose or function

Even outside the context of determining whether a structure is a vessel, maritime-law questions often depend upon a particular vessel's purpose or function.

For example, a critical threshold question in many Jones Act cases is whether an injured employee was a "seaman." 46 U.S.C. 30104 (Supp. IV 2010). *Stewart* reiterated that, even when an employee works on a "vessel," he is still not a Jones Act seaman unless "his duties contribute[] to the vessel's function or mission." 543 U.S. at 494; see also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 355 (1991) ("the requirement that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission captures well an important requirement of seaman status") (brackets and internal quotation marks omitted).

Similarly, when a vessel is subject to Coast Guard inspection, that inspection process must ensure, *inter alia*, that the vessel "is of a structure suitable for the service in which it is to be employed." 46 U.S.C. 3305(a)(1)(A). And determining whether an owner is liable for providing an "unseaworthy" vessel depends in part on the vessel's purpose. See *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 317 n.3 (1964) ("The shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended[.]").

In fact, respondent's own attempt to enforce a maritime lien for the provision of "necessaries" presupposes that petitioner's structure had a discernible purpose or function. Respondent alleges (J.A. 5, 8) that it provided "safe harbor and dockage," establishing a maritime lien

under 46 U.S.C. 31342(a). Although those services are not included in the statutory definition of "necessaries," that definition is introduced by the word "includes" and has generally been understood to be a nonexhaustive list.[7] But the standard for determining whether unenumerated items are "necessaries" is whether they are "things which a careful and provident owner would provide to enable [the vessel] to perform well *the functions* for which, as a maritime agent, she has been designed and engaged." 2 Thomas A. Russell, *Benedict on Admiralty* § 35, at 3-20 (7th ed. rev. 2010) (emphasis added); see also Schoenbaum § 9-3, at 530 ("[T]he term 'necessaries' is broadly construed by the courts to mean any goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her *particular function*.") (emphasis added; internal quotation marks omitted).

Accordingly, there is nothing unusual or untoward about having to determine a structure's purpose or function in deciding whether it is to be a vessel.

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[7] The definition reads as follows: "'necessaries' includes repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. 31301(4). That definition was the product of a codification that omitted the catch-all term "other necessaries," which had previously appeared at 46 U.S.C. App. 971 and 972 (Supp. V 1987). The accompanying House Report said: "As in all codifications, the term 'includes' means 'includes but is not limited to' and, therefore, is not intended to be an exclusion [*sic*] listing of those items that a court has determined or may determine as falling within the meaning of the term 'other necessaries' as contained in current law." H.R. Rep. No. 918, 100th Cong., 2d Sess. 36 (1988). Cf. *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2287 (2010) ("[T]he word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive.").

C. A Structure's Purpose Or Function Should Be Considered In Light Of Objective Criteria Rather Than The Owner's Subjective Intentions

Although the court of appeals erred in declining altogether to consider a structure's "purpose" or "its intended use," Pet. App. 19a, that court was appropriately wary of basing its decision on bare evidence of "an owner's intentions," *id.* at 16a. The statutory text and this Court's cases indicate that a putative vessel's purpose or function should be determined in light of its inherent qualities and circumstances—not merely on what the owner may happen to intend for it at a given time.

According to Section 3, a vessel must be "used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. 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. See 2 *Oxford English Dictionary* 856 (2d ed. 1989) (defining "capable" as "[h]aving the needful capacity, power, or fitness for (some specified purpose or activity)"); *Webster's New International Dictionary* 395 (2d ed. 1958) (defining "capable" as "[h]aving ability or fitness"). This Court's focus on whether a structure is "practical[ly]" (instead of "theoretical[ly]") capable of transportation use is a further indication that real-world circumstances control, not what is in the owner's head. *Stewart*, 543 U.S.C. at 496.[8] And so is the observation that Section 3

[8] The Court's distinction between the practical and the theoretical also supports petitioner's observation (Pet. Br. 20-21 & n.7) that Section 3 uses "capable" in the sense of what something is "*suited*" for, rather than what is "within the realm of conceivability."

does not apply to the "array of fixed structures not *commonly thought of* as capable of being used for water transport." *Id.* at 494 (emphasis added).

Of course, an owner may act on subjective intentions in ways that directly affect his property's fitness for certain uses. Repairing or otherwise improving a structure might give it new capabilities (or revive dormant ones); by the same token, it could be dismantled, or placed in circumstances that effectively deprive it of a capability. Either way, however, a structure's intrinsic *fitness* for a particular use can be determined on the basis of objective criteria.[9]

Using objective criteria to evaluate a structure's purpose or function is consistent with the principal cases discussed above (*Stewart*, *Evansville*, *Cope*, and *Roper*), in which the Court looked to the physical attributes and history of use of a dredge, a wharfboat, a drydock, and a deactivated ship used as a grain warehouse to determine whether they were practically capable of being used for maritime transportation. Those decisions did not endorse the proposition that a structure could be fit for navigation and yet held back from vessel status by the

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[9] The inquiry may be more difficult for watercraft that were once vessels but have arguably "los[t] their character as vessels," *Stewart*, 543 U.S. at 496, because there is necessarily a transition from one phase to another. Such structures will often retain some vessel-like characteristics even after they have reached the point of being "taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport." *Ibid.* Cf. *Chandris*, 515 U.S. at 374 ("At some point, * * * repairs become sufficiently significant that the vessel can no longer be considered in navigation."). Such a situation, however, is not presented here, where neither side contends that petitioner's home switched (in either direction) between vessel and nonvessel status.

owner's unwillingness to send it on a voyage.[10] Refusing to give dispositive weight to an owner's subjective intentions—when they are not adequately reflected in objective criteria—is consistent with the Court's recurring concern about having a "watercraft pass in and out of" vessel status. *Stewart*, 543 U.S. at 495; see also *id.* at 496 (contemplating that a change in status may be based on "extended periods of time" but not on "any given moment"); *Chandris*, 515 U.S. at 363. It is also less subject to manipulation in litigation and is more amenable to consistent application by regulatory agencies.

D. When A Floating Structure's Function Is To Remain Stationary Near The Shore, That Function Will Often Be Highly Probative Of Whether It Is Practically Capable Of Being Used For Maritime Transportation

Stewart reaffirmed the distinction between "fixed structures" (which are not vessels and "not commonly

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[10] The Fifth Circuit's decision in *De La Rosa* v. *St. Charles Gaming Co.*, 474 F.3d 185 (2006), which postdates *Stewart* and *Pavone*—arguably did endorse that proposition. The "boat[]" in that case had been "used as a seagoing vessel" before 2001 and "was still physically capable of sailing," but the court held that such use was "merely theoretical," because the boat had been "indefinitely moored" on Lake Charles for five years, it received utilities from land-based sources, and its owners' intent was "to use it solely as an indefinitely moored floating casino." *Id.* at 186-187. In *Tagliere* v. *Harrah's Illinois Corp.*, 445 F.3d 1012 (2006), the Seventh Circuit suggested that an owner's subjective intentions could determine whether a vessel was "permanently" or "indefinitely" moored, but it acknowledged that "[t]he difference between 'permanently' and 'indefinitely' in this context is vague" and would need to be "explor[ed] on remand." *Id.* at 1016.

As noted above (at pp. 16-17 & note 5), *Stewart* recognized that even a "semi-permanent" or "indefinite" mooring could prevent something from being a vessel, as very few moorings are so "permanent" that they could never be changed at some point in the future.

thought of as capable of being used for water transport") and vessels that are only "temporarily stationed in a particular location." 543 U.S. at 493, 494. The dredge in *Stewart* fell in the latter category. It operated away from shore and its mobility over water was essential to its purpose and function. Like any vessel in navigation, even when it was "moored to a dock," it "remain[ed] in readiness for another voyage," *Chandris*, 515 U.S. at 374 (quoting 2 Martin J. Norris, *The Law of Seamen* § 30.13, at 364 (4th ed. 1985)), during which it would again be used to "transport equipment and workers over water." *Stewart*, 543 U.S. at 495.

By contrast, the wharfboat in *Evansville* operated at a fixed place in the Ohio River. It performed its functions—as "an office, warehouse and wharf," 271 U.S. at 22—while remaining next to a dock. It did not need to be, and it was not, "taken from place to place" while performing those functions; its connections to land-based utilities "evidence[d] a permanent location"; and "[i]t did not encounter perils of navigation" while performing that function (even though it had been repeatedly towed, either to perform the same, stationary functions in another location, or to be repaired, or to be safe from ice). *Id.* at 20-22. The wharfboat was therefore not "*practically* capable of being used to transport people, freight, or cargo from place to place." *Stewart*, 543 U.S. at 493.

After *Stewart*, the Coast Guard—which has statutory obligations to conduct periodic inspections of many categories of vessels, including large passenger vessels, 46 U.S.C. 3301, 3307—established a policy to identify when "Craft Routinely Operated Dockside" are not "vessels" and therefore not subject to inspection. See 74 Fed. Reg. 21,814 (May 11, 2009). The Coast Guard had previously explained that there are sound policy reasons to treat

some waterborne structures—especially some used as permanently moored casinos—as being beyond the "parameters envisioned by vessel regulatory standards." 69 Fed. Reg. 34,385 (June 21, 2004). For example, passenger vessels are structured to give swift access to lifeboats (typically on upper decks) during emergencies. 46 C.F.R. 72.10-40. By contrast, occupants evacuating a land-based building normally attempt to escape through a street-level exit. Because gangways are generally better than lifeboats for evacuating a ship that is indefinitely moored, the Coast Guard explained that, for craft that are routinely operated dockside, "the structural fire protection standards related to means of escape, safe refuge and dimensions of spaces" associated with "shoreside structures" are more appropriate than those that apply to vessels that actually get underway and take passengers away from the shore. 69 Fed. Reg. at 34,385.

In its 2009 policy, the Coast Guard recognized that various factors bear on the question of whether a structure routinely operated dockside—*i.e.*, not at an offshore location—possesses "the practical * * * capability * * * to operate as a means of transportation on water." 74 Fed. Reg. at 21,815. It articulated the following, nonexclusive list of objective factors:

- Is the craft surrounded by a cofferdam, land or other structure, such that although floating, it is in a "moat" with no practical access to navigable water?

- Is the craft affixed to the shore by steel cables, I-beams or pilings, or coupled with land based utility connections for power, water, sewage and fuel?

- If the craft were operated in navigation, would it be thereby endangered because of its construction?

> • What is the purpose, function, or mission of the craft?
>
> • Can the craft get underway in less than eight (8) hours? If more than eight hours are required, the [relevant Coast Guard Officer in Charge of Marine Inspection] will determine if the delay was attributable to factors outside the owner's or operator's control, in which case the delay may be overlooked.

Ibid.[11]

By denying the relevance of virtually all of those factors, the court of appeals effectively erased the category of fixed structures that *Stewart* expressly excluded from "vessel[s]" under 1 U.S.C. 3.

E. This Case Should Be Remanded To Determine Whether Petitioner's Structure Was Practically Capable Of Being Used For Maritime Transportation

As this Court acknowledged in *Stewart*, whether a structure is a "vessel" is an inquiry that "may involve factual issues for the jury." 543 U.S. at 496 (citing *Chandris*, 515 U.S. at 373). Here, respondent bears the burden of proving that petitioner's structure was a "vessel," because it contends that fact gave the district court admiralty jurisdiction. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006). Because the vessel-status question was decided in respondent's favor at summary judgment, disputed questions of fact must be resolved in petitioner's favor. Fed. R. Civ. P. 56(a).

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[11] This Office has been informed by the Coast Guard that adopting the Eleventh Circuit's test on a nationwide basis would significantly increase the number of large passenger "vessels" that the Coast Guard would be required to inspect, diverting time and resources away from structures that are far more relevant to maritime safety and security.

Some evidence tends to support petitioner's contention that his floating home was not a vessel. At the time of its arrest, it had been continuously moored next to a dock in respondent's marina for three years, and it had left its previous dockside location in another marina only after that marina was destroyed by a hurricane. Pet. App. 3a. Like the wharfboat in *Evansville*, it had no motive power or steering, and it received some utilities (including electricity and water) from land. *Id.* at 18a; J.A. 31, 33. Over a period of several years, it was only rarely towed, and even then, there was some evidence that it could be towed only with great care, at very low speeds, in relatively calm waters. J.A. 75, 103-104. To the extent that its purpose or function was to serve as a floating residence, it appears to have been used that way only while adjacent to a dock and quite close to shore.

The district court, however, did not determine whether there were genuine disputes about many of the facts that, as discussed above, may be relevant to the vessel-status inquiry. To the contrary, the court acknowledged that petitioner (who was proceeding *pro se*) "places significance on the fact that moving the [d]efendant vessel may easily damage it," but the court dismissed that concern as irrelevant in light of circuit precedent focusing on whether a structure could be "mov[ed] over water, albeit to her detriment." Pet. App. 42a (quoting *Belle of Orleans*, 535 F.3d at 1312); see also Pet. Br. 5 n.6 (describing petitioner's offer to secure evidence that his home had previously been damaged when it was towed). The court also noted that its standard made evidence about the structure's "present use" irrelevant. Pet. App. 40a. Accordingly, there are no determinations (and little evidence) about the purpose or function of petitioner's floating home; about its design; or

about how suitable the structure was for being towed or for being used as a means of transporting people, freight, or cargo. The court of appeals criticized some of petitioner's contentions about the design of his home and the damage it had suffered as being unsupported by or contradicted by the record evidence, *id.* at 18a-19a, but it endorsed the district court's approach by treating those issues as irrelevant to its analysis.

If this Court concludes that the critical determination made by both of the lower courts—that petitioner's floating home had been towed significant distances—was insufficient to establish that the structure was a "vessel," it should vacate the judgment below and remand for further proceedings in light of the correct legal standard, rather than resolve in the first instance whether the record reflects any genuine disputes of material fact bearing on the vessel-status question, on which respondent bears the burden of proof.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
THOMAS M. BONDY
MICHAEL E. ROBINSON
Attorneys

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