No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN,
Petitioner,
v.
THE CITY OF RIVIERA BEACH, FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS*[1]

The Maritime Law Association of the United States ("MLA") is a voluntary, nationwide bar association founded in 1899 and incorporated in 1993. The MLA has a membership of approximately 3,000 attorneys, law professors and other distinguished members of

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

the maritime community. The MLA is affiliated with the American Bar Association, and it is represented in the ABA's House of Delegates.

The MLA's attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests: ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, underwriters, financiers and other maritime claimants and defendants. MLA members include private practitioners, in-house counsel, academics and members of the judiciary.

The MLA's purposes, as stated in its Articles of Incorporation, are:

> To advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.[2]

In an effort to promote these objectives, the MLA has supported legislation dealing with maritime matters and has cooperated with Congressional committees and Executive Branch agencies in the formulation of legislation and federal maritime

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[2] "About the MLA," MARITIME LAW ASSOCIATION, http://www.mlaus.org (last visited July 11, 2012).

policy. The MLA also assists with international maritime programs and initiatives alongside the United Nations, the International Maritime Organization and the Comité Maritime International. Consistent with its objective to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in numerous cases that have raised questions substantially affecting admiralty practice and jurisdiction.[3] Indeed, the MLA filed a *certiorari*-stage *amicus* brief in this case encouraging the Court to resolve the circuit conflict that has arisen between the Fifth and Eleventh Circuits.

With the consent of all parties, the MLA submits this brief as *amicus curiae* out of deep concern that the growing "split in the circuits" over the definition of "vessel" in Title 1, Section 3 of the U.S. Code may jeopardize a wide range of commercial and legal interests in the maritime field. The errant body of law of concern to the MLA emanates chiefly from the United States Court of Appeals for the Fifth Circuit, as well as more recent rulings by the United States Court of Appeals for the Seventh Circuit and a growing number of state courts. The correct view of the vessel status test has been followed by the court below, the United States Court of Appeals for the Eleventh Circuit. We urge that that view prevail here.

SUMMARY OF ARGUMENT

The crux of the jurisdictional issue presented here is the meaning of the term "vessel" as defined for many years in 1 U.S.C. § 3: "The word 'vessel'

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[3] *E.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

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 (2006). The definition contains a simple disjunctive test to determine whether an object is a vessel. Is the object *used* as a means of transportation on water or, if not, is it *capable* of being so used? If the answer to either question is yes, the object is a vessel under U.S. law.

The clarity of this statutory standard has come under siege by the Petitioner and his supporting *amici*. The briefs are full of policy arguments and speculation on how the federal courts might best shape and contour their admiralty and maritime jurisdiction going forward but are remarkably thin on analysis of the actual words of the statute. Indeed, two of the *amici* briefs (by the three law professors[4] and the Floating Homes Associations) never even include the words of the statute.

The positions of Petitioner and his supporting *amici* raise serious uniformity and policy concerns for the MLA, as they should for this Court as well. For instance, Petitioner argues that the general maritime concept of a "vessel in navigation" has now been written into 1 U.S.C. § 3 by this Court's decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005). *See* Pet. Br. at 29 n.12. The MLA is concerned both that this is a flat misreading of *Stewart* and that serious adverse unintended consequences would flow from the judicial result urged by Petitioner.

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[4] The law professors' brief in support of Petitioner is cited "Three Law Professors' Br." to distinguish it from the law professors' brief in support of Respondent.

Petitioner espouses unstable and open-ended "vessel" criteria that present an even more serious problem for the vessel documentation, ship mortgage and maritime lien enforcement provisions of Title 46 of the U.S. Code. In particular, the validity and enforceability of preferred ship mortgages and maritime liens cannot survive the intent-based "snapshot" view of vessel status urged by Petitioner.[5] Instead, Petitioner's position would foist on preferred mortgagees and maritime lienors an even worse "snapshot" test. For if "in navigation" is truly a central element of the existence of a vessel itself, then mortgagees and lienors would lose their liens whenever a vessel goes into layup or otherwise goes out of "navigation," either objectively or in the subjective intent of its owner. Worse yet, if subjective intent becomes relevant or even dispositive, as Petitioner urges, the maritime community would face the very real possibility of treating two identical watercraft differently based not on their physical status at a given moment, but on the intentions of their owners with respect to future use.

Also problematic is the amorphous concept of a "permanently" or "indefinitely" moored structure proposed by Petitioner and his supporting *amici*. Permanence, originally used to convey a practically irreversible physical connection or condition, has now been wrongly transformed by some courts to mean the absence of any present intention of the vessel's

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[5] The so-called "snapshot" approach to vessel status, which focuses on what the vessel was doing at the moment of injury, has twice been rejected by this Court. *See Stewart*, 543 U.S. at 495; *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995) (citation omitted).

owner to use the craft in future transportation on water.

Lastly, Petitioner's Question Presented[6] is itself ambiguous and somewhat elusive and, indeed, never fully addressed in Petitioner's own brief. The word "intended" in Petitioner's Question Presented invokes the subjective analysis advocated by the Fifth and Seventh Circuit case law following *Stewart*, to the detriment of the "practically incapable of transportation or movement" test in *Stewart*. *See* 543 U.S. at 494.

ARGUMENT

I. THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED THE DEFINITION OF "VESSEL" AND SHOULD BE AFFIRMED.

A. The Definition of "Vessel" in 1 U.S.C. § 3 Has a Plain Meaning.

The definition of "vessel" in 1 U.S.C. § 3 ("Section 3") is the default definition of "vessel," applicable "throughout the U.S. Code 'unless the context indicates otherwise.'" *Stewart*, 543 U.S. at 490 (citing 1 U.S.C. § 1). Section 3 does not establish different definitions of "vessel" for different purposes. Nor have the courts, to our knowledge, construed Section 3 to have more than one meaning.

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[6] Petitioner's Question Presented is: "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." Pet. Br. at i.

The "vessel" definition, in its entirety, provides:

> The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3 (2006). The definition is phrased in the disjunctive, establishing either actual use or capability as the test. With respect to capability, nothing in this definition speaks or alludes to the entry of a watercraft in navigation or the withdrawal of a watercraft from navigation as a criterion to either establish or disprove the existence of a "vessel." There is also no indication in the definition that "intent" of any person is relevant to the determination of what is a "vessel."

The MLA believes that whether a vessel is "in navigation" is relevant to determine whether an onboard employee is a seaman and for some other purposes, but that the definition of "vessel" itself does not and cannot turn on whether it is "in navigation." "Vessels in navigation" must be regarded instead as a subset of the universe of "vessels" defined by Section 3.

A number of briefing parties, citing *Stewart*, suggest that 1 U.S.C. § 3 is merely a codification of what the general maritime law considered a "vessel" for purposes of maritime law and that it therefore incorporates the "in navigation" concept. *See*, *e.g.*, Pet. Br. at 13, 16, 22; Three Law Professors' Br. at 5-6. We agree that the enactment of 1 U.S.C. § 3 did not expand the reach of the general maritime law, which would continue to apply to vessels "in navigation." But there is no support at all for the idea that there has been an "in navigation" qualifier embedded

in the definition of "vessel" since its enactment into law in 1873.[7]

B. The Plain Meaning of 1 U.S.C. § 3 Compelled the Eleventh Circuit to Affirm the District Court.

The Eleventh Circuit applied the plain meaning of "vessel" under 1 U.S.C. § 3 and correctly affirmed the district court's ruling that Petitioner's floating home was a "vessel." By being moored, unmoored and towed with relative ease before and after its arrest, the floating home was readily found by both courts to satisfy the 1 U.S.C. § 3 criteria and to have been "in navigation."[8]

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[7] In 1866, when the earliest precursor of Section 3 was enacted as part of an anti-smuggling statute, *see Stewart*, 543 U.S. at 489 n.3 (citing ch. CCI, § 1, 14 Stat. 178 (1866)), the term "vessel" was understood to mean much more than a "vessel in navigation." Certainly, a vessel had to be in navigation for persons working aboard her to be seamen and for providers of necessaries to acquire a maritime lien. However, the term "vessel" itself was understood to refer to the physical ship regardless of whether she was in navigation. Federal courts sitting in admiralty have always had jurisdiction over cases brought *in rem* against vessels without regard to whether they were in or out of navigation at the time of arrest. There is no basis to conclude that the definition of "vessel" formulated in 1866 and enacted into its current statutory framework in 1873 would not have encompassed this broader meaning of the term in usage from the dawn of the Republic and even before.

[8] The maritime lien on Petitioner's floating home was premised on the provision of "necessaries" by the lienor (Respondent). *See* US Br. at 22-23 & n.7. On the uncontested facts of record, Petitioner's floating home would readily satisfy the criteria for a vessel in navigation when it incurred this lien while docked at Respondent's marina.

Petitioner criticizes the Court of Appeals for failing to construe the word "transportation" narrowly in 1 U.S.C. § 3 to exclude vessels designed merely to move about on the water without carrying passengers or goods. *See* Pet. Br. at 17-20. This restrictive interpretation of "transportation" was rejected long ago in *The International*, 89 F. 484 (3d Cir. 1898), a case cited favorably in *Stewart*. *See* 543 U.S. at 490 n.5, 491. In concluding that a dredge was a "vessel" under the predecessor of 1 U.S.C. § 3, the Third Circuit held that "[t]he word 'transportation' is not expressly or impliedly limited to the carriage of passengers or merchandise for hire." *The International*, 89 F. at 485. Moreover, as in *Stewart*, the record below in this case indicates that Petitioner's watercraft was actually used to transport itself and its contents over water on a number of occasions, some of which involved transport over substantial distances.

C. Seaworthiness Is Not Relevant to Vessel Status.

Petitioner essentially claims that his craft was not suitable for movement over water and was not seaworthy in its design or construction. Pet. Br. at 3-5, 15-16. But seaworthiness is not a criterion for establishing the existence of a vessel. Nor could it be. Otherwise no vessel could be found unseaworthy, and breaches of the warranty of seaworthiness would have no remedy. *See North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 122-23 (1919) (affirming vessel status for "the American steamer *Yucatan*, . . . which was of steel construction, was in need of extensive repairs. She had been wrecked, and had remained submerged for a long time; ice floes had torn away the upper decks,

and some of her bottom plates also needed to be replaced.").

D. Petitioner's Vessel Was Not an Extension of Land or Permanently Moored.

Petitioner's contention that his floating home was intended to be an extension of land is also unconvincing. He may well have intended that his watercraft serve a housing function usually served on land. But he chose to acquire mobile housing on water and to impose himself on the navigable waters of the United States. Petitioner's craft was not a pier, floating dock or "extension of land," any more than a houseboat is an extension of land. Nor did Petitioner's craft resemble the "floating homes" of concern to the Floating Homes Associations.[9] Petitioner's shallow draft craft, kept afloat by the principle of displacement, was certainly not analogous to a "floating home."[10]

The Court of Appeals further noted that whether a watercraft has become a non-vessel depends on whether it has been "rendered practically incapable of transportation or movement," citing its own decision in *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir.

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[9] The Floating Homes Associations' *amicus* brief describes "floating homes" atop flotation structures of twenty tons of logs or other massive understories, moored in large, multi-user, preplanned facilities akin to mobile home communities. Floating Homes Associations' Br. at 9, 14.

[10] Petitioner's craft had a draft of ten inches and appears to have been secured by less restraint than any other vessel in the marina. JA at 39. Its water and sewage connections, a garden hose and an open discharge into the marina waters, respectively, JA at 38, 42, 53, were clearly not indicative of a "permanent mooring."

2008), which in turn relied on this Court's decision in *Stewart*:

> 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*.

543 U.S. at 494 (emphasis added). There was no showing at all that this standard had been met here.

E. "Permanent Mooring" Should Depend on Physical Characteristics and Not Subjective Intent.

Instead of certainty and uniformity in the treatment of similar watercraft, the trending case law in the Fifth Circuit and elsewhere threatens a chaotic and inconsistent patchwork quilt of little precedential value. This is certainly the case if individual intent were to be a factor in determining what is a "vessel" within the meaning of 1 U.S.C. § 3. However, *Stewart* made plain that the standard for determining vessel status is an objective one and not based on subjective intent. 543 U.S. at 494.

While an owner's intent may have some bearing on whether a vessel is "in navigation" or "withdrawn from navigation," it is transparently impossible to say the physical object before the Court in any case is or is not a "vessel" based on its owner's declared, unverifiable and non-binding intent for future use. Logic and common sense dictate that whether a watercraft is a "vessel" within the meaning of Section 3 can only be an objective inquiry based on use or capability.

After decoupling the "in navigation" requirement from the definition of the physical "vessel," or the "existential vessel" as one commentator has noted,[11] there still remains a need to determine when physical alteration transforms the *res* from a "vessel" into something else. When the transformed *res* is no longer practically capable of transportation on water, it is "incapacitated" from such a function. This might be found when a vessel is made a physical fixture to a dock or other structure on land. However, it should not be found permanently affixed, and therefore transformed, unless the manner of its affixing is irreversible as a practical matter.

The compelling implication of the phrase "permanently moored or *otherwise* rendered practically incapable of transportation or movement," *Stewart*, 543 U.S. at 494 (emphasis added), is that "permanent mooring" itself requires a finding that a vessel has been thus "rendered incapable of transportation or movement." "Permanently moored" cannot be excised from this passage of *Stewart* and substituted into future cases as a new, freestanding test of "non-vesselhood." Just as today's declared permanent resident of New York City can choose to move away tomorrow,[12] the fact that a vessel owner states his intent today to remain permanently moored is meaningless speculation that has no bearing on whether

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[11] Bruce A. King, *Ships as Property: Maritime Transactions in State and Federal Law*, 79 TUL. L. REV. 1259, 1289 (2005).

[12] *See Dist. of Columbia v. Murphy*, 314 U.S. 441, 451 n.2 (1941) (reviewing the District of Columbia Income Tax Act) ("We do not understand 'permanent' to have been used in a literal sense. Of course it cannot be known without the gift of prophecy whether a given abode is 'permanent' in the strictest sense.").

today's mooring arrangement is practically reversible.

The essence of the term "permanently moored" has not been directly addressed by this Court. It is clear though that "permanently moored" must mean something more than "withdrawn from navigation." The case law since *Stewart* has produced examples of what is considered "permanently moored," but these range from descriptions of vessels rendered physically or economically incapable of returning to navigation as a practical matter to examples of vessels considered withdrawn from navigation based on the owner's declared absence of an intent to return them to a transportation function.

Cases decided since *Stewart* have struggled with the concept of "permanently moored structures." *See Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (vessel status issue remanded for potential consideration of owner's "intent"); *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat, Hull ID No. LMG37164M80D*, 2010 AMC 404 (D.N.J. 2009) ("key factor" is whether connection to shore "make[s] immediate egress to navigable waters not a practical possibility"); *Martin v. Matt Canestrale Contr. Inc.*, 658 F. Supp. 2d 668 (W.D. Pa. 2009) (river barge found to be a vessel based on *Stewart* and related cases). The range of applications of "permanently moored" has thus acted to deprive the term of any reliable meaning. Of late, to make the exception to vessel status even more open-ended, the word "permanently" has even been replaced with the word "indefinitely," such as in Petitioner's Question Presented here.

Based on the relevant precedents of this Court and their progeny, some courts have developed clear,

pragmatic guidelines for the "permanently moored" element of the *Stewart* decision. For example, in *Sea Village Marina*, the district court observed:

> In addition to these cases cited by *Stewart*, there are a few dozen federal cases grappling with the definition of vessel in the context of a craft that is currently floating and can be towed but that is moored in place. Though each case examines the totality of the circumstances to determine whether the craft remains a vessel, a common thread unites them. The key factor in cases finding that a craft has lost its vessel status is that the former vessel (if not removed from the navigable waters entirely) be moored in such a way as to make immediate egress to navigable waters not a practical possibility. [Citing *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627 (1887), *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995) and other cases.] Unsurprisingly, the actual nature of the mooring—whether the connection to the shore is permanent or otherwise impractical to sever at short notice—is at the hear[t] of what it means to be "permanently moored" in a way that prevents the "practical possibility" of transportation on water.

2010 AMC at 411-12. None of these criteria exists here, as Petitioner's craft could readily move on short order and often did. *See* Resp. Br. at 5, 9, 48-49.

II. A VESSEL WITHDRAWN FROM NAVIGATION REMAINS A VESSEL IF IT SATISFIES THE PLAIN LANGUAGE OF 1 U.S.C. § 3.

A. The *Stewart* Case Cited and Approved the "Withdrawn from Navigation" Doctrine.

Stewart was a Jones Act case in which claimant's rights to recover depended on his status as a seaman, which, in turn, depended on his employment aboard a vessel in navigation. *See Stewart*, 543 U.S. at 485-86. In finding that an injured employee was a seaman, *Stewart* held that a dredge was indeed a vessel even though its primary function was dredging and its movement on water was only occasional and limited. *Stewart*, in turn, acknowledged that vessels sometimes go out of navigation. *See* 543 U.S. at 496 (citing *Chandris*, 515 U.S. at 373-74; *Roper v. United States*, 368 U.S. 20, 21, 23 (1961); *West v. United States*, 361 U.S. 118, 122 (1959)). *See also Pavone*, 52 F.3d at 569 ("concept of 'withdrawn from navigation' . . . [is] certainly alive and well in this circuit").

The concept of a vessel "withdrawn from navigation" was endorsed by this Court in earlier cases as well. *See*, *e.g.*, *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952) (denying Jones Act recovery to worker fatally injured while working on a vessel during its winter layup); *Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam) (judgment reversed and cause remanded for trial of the issue of "whether or not the tug *G. W. Whiteman* was in navigation . . ." such that decedent would qualify as a Jones Act plaintiff); *United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959) (noting that a ship rendered temporarily "dead" and

"out of navigation" with its electric generators dismantled and all personnel evacuated to allow hazardous repairs and maintenance is still referred to as a "vessel").

Professor Rutherglen's article, cited by Petitioner and others, *e.g.*, Pet. Br. at 24, 29 and 44; US Br. at 11, 19, describes the life cycle of a vessel and the stages at which, in his view, it might be deemed to have become a "dead ship." As Rutherglen points out, there is a vast difference between a vessel "withdrawn from navigation" and one that has been rendered practically incapable of use as a vessel.[13] By urging the Court to erase this vast difference, Petitioner and his supporting *amici* would foster chaos in admiralty law generally and render 1 U.S.C. § 3 unusable for a number of statutory regimes in federal shipping law.

Petitioner's view reduces vessel status to the ultimate "snapshot" test. A watercraft withdrawn from navigation for either winter storage or "cold layup," in Petitioner's view, would cease to be a vessel for all purposes.[14]

The treatises and case law indicate that vessels can be "temporarily moored" for a long time and that

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[13] "'Dead ships' are not the opposite of 'vessels in navigation.' A vessel can be out of navigation and still be a vessel." George Rutherglen, *Dead Ships*, 30 J. MAR. L. & COM. 677, 690 (1999).

[14] The Coast Guard recognizes that a vessel remains a vessel even when it is withdrawn from navigation. *See* 46 C.F.R. § 567.313(b) (2011) (excusing documentation-on-board requirement "[w]hen the *vessel* is in storage or out of the water") (emphasis supplied); *see also* 46 C.F.R. § 24.05-1(a) (2011) (excusing vessels from inspection "while laid up and dismantled and out of commission").

their status as "vessels" is not impaired. *See* 1B BENEDICT ON ADMIRALTY § 11(b) n.20 (7th ed., rev. 2011), and cases therein noted. Legions of craft are withdrawn from navigation at various times: Great Lakes and inland marine vessels beached or removed from water to avoid winter ice; yachts encased in shrink wrap for the winter season; and large commercial vessels prepared for storage at anchor to await an improved market, which might take years. *See*, *e.g.*, *Erie v. S.S. North Am.*, 267 F. Supp. 875 (W.D. Pa. 1967) (sustaining maritime lien on a vessel withdrawn from navigation due to winter layup). All these vessels find themselves withdrawn from navigation by their owner's intent. No Jones Act claim could arise for employee service to them during such withdrawal, but they surely must still be regarded as vessels.

B. Narrowing 1 U.S.C. § 3 to Exclude Vessels Withdrawn from Navigation Would Create Significant Adverse Impacts on Other Provisions of Federal Law.

As this Court noted in *Stewart*, "the 'in navigation' requirement can be viewed as an element of the vessel status of a watercraft. It is relevant to whether the watercraft is used, or capable of being used, for maritime transportation." *Stewart*, 543 U.S. at 496. But it is not indispensible.[15] Certainly,

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[15] Petitioner is flatly incorrect to suggest that *Stewart* abolished the "vessel in navigation" concept and replaced it with the Section 3 "vessel" definition. *See* Pet. Br. at 29 n.12. No such issue was presented in *Stewart*. The case focused on how to define "vessel" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G) (2006), not on whether the entire subject of vessels in navigation and vessels withdrawn from navigation should be absorbed into Section 3 for all purposes.

actual use "in navigation" constitutes "use" and is also dispositive on the question of capability to use. However, this observation in *Stewart* does not state that the absence of actual use in navigation determines that a watercraft is not "capable." To reach such a conclusion, one would have to determine that the capability test is surplusage in 1 U.S.C. § 3. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION, § 46:6, 230-42 (7th ed. 2007) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ."). Instead, *Stewart* takes note of objective factors that might negate a finding of capability, such as permanent mooring. *See Stewart*, 543 U.S. at 493. As a conceptual matter, the Court explained in *Stewart* that "the question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.* at 496.

There is no obvious benefit to any party in implying an "in navigation" requirement into either of the definitional tests in Section 3, "use" or "capability." But great mischief may flow from such an exercise. While many recent cases construing this section, including *Stewart* and the subsequent cases cited by Petitioner, involved the status of seamen under the Jones Act,[16] Section 3 is also incorporated into or

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[16] In Jones Act cases, a "vessel in navigation" is often called a "Jones Act vessel" or a "vessel." On occasion, a vessel found not to be "in navigation" in such cases will be referred to as a "nonvessel" when, in fact, the more correct term would be "vessel withdrawn from navigation." *See*, *e.g.*, *Pavone*, 52 F.3d at 564, 568-70 & nn. 23, 24 (vessels outside Jones Act coverage deemed "nonvessels"); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992) (same).

cited by a number of other provisions of the U.S. Code.[17] The viability of the other statutory regimes and the realization of the Congressional intent they embody should compel this Court to clarify the distinction between a Section 3 "vessel" and the concept of "vessel in navigation" for Jones Act purposes.

The preferred mortgage provisions in the Commercial Instruments and Maritime Lien Act of 1988 ("CIMLA") and its predecessor ship mortgage acts[18] were enacted to enable ship owners to finance their vessels and operations with devices and structures not available in the general maritime law. These laws granted preferred mortgage holders lien status and a ranking above all liens and claims apart from preferred maritime liens. The statutes also gave to mortgagees rights found only in admiralty to arrest mortgaged vessels *in rem* on default of preferred mortgages and gave to Article III courts the exclusive power to order the sale of such vessels free and clear of all liens.

Before 1920 in the United States, a ship mortgage had no priority vis-à-vis maritime liens and no means of effective enforcement in foreclosure. Congress

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[17] Such incorporation grew even more widespread in 2006, when Congress made 1 U.S.C. § 3 applicable to the entirety of Title 46, instead of just Subtitle II thereof. *See* Pub. L. No. 109-304, § 4, 120 Stat. 1485, 1487 (2006) (new 46 U.S.C. § 115 (2006) (which defines "vessel" for the entirety of Title 46 as follows: "In this title, the term 'vessel' has the meaning given that term in section 3 of title 1."). The new Section 115 replaced 46 U.S.C. § 2101(45) (2006), which also adopted the Section 3 definition, but only for Subtitle II (Vessels and Seamen (Sections 2102-14702)).

[18] Federal Maritime Lien Act, Pub. L. No. 61-259, 36 Stat. 604-05 (1910) (uniform law of maritime liens); Ship Mortgage Act, Pub. L. No. 66-261, 41 Stat. 988, 1000-06 (1920) (creation of preferred ship mortgages).

enacted the Ship Mortgage Act of 1920, the predecessor to a series of statutes culminating in CIMLA, with the express purpose of encouraging investment in the U.S. flag merchant marine. This objective was spelled out in the legislative history and strongly endorsed by this Court's decision in *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934), which upheld the new statutory scheme, as follows:

> We cannot fail to regard the encouragement of investments "in shipping and shipping securities"—the objective of the Ship Mortgage Act—as an essential prerogative of the Congress in the exercise of its wide discretion as to the appropriate development of the maritime law of the country. The regulation of the priorities of ship mortgages in relation to other liens, and the conferring of jurisdiction in admiralty in order to enforce this regulation, are appropriate means to that legitimate end.

293 U.S. at 48.

A preferred mortgage depends on the existence of a "documented vessel" or one whose documentation is in process by virtue of a proper application. The necessary predicate for documentation, or for the filing of an application for documentation, in turn, is the underlying existence of a "vessel." Nothing in either Chapter 121 or Chapter 313 of Title 46 suggests or implies any requirement that such a vessel must be, at any time or at all times, "in navigation." The documentation provisions do not have a separate definition of "vessel" and rely, in this respect, on 1 U.S.C. § 3 as the definition of "vessel" for all of Title 46. *See* 46 U.S.C. § 115 (2006).

Documentation of a United States vessel must be renewed annually or it expires. The Coast Guard has no authority to continue to document what it does not believe to be a "vessel." Documentation is invalidated if a vessel "no longer meets the requirements of this Chapter . . . ," 46 U.S.C. § 12135(1) (2006), except that documentation is deemed to continue for purposes of any preferred mortgage "filed or recorded before the date of invalidation." 46 U.S.C. § 12136(c)(1)(a) (2006). However, even if the documentation remains of record, lapses in vessel status would negate preferred mortgage liens or other liens that attach only to "vessels." Thus, these provisions on their face are not enough to safeguard a mortgagee if the thing mortgaged is found either (1) not yet to have been a "vessel" when first documented and mortgaged or (2) to have ceased to be a "vessel" within the meaning of 1 U.S.C. § 3 at any time thereafter.

According to the Gaming Association *amicus* brief, many of the "dockside casinos" owned by its members are documented or registered with the Coast Guard or inspected by the Coast Guard. Gaming Ass'n Br. at 9-12, n.8. Also, in the eleven post-*Stewart* cases cited by the Gaming Association, the courts ruled on eight occasions (involving a total of seven separate "dockside casinos") that the watercraft therein were not vessels. Gaming Ass'n Br. at 9-14. Petitioner's logic would presumably require the Coast Guard to revisit eligibility of these floating casinos for documentation purposes as well. And, if Gaming Association members whose floating casinos are financed through preferred ship mortgages have now "walked their collateral" out of vessel status by "permanently" or "indefinitely" mooring them to the shore, then the validity of their mortgages would be at issue as well

as the enforceability of *in rem* remedies against the collateral.

The troubling inconsistency in the interpretation of the 1 U.S.C. § 3 definition is starkly evident in the case of the *Boomtown Belle II*, a floating casino owned by Louisiana A-1 Gaming (the "Boomtown Owner"), a member of the Pinnacle Entertainment group. The *Boomtown Belle II* is listed as the "Boomtown Casino (Westbank)" in the Gaming Association *amicus* brief. *See* Gaming Ass'n Br. at app. 3a. As reported in that brief, the Louisiana state court determined that the *Boomtown Belle II* was not a vessel and was not governed by federal maritime law. *Id*. at 10 (citing *Bourgeois v. Boomtown, L.L.C.*, 2009 WL 5909119 (La. App. 5 Cir. 5/21/09), *writs denied*, 09-1357 (La. 9/25/09), 18 So. 3d 68; *cert. denied*, 130 S. Ct. 1699 (2010)). The *Bourgeois* case is cited by the Gaming Association as support for the proposition that a vessel withdrawn from navigation is no longer a vessel. *Id*. The court indeed found that the floating casino was not a "vessel" under *Stewart* or the general maritime law. *Bourgeois*, 2009 WL 5909119, at 1. This finding in turn was based on evidence that the vessel had been moored in the same location for some time and was not "in navigation or capable of navigation." *Id.* at 2.

While we have no doubt that the *Boomtown Belle II* would have been well secured for its function as a dockside casino, the "permanence" of its attachment to land seems unlikely to have deprived the craft of its capability to engage in transportation on water.[19]

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[19] Of course, if the *Boomtown Belle II* had been permanently affixed to land such that it could not meet either branch of the Section 3 definition, it would no longer be a vessel, and the

In this respect, *Boomtown Belle II* reflects a widespread ambiguity in the decisional law following *Stewart*, where "permanently" has been taken to mean "indefinitely" and not dependent on the practical irreversibility of the connection made to land.

There is nothing ambiguous though about the status of the *Boomtown Belle II* in the official records of the U.S. Coast Guard's National Vessel Documentation Center ("NVDC"), where all the transactions bearing on title to the craft and its various mortgages and encumbrances have been duly recorded since it was first constructed in 1995. To illustrate the concerns and arguments of the MLA, the official Abstract of Title of this craft, as of July 5, 2012, has been obtained for purposes of this *amicus* brief. *See* DEP'T. OF HOMELAND SECURITY, U.S. COAST GUARD, NO. 1028319, "BOOMTOWN BELLE II" GENERAL INDEX OR ABSTRACT OF TITLE 15-22 (July 5, 2012), true and correct copies of the cited pages of which are contained in Appendix A.[20] These pages of the Abstract of Title reflect the entire period from acquisition by the Boomtown Owner to the present and show that before, during and after the decision in *Bourgeois*, the Boomtown Owner documented the structure as a "vessel" without interruption and granted preferred ship mortgages to secure obligations of up to $1.5 billion. *See, e.g.,* App. A at 6a (preferred ship mortgages on the *Boomtown Belle II* granted on December 30, 2005 and November 14,

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validity of its documentation and preferred ship mortgages would be in question.

[20] The complete original of this document is on file with counsel for the MLA and will be lodged with the Clerk's Office on request.

2006 to secure indebtedness of $750,000,000 and $1,500,000,000, respectively). The latter preferred ship mortgage remains in place to this day, securing a face amount of indebtedness of $1,500,000,000. *Id.* at 8a (as of July 5, 2012).

Moreover, the Boomtown Owner is required to renew the *Boomtown Belle II's* certificate of documentation annually and in doing so affirms that the *Boomtown Belle II* is entitled to its expiring documentation status and trade endorsements. *See* 46 C.F.R. § 67.163 (2011). Based on the activity reflected in the Abstract of Title, the Boomtown Owner appears to have renewed the vessel's documentation every year and made that affirmation.

So the *Boomtown Belle II* is a nonvessel in a state court tort action and a vessel at the NVDC. But 1 U.S.C. § 3 cannot mean one thing to maritime tort victims and another to preferred mortgagees. The MLA believes this case provides the right vehicle for this Court to restore both the plain meaning of the "capability" test in 1 U.S.C. § 3 and the distinctiveness of the "capability" test from the "use" test. The MLA also urges the Court to halt the continued conflation of 1 U.S.C. § 3 with the general maritime law concept of a "vessel in navigation" and the ever-expanding notion of "permanently moored." Anything short of a strong clarification of 1 U.S.C. § 3, we submit, will yield terribly destructive results in ship finance, endangering the congressionally intended benefits of the preferred mortgage.

C. Arrest and Foreclosure of a Vessel to Enforce a Maritime Lien or Preferred Mortgage Cannot Be Made to Depend on Whether the Vessel Is "In Navigation."

No provision of CIMLA, or any other statute of which we are aware, permits an erstwhile preferred mortgagee to have the privileges, priorities and enforcement rights, such as arrest, foreclosure and sale free and clear of all liens, against the collateral once the collateral is no longer a "vessel," as defined in 1 U.S.C. § 3. These provisions also establish the relative priority of preferred mortgages and maritime liens as to both federally documented vessels and foreign registered vessels arrested in the United States. Petitioner's reasoning would suggest that a vessel in layup status or one that is indefinitely tied up to shore as a floating casino may not be arrested and foreclosed upon in an *in rem* proceeding. Surely this is not what Congress intended. Indeed, such a result would thwart Congressional purposes.

Ship lenders depend on the validity and enforceability of a preferred mortgage over the entire term of a loan until the loan is either repaid or the lender proceeds through arrest and foreclosure to realize upon the value of the vessel at auction to satisfy the unpaid obligations. If the vessel is destroyed, the mortgage will fail because the vessel no longer exists.[21] Similarly, mortgage documents often prohibit the owner from incorporating the vessel as a fixture to real estate for fear of changing the physical nature of the vessel into something, such as the *Boomtown Belle II*, that is purportedly not capable of transportation over water.

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[21] In the event of marine casualties, mortgagees customarily rely on rights to insurance proceeds.

However, in no case would a ship mortgage financing be possible if the mortgagee had to live in fear that the status of the mortgagee's collateral could depend on whether it was at all times "in navigation" or that its status was jeopardized because it had been "withdrawn from navigation" "indefinitely." While the questions of "in navigation" or "withdrawn from navigation" are useful factors often used in tort analysis to determine the relationship to traditional maritime activity, they confuse the issue in determining whether a particular watercraft is a "vessel" for purposes of vessel documentation and ship finance.

A further adverse effect would appear in any *in rem* action commenced in the United States against a vessel, including a vessel under foreign flag. Rights of parties, including mortgagees and suppliers of necessaries, in enforcement actions against foreign flag vessels arrested in the United States are also provided for in CIMLA. 46 U.S.C. §§ 31301(6)(B), 31325 and 31326 (2006). But again, the provisions apply only to a "vessel." By adopting the confused concept of Petitioner and his supporting *amici*, the Court would open the door to possible challenges as to whether the *res* is a "vessel," and has been a "vessel" at all times since it was registered, and whether or not a foreign preferred mortgage equivalent can be enforced in U.S. courts.

D. The Distinction Between "Vessel Status" and "Navigation Status" Remains Vital to the Maritime Community.

Vessels may be documented and financed through preferred mortgages before they are ever placed in

navigation[22] and may remain documented and subject to preferred mortgages for long periods of inactivity and storage (called "layup") at anchor or on dry land, depending on size and circumstances. While a seaman's relationship with a vessel can be measured by voyages or months, a mortgagee's relationship may carry on for many years, during which the ship may be laid up "indefinitely," devoted to a stationary use dockside for a period of time, or otherwise be in a status that future courts or litigants might consider to be "withdrawn from navigation."

Indeed, overcapacity in the shipping industry has recently pushed ship owners to layup vessels in large numbers for periods of up to five years or more, often requiring three to four weeks of reactivation procedures before the vessels can be placed back in service. As any fair reading of the industry forms will make clear, modern layup procedures are far removed from the abandonment of derelict vessels in back channels. The Baltic and International Maritime Council ("BIMCO") has recently developed a standard form contract, titled "LAYUPMAN," to address this development.[23] The American Bureau of Shipping has also

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[22] Newly constructed vessels meet the "capability" test of 1 U.S.C. § 3 well before they are delivered or accepted as completed.

[23] *See* BIMCO, LAYUPMAN: STANDARD CONTRACT FOR THE LAYING UP OF VESSELS cvr., 1-3 (BIMCO, Copenhagen) (2011), *full document available at* http://www.bimco.org/Chartering/Documents/Ship_Management/~/media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_LAYUPMAN.ashx, excerpts of which are contained in Appendix B. *See* App. B at 15a, § 9(d) ("On completion of Re-activation the Owners shall take over responsibility for the Vessel and remove it from the Layup Site. . . . [If they] fail to remove the Vessel from the Layup Site . . . [t]he Managers shall . . . have a lien over the

dealt extensively with the subject of vessel layup and the reactivation of laid-up vessels.[24]

Nothing in the Vessel Documentation Act of 1980, 46 U.S.C. ch. 121, §§ 12101-12152 (as codified 1983), states or implies that, in addition to capability, a watercraft must also be "in navigation" to remain a "vessel." Nor does any provision of the Vessel Documentation Act state or imply that the intent of any person, including the owner, may affect vessel status.

Petitioner's argument to the contrary would expose marine lenders to another form of the "snapshot" issue already resolved for seamen in *Chandris* and confirmed in *Stewart*. If the definition of "vessel" were made to depend on whether the craft in question remained "in navigation" at all relevant times, the validity and effectiveness of a preferred mortgage or its priority relative to competing maritime and

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Vessel [to recover losses]. . . ."). BIMCO is a widely used source of forms for international vessel chartering and management transactions generally.

[24] The American Bureau of Shipping, a classification society founded in 1862, issues standards and guidelines that are widely recognized and adopted by the maritime community, including the U.S. government. *See* 46 U.S.C. § 3316(b) (2006) (expressly authorizing the Secretary of Homeland Security to delegate certain inspection and certification authorities to the American Bureau of Shipping). *See* AMERICAN BUREAU OF SHIPPING, *Guide for Lay-Up and for Reactivation of Laid-Up Ships*, *in* RULES FOR SURVEY AFTER CONSTRUCTION, pt. 7, app. sec. 3, cvr., 243-44, 252-53 (2011), *available at* http://www.eagle.org/eagleExternalPortalWEB/ShowProperty/BEA%20Repository/Rules&Guides/LinkedGeneralGuideTitles/Current/Part7_2012, excerpts of which are contained in Appendix C. *See* App. C at 18a-24a, § 1, 3 (distinguishing a "vessel in lay-up" from active-status vessels and spelling out the steps potentially needed to reactivate a laid-up vessel).

non-maritime claims could be forever lost at the first moment it is "withdrawn from navigation," for example, by being stored in long-term layup.

If a craft is substantially completed by a builder and documented by the Coast Guard, and a preferred mortgage is placed on the craft before its delivery and, therefore, before its coming into navigation, is the craft not a "vessel" at the moment of documentation? Or is the documentation therefore defective and the preferred mortgage a nullity as a result?

These unfortunately are not hypothetical questions. The Fifth Circuit decision in *United States v. Trident Crusader*, 366 F.3d 391 (5th Cir. 2004), offers a perspective on the danger to preferred mortgages posed by the proposition urged by Petitioner and his supporting *amici*. In *Trident Crusader*, Det Norske Veritas ("DNV"), a classification society, challenged a preferred mortgage in favor of the United States, which was given to secure a Title XI financing of a vessel,[25] on the grounds that the vessel was documented approximately three weeks before final completion and was therefore not a "vessel" under 1 U.S.C. § 3. DNV claimed a necessaries lien for services provided after the vessel was delivered. The Court found that, at the time of documentation, the only work left on the vessel was performance of sea trials. In upholding the preferred mortgage, the

[25] Title XI is a government program to provide loan guaranties in support of U.S. shipbuilding. Such guarantees are issued to debt holders in return for mortgages on vessels under construction and preferred mortgages on vessels once documented. Title XI is codified today at 46 U.S.C. §§ 53701-735 (2006). There is a separate "vessel" definition for the Title XI program, which expressly includes vessels under construction. *Id.* § 53701(14) (2006).

Fifth Circuit held that the 1 U.S.C. § 3 definition did not apply to the preferred mortgage provision of CIMLA and, instead, relied on the definition of "vessel" in what was then 46 U.S.C. § 1271(b),[26] which was more expansive, taking in "all types of vessels, whether in existence or under construction . . . ." The definition relied upon by the Fifth Circuit, by its terms, applies only to the federal vessel loan guaranty programs under Title XI, and not to the vast array of preferred mortgages outside Title XI programs. The status of all vessels built in the United States, other than Title XI vessels, is governed by the definition of "vessel" in Section 3.[27]

All these questions are of acute concern if the long-standing 1 U.S.C. § 3 "capability" definition of "vessel" is burdened with the "in navigation" test used to determine Jones Act status or if the subjective intention of the vessel owner plays any part in the determination of whether a craft is a vessel.

III. STATE LAW AND U.S. COAST GUARD POLICY DO NOT AFFECT THE DEFINITION OF "VESSEL" IN 1 U.S.C. § 3.

A. As a Constitutional Matter, State Law Cannot Provide Guidance in Determining What Is a Vessel.

Article III of the U.S. Constitution and the long succession of implementing judiciary acts has re-

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[26] This provision has been recodified as 46 U.S.C. § 53701(14) (2006).

[27] The same issue could arise in arrest of foreign flag vessels in the United States if the status of such vessels can be made subject to "in navigation" tests and their mortgages rendered suspect or invalid.

served original jurisdiction over admiralty and maritime cases to the federal courts, to the exclusion of the state courts, while "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (2006). The question of what constitutes a "vessel" is fundamental to controlling and defining that jurisdiction. Indeed, the term "vessel" appears in Section 9 of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789). It is therefore inconceivable that this term could be defined by reference to what state law considers to be a "floating home," houseboat or any other vessel. The Court of Appeals correctly observed that the fact that Florida state law regards the watercraft in question as a "floating home," and not a "vessel," is irrelevant. Pet. App. at 12a n.6, 17a.[28]

B. Decisions by the Coast Guard to Allocate Inspection Resources Should Not Be Given Weight in Determining Whether a Watercraft Is a "Vessel."

The U.S. Coast Guard has a variety of functions to perform with respect to vessels and navigable waters of the United States. Maintaining facilities for the documentation and mortgaging of vessels is only one of those functions. Others include oil spill prevention and remediation and the safety of life at sea and on navigable waters. In discharging these functions, the Coast Guard has been tasked to develop and apply standards in the design, construction, equi-

[28] Similar references are made by Petitioner's supporting *amici* to state laws regarding floating homes or protecting homestead rights. *See* Floating Homes Associations' Br. at 22-29. None of these arguments has any place in establishing what is a vessel for purposes of Section 3 or admiralty jurisdiction.

page, manning, maintenance and operation of vessels on navigable waters. The Coast Guard's approach to watercraft is not always consistent, as the cases cited in the Gaming Association's *amicus* brief make clear. Gaming Ass'n Br. at 9-12. The documentation and mortgage recording protocols view craft as vessels in many cases when the Coast Guard marine inspection service considers craft as not requiring close inspection or intensive safety regulation. *See* Pet. Br. at 42; Gaming Ass'n Br. at 9-12 (describing level of Coast Guard regulation of *Boomtown Belle II* and other dockside casinos).

Several briefs have cited a five-factor "non-exclusive list of questions" announced by the Coast Guard in a 2009 Notice of Policy as part of a "totality of the circumstances" framework for its exercise of discretion in seeking to distinguish "vessels" that should be subjected to regulation and inspection from "permanently moored craft" that should be largely exempt from regulation. Pet. Br. at 42-43; US Br. at 2, 10, 27-29 (citing U.S. Coast Guard Notice of Policy, 74 Fed. Reg. at 21,814 (2009)).

The Notice of Policy purports to carry out this Court's ruling in *Stewart* by abolishing the category of "permanently moored vessels" and proceeds to set forth guidelines for its exercise of discretion and allocation of inspection and enforcement resources. This Notice of Policy certainly cannot form the basis of a constitutional or jurisdictional ruling by this Court. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 553 (1995) (Thomas, J., concurring) ("The dangers of a totality-of-the-circumstances approach to jurisdiction should be obvious. . . . Such a test . . . introduces undesirable uncertainty into the affairs of private actors—even

those involved in common maritime activities—who cannot predict whether or not their conduct may justify the exercise of admiralty jurisdiction."); *see also Sisson v. Ruby*, 497 U.S. 358, 368-75 (1990) (Scalia, J., concurring). Petitioner's floating home would not have satisfied these criteria in any event. *See* Resp. Br. at 34-36.

IV. PRINCIPLED APPLICATION OF THE DEFINITION OF "VESSEL" IN 1 U.S.C. § 3 NEED NOT RAISE FEDERALISM CONCERNS.

Petitioner and his supporting *amici* raise concerns that treatment of permanently or indefinitely moored structures as "vessels" threatens expansive involvement of federal jurisdiction in local and state matters. However, it is only by failing to recognize the distinction between a vessel under 1 U.S.C. § 3 and a "vessel in navigation" that Petitioner is able to conjure up his nightmare scenario, in which bartenders, roulette operators and nannies become "seamen" subject to federal admiralty jurisdiction. The fact that this concern about seaman status has been raised by *amici* such as the Gaming Association and the Floating Homes Associations proves yet again that the effect of consolidating 1 U.S.C. § 3 with the "in navigation" doctrine serves only to paint the parties and the courts into a doctrinal corner.

The federal government has admiralty jurisdiction over the navigable waters of the United States. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) ("The power of Congress, then, comprehends navigation, within the limits of every State in the Union."). The definition of "vessel," which underlies much of maritime law and the subjects of admiralty jurisdiction, cannot therefore be determined by state law as a constitu-

tional matter. Moreover, tailoring the definition of "vessel" to individual state laws would destroy uniformity.

CONCLUSION

The MLA respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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July 19, 2012

APPENDIX

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-1332A (REV. 9-92)

GENERAL INDEX OR ABSTRACT OF TITLE
CONTINUATION SHEET NO. 14

OFFICIAL NO. 1028319

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
SMTG	100	9-19-97	$115,000,000.00	97-97	154

FILED PORT	DATE	TIME	DATE TERMINATED
NEW ORLEANS, LA.	9-25-97	2:11 PM	----

GRANTOR: FIRST UNION BANK OF CONNECTICUT, TRUSTEE

GRANTEE: CASINO MAGIC OF LOUISIANA CORP.

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
BS	100	9-25-97	$1.00	97-97	155

FILED PORT	DATE	TIME	DATE TERMINATED
NEW ORLEANS, LA.	9-25-97	2:11 PM	----

GRANTOR: CASINO MAGIC OF LOUISIANA CORP.

GRANTEE: LOUISIANA-I GAMING, A LP

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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GRANTOR

GRANTEE

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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GRANTEE

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PORT: PAGE OF

DOCUMENTATION OFFICER

PREVIOUS EDITION MAY BE USED

PREVIOUS EDITION OBSOLETE

*U.S. Government Printing Office: 1992 — 312-673/62947 SN 7530-01-GF3-2260

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-1332A (REV. 9-92)

GENERAL INDEX OR ABSTRACT OF TITLE CONTINUATION SHEET NO. 15

OFFICIAL NO. 1028319

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
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FILED PORT	DATE	TIME	DATE TERMINATED
N/A	N/A	N/A	N/A

GRANTOR

N/A

GRANTEE

**** VESSEL NAME CHANGED TO: BOOMTOWN BELLE II (10/21/97) ****

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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GRANTOR

GRANTEE

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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PREVIOUS EDITION OBSOLETE *U.S. Government Printing Office: 1992 — 312-673/62947 SN 7530-01-GF3-2260

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-1332A (Rev. 6-93)

GENERAL INDEX OR ABSTRACT OF TITLE
CONTINUATION SHEET NO. 16

OFFICIAL NO. 1028319

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
PM	100	02 02 98	$225,000,000.00	98-80	32

FILED PORT	DATE	TIME	DATE TERMINATED
NVDC	09 25 98	11 07 AM	- - -

GRANTOR
LOUISIANA-I GAMING, LP

GRANTEE
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
555 SOUTH FLOWER STREET, #3283, LOS ANGELES, CA 90071

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
AMPM	100	10 14 98	$375,000,000.00	98-98	583

FILED PORT	DATE	TIME	DATE TERMINATED
NVDC	11 05 98	11 34 AM	- - -

GRANTOR
LOUISIANA-I GAMING LP

GRANTEE
BANK OF AMERICA NATL TRUST AND SAVINGS ASSOC
555 SOUTH FLOWER ST #3283 LOS ANGELES CA 90071

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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GRANTEE

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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DEPARTMENT OF TRANSPORTATION U.S. COAST GUARD CG-1332A (Rev. 6-93)	**GENERAL INDEX OR ABSTRACT OF TITLE CONTINUATION SHEET NO.** 17	OFFICIAL NO. 1028319

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE
AMPM	100	09 08 03	$ 240,000.00	03-98	556

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NVDC	09 15 03	10 01 AM	-- -- --

GRANTOR

LOUISIANA -I GAMING, LP

GRANTEE

REFERS TO BOOK # 98-80, PAGE # 32
BANK OF AMERICA, N.A. FORMERLY KNOWN AS BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOC

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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GRANTEE

INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

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GRANTOR

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INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE

FILED PORT	DATE	TIME	DATE TERMINATED

GRANTOR

GRANTEE

☐ ISSUED AS AN ABSTRACT OF TITLE ☐ ISSUED FOR CHANGE OF PORT OF RECORD

DATE: TIME:

PAGE: OF PORT:

DOCUMENTATION OFFICER

PREVIOUS EDITION MAY BE USED

DEPARTMENT OF HOMELAND SECURITY U S. COAST GUARD CG - 1332	**GENERAL INDEX OR ABSTRACT OF TITLE Continuation Sheet No. 18**	Official No. 1028319

PREFERRED MORTGAGE

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	December 17, 2003	$300,000,000.00	BK 04-49	87

DATE FILED	TIME FILED	STATUS
December 18, 2003	12:25 PM	RECORDED

MORTGAGOR:
LOUISIANA-I GAMING

MORTGAGEE:
LEHMAN COMMERCIAL PAPER INC.
745 SEVENTH AVE
NEW YORK, NY 10019

SATISFACTION MORTGAGE

Refers To: BOOK 03-98 PAGE 556
BOOK 98-98 PAGE 583
BOOK 98-80 PAGE 32

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	December 15, 2003	$240,000,000.00	BK 04-61	695

DATE FILED	TIME FILED	STATUS
August 05, 2004	10:16 AM	RECORDED

GRANTOR:
BANK OF AMERICA N A - as ADMINISTRATIVE AGENT
F/K/A BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

GRANTEE:
LOUISIANA-I GAMING
A LOUISIANA PARTNERSHIP IN COMMENDAM

AMEND PREFERRED MORTGAGE

Refers To: Document: 87

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	August 27, 2004	$400,000,000.00	283759	2615121

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September 01, 2004	11:15 AM	RECORDED

MORTGAGOR:
LOUISIANA-I GAMING

MORTGAGEE:
LEHMAN COMMERCIAL PAPER INC

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DEPARTMENT OF HOMELAND SECURITY U S. COAST GUARD CG - 1332	**GENERAL INDEX OR ABSTRACT OF TITLE** **Continuation Sheet No. 19**	Official No. 1028319

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% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	December 30, 2005	$750,000,000.00	445312	4755189

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January 10, 2006	10.30 AM	RECORDED

MORTGAGOR:
LOUISIANA-I GAMING

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% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100	November 14, 2006	$1,500,000,000.00	554870	6345197

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November 17, 2006	09:20 AM	RECORDED

MORTGAGOR:
LOUISIANA-I GAMING

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AMEND PREFERRED MORTGAGE

CORRECTED

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100 100	July 21, 2009	N.A. N.A.	702697	10805032

DATE FILED	TIME FILED	STATUS
July 24, 2009	04:20 PM	RECORDED

ASSIGNOR:

LEHMAN COMMERCIAL PAPER INC

ASSIGNEE:

BARCLAYS BANK PLC
200 PARK AVENUE
NEW YORK NY 10166

MORTGAGOR:

LOUISIANA-I GAMING

MORTGAGEE:

BARCLAYS BANK PLC

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DEPARTMENT OF HOMELAND SECURITY U S. COAST GUARD CG - 1332	**GENERAL INDEX OR ABSTRACT OF TITLE Continuation Sheet No. 21**	Official No. 1028319

ASSIGN PREFERRED MORTGAGE Refers To: Document: 87

AMEND PREFERRED MORTGAGE

% CONVEYED	DATE	AMOUNT	BATCH	DOC ID
100 100	July 24, 2009	N.A. N.A.	702697	10805032

DATE FILED	TIME FILED	STATUS
July 24, 2009	04:20 PM	RECORDED

ASSIGNOR:
LEHMAN COMMERCIAL PAPER INC

ASSIGNEE:
BARCLAYS BANK PLC
200 PARK AVENUE
NEW YORK NY 10166

MORTGAGOR:
LOUISIANA-I GAMING

MORTGAGEE:
BARCLAYS BANK PLC

CORRECTION REMARK
Date of Instrument Corrected at NVDC 7/27/2009

ISSUED AS AN ABSTRACT OF TITLE AS OF

DATE: July 05, 2012 TIME: 09:14 AM

CYNTHIA BARRETT
NATIONAL VESSEL DOCUMENTATION CENTER

Explanatory Notes for LAYUPMAN are available from BIMCO at www.bimco.org

BIMCO

LAYUPMAN

STANDARD CONTRACT FOR THE LAYING UP OF VESSELS

PART I

1 Place and date of Agreement (Cl 2, 20)	2 Minimum contract period (state number of months from date of completion of de-activation) (Cl 17(a), 17(f))
3 Owners (Cl 1) (i) Name (ii) Place of registered office (iii) Law of registry	4 Managers (Cl 1) (i) Name (ii) Place of registered office (iii) Law of registry
5 Technical Managers (i) Name (ii) Contact address	6 Vessel (Cl 1 and Annex A) (ii) Name (iii) IMO Number IMO
7 Layup Site (state place or area (latitude/longitude)) (Cl 1)	8 Notice of arrival off Layup Site (state number of hours notice) (Cl 6)
9 Management Fee (state payment frequency and amount) (Cl 11(a))	10 Managers' nominated account (Cl 11(a))
11 Interest (state rate of interest to apply after due date to outstanding sums) (Cl 5(a))	12 Managers' maximum liability (state amount) (Cl 13(b))
13 Management fee on termination (state number of months to apply) (Cl 17(h))	14 Dispute Resolution (state alternative Cl 18(a),18(b) or 18(c), if 18(c) agreed, place of arbitration must be stated) (Cl 18)
15 Notices (state full style contact details for serving notice and communication to the Owners) (Cl 19)	16 Notices (state full style contact details for serving notice and communication to the Managers) (Cl 19)

It is mutually agreed between the party stated in Box 3 and the party stated in Box 4 that this Agreement consisting of PART I and PART II as well as Annexes "A" (Vessel Description), "B" (Scope of Work), "C" (Additional Fees, Expenses and Optional Services), "D" (Protocols) and "E" (Associated Vessels) attached hereto, shall be performed subject to the conditions contained herein In the event of a conflict of conditions, the provisions of PART I and Annexes "A", "B", "C", "D" and "E" shall prevail over those of PART II to the extent of such conflict but no further

Signature(s) (Owners)	Signature(s) (Managers)

PART II

LAYUPMAN

STANDARD CONTRACT FOR THE LAYING UP OF VESSELS

SECTION 1 – Basis of the Agreement

1. Definitions

In this Agreement save where the context otherwise requires, the following words and expressions shall have the meanings hereby assigned to them:

"De-activation" means the period of time during which the activities set out in Section 3 of Annex B (Scope of Work) are carried out.

"Flag State" means the State whose flag the Vessel is flying.

"Layup site" means the location stated in Box 7.

"Layup Period" means the period of time after De-activation and before Re-activation and includes the carrying out of activities set out in Section 4 of Annex B (Scope of Work).

"Managers" means the party providing Management Services as identified in Box 4.

"Management Services" means the services specified in Annex B (Scope of Work) for which the Managers are stated to be responsible therein, and all other functions performed by the Managers under the terms of this Agreement.

"Owners" means the party identified in Box 3.

"Re-activation" means the period of time during which the activities set out in Section 5 of Annex B (Scope of Work) are carried out.

"Vessel" means the vessel named in Box 6 details of which are set out in Annex A (Vessel Details) attached hereto.

2. Commencement and Appointment

With effect from the date of this Agreement stated in Box 1 and continuing until and unless terminated as provided herein, the Owners hereby appoint the Managers and the Managers hereby agree to act as the Managers of the Vessel in respect of the Management Services.

3. Authority of the Managers

Subject to the terms and conditions herein provided, during the period of this Agreement, the Managers shall carry out the Management Services in respect of the Vessel as agents for and on behalf of the Owners. The Managers shall have authority to take such actions as they may from time to time in their absolute discretion consider to be necessary to enable them to fulfill their obligations under this Agreement.

SECTION 2 – Obligations

4. Managers' Obligations

The Managers shall:

(a) use their best endeavours to perform the Management Services in accordance with sound layup industry practice, including but not limited to compliance with all relevant rules and regulations, and protection of the Vessel and surrounding environment in the case of emergency. The Managers shall have in place and maintain an emergency response plan. The Managers shall waive their right to claim any award for salvage performed on the Vessel and/or to protect the

environment. The performance of the Management Services shall be conducted in a manner consistent with appropriate social responsibility;

(b) maintain records of work carried out in performance of the Management Services;

(c) provide periodic written reports to the Owners of the observed condition of the Vessel and its equipment and machinery in a form and frequency agreed between the parties; and

(d) notify the Owners in the event that, during the performance of the Management Services, the Managers become aware of any equipment or machinery (for which the Managers are not responsible under Annex B (Scope of Work)) that needs maintenances and/or repair.

In the performance of their management responsibilities under this Agreement, the Managers shall be entitled to have regard to their overall responsibility in relation to all vessels as may from time to time be entrusted to their management. In particular, but without prejudice to the generality of the foregoing, the Managers shall be entitled to allocate available supplies, manpower and services in such manner as in the prevailing circumstances the Managers in their absolute discretion consider to be fair and reasonable.

5. Owners' Obligations

The Owners shall:

(a) pay all sums due to the Managers punctually in accordance with the terms of this Agreement. In the event of payment after the due date of any outstanding sums the Manager shall be entitled to charge interest at the rate stated in Box 11;

(b) use their best endeavours to perform those items in Annex B (Scope of Work) for which the Owners are stated to be responsible therein;

(c) maintain records of work carried out in performance of their obligations under Annex B (Scope of Work);

(d) advise the Managers of any change of flag or classification society of the Vessel whereupon either party may request an adjustment of the Management Fee (see Clause 11(a)) to reflect any increase of decrease in cost of providing Management Services as a consequence of such change. If agreement cannot be reached then either party may terminate this Agreement in accordance with Sub-clause 17(f);

(e) ensure that, throughout the Layup Period, the Vessel is in possession of valid certificates to comply with the requirements of the port authority, Flag State or classification society; and

(f) ensure that the minimum crew required by the Flag State is maintained until delivery into layup.

SECTION 3 – Operation

6. Arrival and De-activation

(a) Not later than seventy-two (72) hours or the number of hours stated in Box 8 before the Vessel's arrival off the Layup Site, the Owner shall give notice to the Managers. Upon arrival at the Layup Site the Managers shall attend on board the Vessel and carry out a joint inspection with the Owners to establish that the Vessel is in the condition stated in Annex B (Scope of Work).

(b) The de-activation of the Vessel shall be carried out in accordance with Annex B (Scope of Work).

During the period of de-activation the Owners and Managers shall be responsible respectively for those tasks allocated to them in Annex B (Scope of Work), and the Vessel shall be moved to the Layup Site. Owners shall remain responsible for the navigation of the vessel until completion of De-activation.

(c) The Owners and the Managers shall agree a down-manning plan upon the Vessel's arrival at the Layup Site.

(d) On commencement and again on completion of de-activation a Protocol in the form attached to Annex D (Protocols) shall be signed by both parties. On completion of De-activation the Managers shall take delivery of the Vessel into layup.

7. Layup Period

The Managers shall carry out the services identified in Annex B (Scope of Work) in relation to the Layup Period.

8. Inspection of Vessel

The Owners may at any time after giving reasonable notice to the Managers inspect the Vessel for any reason they consider necessary.

9. Re-activation and Removal of the Vessel from Layup

(a) At the time the expiry date of this Agreement becomes known (see Clause 17 (Termination)), the process of Re-activation set out in Annex B (Scope of Work) shall be commenced in such a way as to enable Re-activation to be completed by the expiry date. During the period of Re-activation the Owners and Managers shall be responsible re-

spectively for those tasks allocated to them in Annex B (Scope of Work).

On commencement and again on completion of Re-activation a protocol in the form attached to Annex D (Protocols) shall be signed by both parties.

(b) The Owners and the Managers shall agree an up-manning plan prior to Re-activation.

(c) In the event that the Vessel:

(i) Can be re-activated prior to the expiry date of this Agreement, the Owners shall take over responsibility for the Vessel not later than such date;

(ii) Cannot be re-activated prior to the expiry date of this Agreement then the party responsible for the tasks that are preventing completion of Re-activation shall complete those tasks as expeditiously as possible and the terms of this Agreement shall continue to apply.

(d) On completion of Re-activation the Owners shall take over responsibility for the Vessel and remove it from the Layup Site. If the Owners for any reason within their control fail expeditiously to carry out their obligations in accordance with Annex B (Scope of Work) in respect of Re-activation or upon Re-activation fail to remove the Vessel from the Layup Site, the Managers shall be entitled to recover such losses as they may suffer from the Owners. The Managers shall also have a lien over the Vessel and shall have the right but not the obligation to remove the Vessel to a safe place.

(e) In the event that Re-activation under this Agreement is not required, the process for removal of the Vessel from the Layup Site shall be agreed between the parties, and on completion of that process a Protocol in the form attached to Annex D (Protocols) shall be signed by both parties and the Owners shall take delivery of the Vessel out of layup. In the event the Owners fail to take delivery of the Vessel and remove it from the Layup Site, the Managers shall be entitled to recover such losses as they may suffer from the Owners and shall have a lien over the Vessel and shall have the right but not the obligation to remove the Vessel to a safe place.

. . .

APPENDIX C

RULES FOR

SURVEY AFTER CONSTRUCTION
2012

PART 7

American Bureau of Shipping
Incorporated by Act of Legislature of
the State of New York 1862

PART 7
APPENDIX

SECTION 3 Guide for Lay-up and for Reactivation of Laid-up Ships

1 Guide for Lay-up of Ships (12 June 2009)

When requested by the Owner, ABS will undertake to review, survey, and confirm by issuance of a factual Lay-up Report, the actions taken to preserve and protect a vessel in lay-up. Outlined below are precautions and procedures suggested to accomplish this objective, however, it is recognized that there may be a variety of equally satisfactory approaches to accomplish the same objective.

Approval Procedure for LAID UP Additional Notation

An ABS optional notation, LAID UP, for Laid-up Ships, may be assigned to a vessel in full compliance with the requirements as specified in this Appendix.

Specific elements required for LAID UP notation include the following:

i) Preparation and submission of plans to the ABS Divisional survey office as noted in 7-A-3/1.1.3(a).

ii) Lay-up survey

iii) Annual lay-up confirmatory survey to be conducted in lieu of the Annual Survey – Hull:

a) Hull integrity

b) Review of vessel maintenance and preservation record

c) General examination

iv) A survey report will be issued with details of vessel lay-up status.

1.1 Lay-up Surveys

1.1.1

When ABS is notified by the Owner that a vessel has been laid-up, this status will be noted in the vessel's survey status and in the *Record*, and surveys falling due during lay-up may then be held in abeyance until the vessel reactivates, at which time they are to be brought up-to-date.

1.1.2 (*12 June 2009*)

Vessels which have been laid up and are returning to active service, regardless of whether ABS has been previously informed that the vessel has been in lay-up, a Reactivation Survey is required. The requirements for the Reactivation Survey are to be specially considered in each case, having due regard being given to the status of surveys at the time of the commencement of lay-up, the length of the lay-up period and the conditions under which the vessel has been maintained during that period.

1.1.3 (*2011*)

Where the initial lay-up preparations and procedures have been submitted to ABS for review and survey, and re-verified annually by survey, consideration may be given to deduct-

ing part or all of the time in lay-up from the progression of survey intervals, or to modifying the requirements for updating surveys at the time of reactivation. This consideration is not applicable to vessels in the Enhanced Survey Program (ESP) and the Expanded Survey Program for Dry Cargo Vessels (ESDC).

1.1.3(a) When lay-up specification procedures are submitted, they shall include the following details:

- Lay-up site details (location, access, meteorological data, currents and tides)
- Proposed period for lay-up
- Mooring and anchoring arrangements considering the most severe tidal changes, wind strength and direction, including provisions for clearing the anchor chain of twists
- Fendering and gangways
- Ballast requirements
- Communications with shore services
- Proposed manning
- Power availability and other services
- Fire prevention, fire fighting, flooding and securing arrangements
- Preservation of cargo gear
- Back-up, preservation or removal/storage of electronic equipment
- Preservation of hull, tanks, and cathodic protection

- Procedures for preservation and maintenance of equipment
- Use of dehumidification equipment
- Gas free certificates to be issued and maintained
- Reactivation plan
- Record of spare parts removed from the laid up vessel

A log book with record of lay-up preparations, maintenance, and preservation actions should be maintained throughout the vessel's lay-up and reactivation. Machinery space humidity levels should be recorded on a regular basis during the lay-up period, together with scheduled equipment maintenance and operation.

1.1.4 (*12 June 2009*)

Flag administrations may have specific regulations for lay-up and reactivation surveys, and should be contacted for additional requirements.

. . .

3 Guide for Reactivation of Laid-up Ships

(*12 June 2009*) For vessels returning to active service from lay-up, regardless of whether ABS has been informed that the vessel has been in lay-up or lay-up preparations reviewed by ABS, a Reactivation Survey is required. An ABS office should be contacted for details of the requirements. Outlined below are guidelines on such surveys.

3.1 Reactivation Survey Status

3.1.1

In order to restore a laid-up vessel to active Class status, a Reactivation Survey is to be carried out including a corresponding point-by-point coverage of the original lay-up items. The extent of the Reactivation Survey is generally dependent on the length of the lay-up, the lay-up procedures followed, and the maintenance conditions during lay-up. However, the equivalent of an Annual Survey for all Class items, up-dating any due surveys and compliance with any outstanding recommendations are normally required.

3.1.2 (*12 June 2009*)

The primary objective of the Reactivation Survey is to verify that the vessel is in conformance with the applicable class Rules and requirements. Where the lay-up preparations and procedures were submitted to ABS for review and verified by survey at time of lay-up and annually thereafter, consideration may be given to deducting part or all of the time in lay-up from the progression of survey intervals, or to modifying the requirements for updating surveys at time of reactivation.

3.1.3 (*12 June 2009*)

Applicable items of the Reactivation Survey may be credited to a forth coming [sic] Special Periodical Survey, provided that the entire Special Periodical Survey is completed within a period of approximately fifteen months, or

the Special Periodical Survey is on continuous basis.

3.3 Reactivation – Hull and Outfit

3.3.1 (*12 June 2009*)

Drydocking Survey – Dependent upon the date of the last Drydocking Survey and the period and conditions of lay-up, an underwater inspection by diver may be permitted in lieu of drydocking for reactivation. In such cases, cleaning of vessel's underwater body, including sea suctions, may be required. Where it is intended to proceed from the lay-up site to another location for drydocking, an underwater inspection by diver will normally be required prior to departing the lay-up site.

3.3.2

The following additional items should normally be included in the reactivation surveys of hull and outfitting:

- Anchors and chain cables, chain stoppers and chain locker pumping arrangements
- Anchor windlass, mooring winches and roller fairleads
- Cargo holds and machinery space drain wells together with bilge pumping arrangements and hull penetrations
- Random cargo tanks, pump rooms, cargo piping and associated valves and pumping arrangements
- Watertight doors, engine room skylights, fire dampers, ventilators, portlights, hatch covers and their respective closing devices

- Peak tanks, random ballast tanks and their respective pumping systems
- Cofferdams and voids, together with their pumping out arrangements
- General examination and testing of ship's whistle, internal communication systems, engine order telegraph, steering arrangements and controls, general alarm system, rudder angle indicator and navigational lights
- Examination and servicing as necessary of ship's radio installation, radio direction finder, gyro-compass and repeaters, magnetic compasses, depth sounder, radar and other navigational aids
- Fire extinguishing arrangements to be verified in order
- (*12 June 2009*) Foam tank solution to be tested and replaced as necessary
- Tank venting arrangements including closing devices, pressure-vacuum relief valves and flame arrestors to be examined and placed in order as required