

No. 11-626

IN THE
Supreme Court of the United States

FANE LOZMAN

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA

Respondent.

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

**BRIEF FOR THE SEATTLE FLOATING
HOMES ASSOCIATION AND THE FLOATING
HOMES ASSOCIATION OF SAUSALITO AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTERESTS OF AMICI CURIAE¹

Amici Curiae are the Seattle Floating Homes Association (“Seattle Association”) and the Floating Homes Association of Sausalito (“Sausalito Association”). The Seattle Association represents owners of floating homes—*i.e.*, residences that are built on flotation devices and are designed to be indefinitely moored and connected to land-based utilities—on Portage Bay and Lake Union in Washington State. It was founded in 1962, and its members represent 250 of the roughly 500 floating homes in Seattle. The Sausalito Association was founded in 1985 to represent floating homes located on Richardson Bay, an inlet of the San Francisco Bay. Its members represent roughly half of the more than 500 floating homes in Sausalito and the immediately adjacent unincorporated regions of Marin County.

Amici have a profound interest in this case, because the rule adopted by the Eleventh Circuit below threatens to sweep floating homes into the definition of a “vessel” under 1 U.S.C. § 3, and thus subject their members’ single family residences to the broad array of legal doctrines and remedies of federal admiralty and maritime law. If affirmed, the holding of the Eleventh Circuit could radically alter the legal regime that applies to floating homes, and supplement or displace longstanding state and local laws governing these land-affixed residences with requirements intended for maritime transportation.

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici Curiae or their counsel contributed money to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In this brief, Amici describe the design and purpose of floating homes, their structural limitations, and the nature of the communities that comprise them. These facts establish that floating homes are stationary residences, by design and in practice. They lack any means of self-propulsion. They are attached to land-based moorage facilities, and their residents depend on connections to land-based utilities for water, electricity, sewage treatment, and other necessities. They are governed by most of the same building code provisions that apply to upland homes and are built using essentially the same materials and techniques that one would employ in building a house on land. They sit atop flotation devices selected for durability and stability, which are often singularly unsuited for being towed through the water. Owners of floating homes normally keep their homes in the same place for decades at a time. Floating home owners develop bonds with their neighbors and put down roots in the community. Floating homes are rarely moved, and when they are, it is a complicated and dangerous endeavor.

Amici also argue that the Court should reject Respondent's invitation to pin federal vessel status under 1 U.S.C. § 3 on these stationary residences, which are a functional extension of the land. The existing state and local regulatory regime for floating homes is comprehensive, effective, and carefully tailored to the localized issues that floating homes implicate. This current regime accords with the national tradition of local control of land use. Reclassifying floating homes as vessels would frustrate local regulation that has evolved over

decades with input from diverse stakeholders. And the reclassification could have numerous undesirable consequences, subjecting floating homes to a panoply of ill-fitting doctrines and requirements intended for maritime transportation.

ARGUMENT

I. FLOATING HOMES ARE STATIONARY RESIDENCES THAT ARE ATTACHED TO THE LAND, NOT DESIGNED FOR TRANSPORTATION, AND RARELY EVER MOVED.

A. Like Upland Homes, Floating Homes Are Intended To Be Stationary And To Remain Connected To Moorage Facilities And Land-Based Utilities.

Like upland houses, “floating homes” are residential structures that are attached to the land. Not only are they affixed to piers or pilings, but they are connected to all of the land-based utilities upon which modern home dwellers rely.² Like upland houses, floating homes are located in communities, where homeowners come to settle for decades, build relationships with their neighbors, and join homeowner associations. Like upland houses,

² See, e.g., A. Jeffries, *Floating Homes Weather Housing Crisis*, Or. Bus., March 2010, (Jeffries) available at <http://www.oregonbusiness.com/articles/82-march-2010/3079-liquid-assets> (“Floating homes are permanent houses . . . [that] come with all the comforts—water, telephone, heat, a complete septic system—of a house on land.”).

floating homes have no means to move themselves.³ Like upland houses, they can be expansive—with some floating homes measuring 4,000 or 5,000 square feet.⁴ See generally N. Gromicko & K. Shepard, *Inspecting Floating Homes*, <http://www.nachi.org/inspecting-floating-homes.htm> (Gromicko & Shepard) (describing floating homes as homes that are “constructed on a float; designed and built to be used as a residential dwelling; stationary by being moored or anchored, and not meant for navigation; without a means of self-propulsion; powered by utilities connected to the shore; and permanently and continuously connected to a sewage system on shore.”).

The only substantial difference between floating homes and their upland counterparts is the foundation on which they rest. While upland houses rest on a solid foundation that is connected to the earth, floating homes rest on a flotation device that sits upon the water.

³ See, e.g., K. Carber, *Floating Through Life*, S.F. Chron., Oct. 4, 2003, at E3 (observing that floating homes lack any mechanism for “self-propulsion”).

⁴ See, e.g., *Nine Outrageous Floating Homes For Sale*, Forbes.com, June 23, 2011 <http://www.forbes.com/sites/zillow/2011/06/23/9-outrageous-floating-homes-for-sale/> (describing “humongous, 4,200 sq ft floating home on Portland’s Columbia River,” which is “built on a concrete slab that can ‘hold up [to] 2 million pounds” and contains “5 bedrooms and 4.5 baths” as well as a “17-foot swim spa off the master deck”); T. Laturus, *Floating Homes* 61 (1986) (Laturus) (describing floating home that is “a 3000-square-foot floating palace, replete with electronically-controlled drapes that open and close in relation to the sun’s location, sauna, whirlpool, roof garden, solarium, and maid’s quarters”).

Statutory definitions of the term “floating home” reflect the stationary nature of these structures, and the fact that they are connected to land. In California, for example, floating homes are defined as

a floating structure which is all of the following: (1) It is designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling. (2) It has no mode of power of its own. (3) It is dependent for utilities upon a continuous utility linkage to a source originating on shore. (4) It has a permanent continuous hookup to a shoreside sewage system.

Cal. Health & Safety Code § 18075.55(d); *see also* Idaho Code Ann. § 55-2704(1) (same).

Such definitions also specify that floating homes are not to be confused with “vessels.” *See* Wash. Rev. Code § 90.58.270(5)(b)(ii) (“‘Floating home’ means a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, *and is not a vessel*, even though it may be capable of being towed.”) (emphasis added); *cf.* Cal. Harb. & Nav. Code § 501(e) (“‘Vessel’ means every description of watercraft, other than a seaplane on the water or a floating home . . .”).

Floating homes are distinct from “houseboats,” which are vessels that are intended to move across water under their own power. A contemporary houseboat “is a wide and slow-moving power boat propelled by an inboard or outboard engine, with a relatively flat hull and shallow draft designed for short-term living and light cruising on inland lakes, rivers, canals, and bays.” B. Flanagan, *The*

Houseboat Book 20 (2003) (Flanagan). Not only must houseboats have mechanisms for propulsion and steering, they also must have “deck fittings, navigational and nautical equipment, and the required marine hardware,” as well as “a seaworthy hull design that meets U.S. Coast Guard standards for flotation, safety equipment, fuel, electrical power, ventilation, and an on-board sewage system.” Gromicko & Shepard; *see also* 33 C.F.R. § 173.3 (Coast Guard regulation on vessel numbering and accident reporting, defining “houseboat” as “a motorized vessel that is usually non-planing and designed primarily for multi-purpose accommodation spaces with low freeboard and little or no foredeck or cockpit”). Floating homes generally do not include any of these features.⁵

To be sure, some written authorities use the term “houseboat” to refer also to stationary floating homes without any means of self-propulsion. *See, e.g.*, Flanagan 20; Sausalito Municipal Code § 16.08.020(C). But this occasional loose language belies the clear and well understood distinction between floating homes, which cannot be moved unless they are disconnected from the land and towed by another vessel, and house boats, which are designed to move under their own power. *See* Flanagan 20 (“In the lingo of marinas the understanding is simple. Houseboats propel

⁵ Floating homes are also distinct from “house barges,” which are floating residences that, unlike floating homes, are specifically designed to be towed. *See* Gromicko & Shepard; *see also* Seattle Municipal Code § 23.60.916 (“‘House barge’ means a vessel that is designed or used as a place of residence without a means of self-propulsion and steering equipment or capability.”).

themselves. Floating homes have no motor”); *id.* at 26 (describing “floating homes” as “non-motorized dwellings—built on flotation devices—designed to remain in slips where they will be connected to water, electrical, and sewage services”).

Floating homes are typically located at a residential moorage facility, the aquatic equivalent of a suburban subdivision. The homes are generally moored alongside docks supported by pilings, in designated spaces called “slips” or “berths.”⁶ Similar to upland homes, there are a variety of legal mechanisms by which floating home residents may possess their slips. Floating home residents may lease their slip, either for a fixed term or on a month-to-month basis. They may form a cooperative with other floating home owners, which owns the dock and the slips collectively. Or they may own the slip and the land underneath it as a condominium. *See generally* F. Russell, *Flotation, flotation, flotation*, Puget Sound Bus. J., July 12-18, 1996 (Russell). It is increasingly common for floating home owners to own their slips. *See ibid.* The cost of purchasing a slip can exceed \$100,000,⁷ an investment that ties floating home owners to their moorage facility in a financial sense.

Floating home owners are also connected to the moorage facility in a physical sense. First, their

⁶ For ease of reference, Amici will refer to these collectively as “slips.”

⁷ *See* G. Marden, *Floating Homes FAQ's*, http://www.oregon-floating-homes.com/portland_oregon_floating_homes_faq.htm (“Slip prices range from about \$75,000 to \$150,000, depending on the moorage, the exact location of the slip, and whether a garage is included.”).

homes are tied to the dock or to pilings, usually with ropes or chains. Using this type of flexible material instead of a rigid connection “allows the home to rise and fall with the tide or seasonal changes in water levels and puts less stress on permanent docks and mooring anchors.” Gromicko & Shepard. Second, floating homes “are ‘permanently’ connected to services via conduits and PVC pipes, rigid or flexible, running under the docks.” Flanagan 22. Typically, “gas, water and sewer pipes and electrical power lines are suspended from the undersides of docks and branch out to homes in each slip.”⁸ Gromicko & Shepard.

Connections to various land-based utilities are a defining feature of floating homes. As previously noted, the statutory definition of a floating home in California and Idaho provides that the structure is “dependent for utilities upon a continuous utility linkage to a source originating on shore.” *Supra* at 5. In some jurisdictions, utility connections are required by law. In the City of Sausalito, for example, floating homes are required to have a “secure water connection” and a “permanent and adequate electrical connection.” Sausalito Municipal Code §§ 16.08.030(C)–(E).

Because floating homes rely on land-based utility connections for water, electricity, heat, and so on, they lack parallel systems that can provide these necessities if the home is detached from its moorage facility. Once detached, the house may only be rendered operable again if it is re-connected to utilities at one of a very small number of floating

⁸ Modern floating homes are usually also connected to cable television and broadband internet services.

home moorage facilities that offer the necessary services.

B. Most Floating Homes Are Part Of Stable, Permanent Communities.

Since floating homes are stationary, and often occupied by the same owners in the same slip for decades at a time, vibrant communities have grown up around floating home moorages.

The largest floating home communities in the United States are found along the Pacific coast. Over 2,300 floating homes line the Columbia and Willamette Rivers near Portland, Oregon. Jeffries. In Seattle, where the forlorn character played by Tom Hanks paced the terrace of his floating home in the film *Sleepless in Seattle*, there are around 500 homes in the waters of Portage Bay and Lake Union.⁹ In the San Francisco Bay Area, Sausalito hosts an iconic floating home community of over 500 homes, where Otis Redding once penned the song *Sitting on the Dock of the Bay*.¹⁰

Hundreds of other floating homes are found across the nation. For example, in the San Francisco Bay Area, floating homes are also found along Mission Creek in the city of San Francisco, at Point San Pablo, Berkeley, and Alameda in the East Bay, and in Redwood City on the Peninsula. On the eastern seaboard, floating homes are found in Washington,

⁹ See Seattle Floating Homes Association, <http://www.seattlefloatinghomes.com>.

¹⁰ See J. Greenwald, *Living on the Dock of the Bay*, Smithsonian Mag. (Apr. 4, 2012), <http://www.smithsonianmag.com/people-places/Everything-Floats-Their-HouseBoats-What-Its-Like-to-Live-on-the-Dock-of-the-San-Francisco-Bay.html>.

D.C., New Jersey, and Florida, among other places. Floating homes also dot lakes and waterways in the interior of the country. For example, there are around 200 floating homes in Idaho, most on Lake Pend Oreille.

The communities that form around floating home moorage facilities are like upland communities, with their own histories, unique and vibrant identities, and strong ties between neighbors. In many cases, floating home communities were born out of a need for affordable housing. In Seattle, for example, the modern floating home community emerged during the Depression, when people “desperately seeking cheap places to live” erected structures on log floats on Lake Union. B. Means & B. Keasler, *FHA History*, <http://www.seattlefloatinghomes.org/about/history> (Means & Keasler). Floating homes remained popular during World War II and in the post-war years because they were comparatively less expensive than upland housing. See H. Droker, *Seattle’s Unsinkable Houseboats* 88, 91 (1977) (Droker). Sausalito’s floating home community, located in and around a former shipyard, blossomed in the 1950s and 1960s when people moved there because of the opportunity for affordable housing. See J. Greenwald, *Living on the Dock of the Bay*, *Smithsonian Mag.* (Apr. 4, 2012) (Greenwald).¹¹

Over time, floating home owners in these communities organized themselves, working together to build necessary infrastructure such as sewer

¹¹ See also S. Dreman, *Floating homes*, Palo Alto Online, http://www.paloaltoonline.com/news_features/real_estate/spring_2004/floatinghomes.php (describing Silicon Valley resident who built a floating home because “It’s the only source of true affordable housing left” in the area).

connections, and fighting against waterfront development, evictions, and efforts to regulate their homes out of existence. *See* Means & Keasler; Droker 101-129; P. Frank, *Houseboats of Sausalito* 109 (2008). The larger floating home communities formed nonprofit associations of floating home owners—including Amici as well as associations in Alameda, Portland, and elsewhere. These associations are dedicated to strengthening and protecting their respective communities. Like other neighborhood associations, they elect boards of directors, publish newsletters, and host community events such as dances and fire safety trainings.¹²

The close quarters and shared docks at moorage facilities build strong relationships between neighbors. *See* Greenwald (“Here, walking to and from your boat, you meet half the people on the dock. Yes, we all come from diverse economic backgrounds. But when there’s a problem, everybody comes out and helps one another.”). Residents of floating home moorage facilities look after each others’ homes, and lend a hand when their neighbors are in need. *See ibid.*; T. Laturus, *Floating Homes* 18 (1986) (Laturus).

Many floating home owners are drawn to their houses not just for the opportunity to live in relatively affordable housing on the water, but also by a desire to be a part of these permanent communities.¹³ In Sausalito, hippies who originally

¹² *See generally* <http://www.seattlefloatinghomes.org/about>; <http://www.floatinghomes.org>; <http://www.alamedafloatinghomes.org>.

¹³ To be sure, some floating homes are found at mixed-use marinas, which may lack some of the sense of community found in dedicated floating home moorages. But the floating home

helped found the floating home community have been joined by physicians, lawyers, and other professionals, attracted by the diversity of the waterfront. *See* Greenwald (“There are people on welfare, there are millionaires, there are outstanding artists, there are computer whizzes.”). In Seattle, many floating homes have been purchased by transplants from the suburbs, enchanted not only by the views and the proximity to the city, but also by the “spirit of community among their neighbors.” Russell.

Important geographic and environmental differences distinguish floating home communities. For example, whether a moorage facility is in salt water or fresh water affects the design of the floating homes located there. Log floats are rarely found in salt water, because they are subject to infestation by salt water teredo worms. *Laternus* 41. And flat-bottom boats are more common in tidal areas, where floating homes often rest on the mud at low tide.

C. Floating Homes Are Designed To Be Stationary, And Not To Be Used For Transportation.

Designing and building a floating home is not very different from designing and building a home on land. *See generally* *Laternus* 64 (“Building a floating home isn’t, surprisingly perhaps, much different from building a house on land.”). It involves the same professionals, most of the same building code provisions, and the same materials and construction techniques.

residents who dwell there are still attracted to the unique experience of living on the water while connected to the land.

Floating homes are typically designed by architects, sometimes with the assistance of structural engineers. Marine engineers, yacht designers, and other professionals with expertise in the design of vessels are not normally involved in the design or construction of floating homes. Given the relatively small quantity of new floating home construction, floating home architects generally have a mixed practice, working on both floating and upland structures. They design floating homes in a wide variety of architectural styles, most of which also can be found on land.¹⁴

With a few exceptions, floating homes must comply with the same building code provisions that bind upland homes; municipal codes governing floating homes typically incorporate the standard building code by reference.¹⁵ The codes then provide additional or different regulations specific to floating homes, such as provisions governing the type of flotation device or the amount of “freeboard” (*i.e.*, the distance from the waterline to the first floor or deck of the floating home). *E.g.*, Alameda Municipal Code §§ 13-38.16–17. *See infra* at 25, 27.

Because standard building code provisions apply to floating homes, contractors employ essentially the same materials and techniques in erecting a floating home as they would use on land. These include heavy materials, used for stability and durability, which would not be employed on a vessel of similar size. For example, architects routinely use wooden I-

¹⁴ Flanagan 26 (describing floating homes built to be “cabin[s],” “cottage[s],” and “townhouse[s]”).

¹⁵ *See, e.g.*, Marin County Code § 19.18.040; Alameda Municipal Code § 13-38.6; Portland City Code § 28.01.020.

joists to support the floor and roof of a floating home. This type of structural member weighs several pounds per foot, depending on the dimensions, and is too heavy and bulky for use in most vessels.

The main design difference between floating homes and their upland counterparts is that floating homes are built on flotation devices instead of foundations.¹⁶ The designer of a floating home must give careful consideration to the type of flotation device, the weight of the structure that will rest on it, and the distribution of weight, to ensure that the floating home will be sufficiently buoyant and will sit stably upon the water.

Floating homes use numerous types of flotation devices. The vast majority of floating homes in Seattle and Portland are built atop a raft of logs initially tied together decades ago. *See generally* Laturus 32 (describing raft flotation device). When the original logs become soaked and lose some of their buoyancy, additional logs are added below them. As this process is repeated over the years, the homes eventually collect “an inverted pyramid of logs beneath them.” *Id.* at 40. When more logs cannot be added, an assortment of supplemental flotation devices are attached to the logs for additional buoyancy. Flanagan 62; Laturus 10, 47. All told, a typical log float will weigh at least twenty tons. Laturus 36.

¹⁶ One other difference is that floating homes, unlike upland homes, are typically required to have a holding tank for waste and a device called an “ejector.” *See, e.g.*, Marin County Code § 19.18.120. This is because floating homes are at a lower elevation than the municipal sewer systems, and the device is needed to pump the sewage uphill into the municipal system.

Most floating homes in Sausalito and elsewhere in the San Francisco Bay Area rest on concrete flotation devices. *Id.* at 34. Concrete flotation devices, “considered to be the *‘ne plus ultra’* in houseboat flotation,” *id.* at 45, are typically shaped like massive shoe boxes. They are also quite heavy. A sixteen by thirty-six foot concrete float will generally use about two tons of reinforcing bars. Flanagan 63. The concrete and the house above add a dozen tons or more. *See* Laturus 39.

Floating homes can also be built upon box-flotation devices made of other materials, such as steel. Another approach is to build on pontoons, which can be made out of materials like steel, plywood, styrofoam, or fiberglass. In some cases, floating homes are built on old hulls. *See generally* Laturus 32-34; Gromicko & Shepard.

In selecting a flotation device and designing the home that will sit above it, designers of floating homes do not focus on whether it can be transported effectively. The emphasis is on how the flotation device will sit on the water, not how it might move through the water. This explains the popularity of boxy, heavy, concrete flotation devices, which—unlike boats and most barges—lack any sort of angled bow, or other slope or curvature to make them more hydrodynamic and minimize water resistance.¹⁷ This is a key point of distinction between floating homes and houseboats. “Motorized, boatlike houseboats require maneuverable,

¹⁷ *See* Greenwald (noting that most floating homes in Sausalito are “encased in concrete hulls,” which offer “protect[ion] from rot and ocean organisms at the price of immobility”).

lightweight hulls, or pontoons, designed to slice through protected waters using minimal fuel,” Flanagan 59, and for that reason are designed with the assistance of marine engineers or yacht designers. Floating homes, designed by architects and intended to be stationary, do not typically include these features.

The shape of the flotation device is just one of many areas where the typical design of floating homes ignores elements that would be crucial for watercraft intended for transportation. Floating homes are not designed to be aerodynamic above the water line. They are not designed to include a motor, or any sort of mechanism to facilitate steering. They are not designed to resist waves or choppy waters. Indeed, floating homes often have doors and windows that are just above the waterline and are ill-equipped to resist repeated battering with waves. Floating homes also lack equipment that is commonly found on boats. They do not have navigational systems, batteries, independent electrical systems or water systems, and so forth. Nor are floating homes designed to comply with any of the myriad safety requirements and regulations that apply to vessels. Although floating homes may be designed with mooring rings so they can be connected to pilings, they generally lack the T-shaped metal “cleats” or “bits” that are commonly found on boats and typically used when towing vessels and barges. And they frequently lack any side walkways from which to push the home away from the dock.

Furthermore, when floating homes are inspected after their construction or before a sale, the inspector generally does not examine whether they are in a condition to be towed. Instead, floating home

inspections focus on compliance with building codes, and factors that have to do with the buoyancy, stability, and durability of the home. For example, inspectors measure for compliance with height limitations, test whether the house is “listing’ to one side or another,” assess whether utility connections are adequate, and may also dive under the house to examine the sufficiency of the flotation. Gromicko & Shepard.

D. Towing Floating Homes Is Complicated, Dangerous, And Rare.

Because floating homes are not designed or intended for transportation, it is complicated and expensive to tow them, regardless of the distance. Indeed, the very act of towing can imperil a home. For these reasons, among others, floating homes are rarely towed more than a few times during their lifespan, if that.

As discussed above, the flotation devices underlying most floating homes are not designed to move smoothly through the water. *See supra* at 15–16. The boxy profile of a concrete float, for example, coupled with its immense weight, limit the speed at which a home on such a float may be towed to just a few knots.¹⁸ *Cf.* Laturus 34 (disadvantages of “[b]ox-type flotation” include “difficulty in towing for any distance”). Moreover, because of their flat bottom and square end, concrete floats do not tow in a straight line, but instead make unpredictable lateral movements as they are towed.

Homes built on log floats face even graver challenges when towed. As described above, these

¹⁸ A “knot” is equal to approximately 1.15 miles per hour.

homes sit above an inverted pyramid of soaked logs supplemented by additional flotation devices that collectively weighs twenty tons or more. *See supra* at 14; *see also* Laturus 47 (describing supplemental flotation devices, including “three-hundred-gallon stove oil tanks, mooring buoys, forty-five gallon drums, and plastic barrels filled with foam”). This complex collection of logs, barrels, and other flotation devices makes towing a challenging and dangerous endeavor. The inverted pyramid of logs is not hydrodynamic. Moreover, when a home on a log float is towed through the water, logs and supplemental flotation devices commonly break away from the float, thereby threatening the home’s flotation.¹⁹ For these reasons, and because of log floats’ extraordinary weight, the maximum speed for towing a home on a log float is even slower than for homes on concrete floats. Some tugboat captains will not tow a log float faster than one knot.

Floating homes constructed on other types of flotation devices may also be imperiled if they are towed. One serious danger, particularly for homes built on open flotation devices, is that they will take on water and sink. A leading book on floating homes recounts the story of a home built upon “pontoon flotation that was open at the top.” Laturus 35. “When it was moved, the forward motion of the houseboat in the water, in combination with the propeller turbulence of the tow vessel, swamped the

¹⁹ Homes on concrete floats, or floats made out of other materials, sometimes also employ supplemental flotation devices. This is particularly common when there is a large concentration of weight on one side of the home. To the extent that these homes are towed, they also face the risk of losing their supplemental flotation devices.

houseboat and filled the flotation tanks on one side before the houseboat had gone fifty feet.” *Id.* at 36. Indeed, the danger of taking on water during a tow applies to all types of floating home designs, because of the very short distance between the waterline and the floor of the home. To minimize this risk, one must board up windows and doors, and attach a splash board or other mechanism intended to fend off waves and swells, prior to a move.

Another challenge presented when towing floating homes is their large profile above the water, which can act as a massive sail during windy conditions. In Marin County, for example, floating homes may be forty-six feet long and may rise to sixteen feet above the water (or even higher if the owner obtains a variance). *See* Marin County Code §§ 19.18.050–051. A home of these standard dimensions creates a “sail” of over 700 square feet, which cannot be trimmed or reduced. In windy conditions, it may push the home in the wrong direction as it is being towed. Indeed, if a home has a high center of gravity, it risks being blown over when exposed to high winds.²⁰ For these reasons, tugboat captains typically must wait for a perfectly still day without any wind to tow a floating home.²¹

Even in ideal weather conditions, the process of moving a floating home is fraught with danger because the home’s large contours diminish visibility

²⁰ *Cf.* Laternus 34 (describing floating home “that has blown over, not once, but *twice* in high winds, simply because it floats four feet out of the water and only draws a foot of water, giving it a high center of gravity”).

²¹ In tidal areas, one must also wait for good tide conditions before moving a floating home.

for the tugboat captain guiding the home. The outline of the home may prevent the captain (or captains, if multiple boats are required) from seeing hazards in the home's path. To address this concern, a captain may employ multiple people to act as "spotters" during the move.

In addition to the waterborne challenges associated with towing a floating home, the process of readying a home to be towed is long and resource-intensive. In many cases, an underwater inspection of the flotation device is required to ensure that it will survive transportation. The floating home also must be detached from its many connections to the land—not only its ties to the pier or pilings where it is moored, but also the connections for all of the home's utilities. The electrical connection generally must be detached by an electrician. Depending on the configuration of the sewer line, it may also be necessary for a diver to detach the home's sewage hookup.²²

In view of these hazards and requirements, towing a floating home can be an expensive project. A floating home owner must engage the services of a tugboat, or another vessel with sufficient power to pull the home through the water. There are also labor costs; a move generally requires the work of four or five people. All told, moving a floating home over a relatively short distance can cost thousands of

²² Some floating homes are built on old flat-bottomed boats, barges, or other forms of hull flotation devices. Such homes are more easily towed through water from a hydrodynamic perspective. Laternus 32. But they are still subject to the other obstacles to towing identified above, including their large profile, limited visibility, the need to detach utility connections, and so forth.

dollars. And circumstances may drive costs even higher. The size of the floating home or the conditions may necessitate multiple tugboats. In some cases, the path of the floating home is obstructed by its neighboring homes, which must be moved about like puzzle pieces to create a means of egress.

Not surprisingly, given the above, floating homes are rarely towed. Amici are not aware of any statistics on point, but veterans of the Sausalito and Seattle floating home communities estimate that an average home would only be towed a couple of times over its lifespan. New floating homes are sometimes constructed away from their moorage facility and then towed to their slip. On other occasions, however, floating homes are built in their slip. At the end of their lives, floating homes are often towed a short distance to be scrapped. And, infrequently, floating homes are towed to a new slip or moorage facility—sometimes upon the sale of the home. But this type of move is quite rare. Floating home moorage facilities are few in number, and it is difficult to find a vacant slip of the requisite size and with the appropriate utility connections. As a result, owners of floating homes, including new owners, generally keep their residence in the same slip where it has sat for decades.

II. THE EXISTING REGIME OF STATE AND LOCAL REGULATION OF FLOATING HOMES IS APPROPRIATE.

Notwithstanding the stationary nature of floating homes, their operation as an extension of the land, and the great difficulties associated with towing them, the Eleventh Circuit's test treats floating homes as "vessels" under 1 U.S.C. § 3. That result is inconsistent with the statutory text and with this Court's case law (*see* Br. for Petitioner 16–34), and it would trigger disruptive and undesirable consequences.

Floating homes are best governed by state and local regulation. The existing regulatory scheme is comprehensive, effective, and carefully tailored to the particular structural, cultural, and environmental attributes of floating homes. The existing regime is also consistent with this Court's longstanding recognition that state and local regulation is the favored framework for land use, a tradition that applies with force here given the distinctly local issues that inform the regulation of floating homes. The alternative scheme threatened by the Eleventh Circuit's test would impose on stationary residences an ill-fitting scheme designed for maritime transportation and commerce, and could make life difficult and confounding for floating-home residents in several ways.

**A. The Existing State And Local
Regulatory Scheme Successfully
And Comprehensively Manages
Floating Home Communities And
Balances Local Priorities.**

Floating homes are subject to a comprehensive regulatory regime at the state and local level. Two points about the existing regime are salient. First, existing regulation is extensive, requiring compliance not only with traditional building codes, but also with prescriptions specific to floating homes. Second, the existing scheme is carefully drawn. It was tailored over decades to balance local interests with respect to the unique considerations that floating homes implicate. The regulatory regimes and experiences in Seattle and Sausalito illustrate these two points.

1. Seattle, Washington

Washington State regulates floating homes as part of its statewide shoreline management. *See generally* Washington Shoreline Management Act (SMA), Wash. Rev. Code § 90.58.010 *et seq.* In refining the SMA over the years, the legislature has solicited the views of many stakeholders, and has twice invited a representative from the Seattle Association to testify at state legislative hearings. Although there has not always been agreement over shoreline management, and satisfying all interests is an ongoing challenge, the legislative process has allowed the Association to explain the history and significance of floating homes in Seattle and the need for a legal status that allows for their continued existence. The law now recognizes the special status of floating homes:

The legislature recognizes that existing floating homes, as part of our state's existing houseboat communities, are an important cultural amenity and element of our maritime history. These surviving floating home communities are a linkage to the past, when our waterways were the focus of commerce, transport, and development. In order to insure the vitality and long-term survival of these existing floating home communities, consistent with the legislature's goal of allowing their continued use, improvement, and replacement without undue burden, the legislature finds that it is necessary to clarify their legal status.

Wash. Rev. Code § 90.58.270, note (2011).

The statutory revision implemented in view of this recognition classifies floating homes as a “conforming preferred use”—meaning that they must be regulated in a way that allows for their continued existence. *See* Wash. Rev. Code § 90.58.270(5)(b)(i) (“[A]pplicable development and shoreline master program regulations may only impose reasonable conditions and mitigation that will not effectively preclude maintenance, repair, replacement, and remodeling of existing floating homes and floating home moorages by rendering these actions impracticable.”).

The City of Seattle implements Washington's Shoreline Management Act through a Shoreline Master Program (SMP), which imposes detailed requirements aimed at balancing the many environmental, recreational, and aesthetic interests affecting the city's shores. *See* Seattle Municipal

Code §23.60.002. Here, too, regulations were developed with input regarding the particular needs of various local stakeholders, including the floating home community and surrounding Seattle communities. Members of the Seattle Association participated in a Citizens' Advisory Committee for the SMP and met with city council members; one city representative came to walk the Association's docks to better understand how the law can properly account for floating homes' distinct qualities.

The SMP requires floating homes to comply with the city's building code for upland homes, plus numerous requirements specific to floating homes. *See id.* § 23.60.196. The requirements for floating homes include restrictions on the location, height, and square footage of floating homes, the distance between them, and the type and width of direct access that must be provided to a moorage walkway leading to a street.²³ *Id.* Because some floating homes in the Seattle area extend over state property, 131 floating home owners also currently have leases with the State Department of Natural Resources that impose additional restrictions aimed at environmental protection.

²³ In addition, Seattle has a consumer protection ordinance that governs rent increases and other conduct by floating home moorages. Reinforcing the special local status of floating home communities, the stated aim of the ordinance is to "prevent harm to the public by protecting the stability, viability, and fiscal integrity of Seattle's unique floating home communities by preventing the eviction of floating homes from their moorages through arbitrary actions and unreasonable rent increases . . ." Seattle Municipal Code § 7.20.020.

2. Sausalito, California

The floating home community in and around Sausalito, California is also subject to extensive regulation under state and local law. Recognizing the special status of floating homes, California treats them as residences and specifically excludes them from vessel status for purposes of state law. *See supra* at 5. Like Washington, California also protects floating home tenants. *See* Floating Home Residency Act, Cal. Civ. Code § 800 *et seq.* (governing rental agreements, tenancy terminations, and the sale or transfer of floating homes).

The special status of floating homes is paired with rigorous state regulation. Floating homes in the San Francisco Bay must comply with the San Francisco Bay Plan, *see* Cal. Gov. Code § 66600 *et seq.* (2011), implemented by the Bay Conservation and Development Commission (BCDC). The Bay Plan and accompanying state regulations strictly limit the construction and modification of floating homes and require a permit for the construction or “substantial modification” of floating homes. *See* Cal. Gov. Code § 66632(a) (permit requirement); *see also* San Francisco Bay Plan, *available at* http://www.bcdc.ca.gov/laws_plans/plans/sfbay_plan.shtml. Permits will be granted only if the project is either “(1) necessary to the health, safety or welfare of the public in the entire bay area, or (2) . . . consistent with the provisions of this title and with the provisions of the San Francisco Bay Plan then in effect.” *See* Cal. Gov. Code § 66632(f). The Commission has authority to grant permits subject to specific use, intensity, or construction conditions. *See id.* The Sausalito Association and other interested parties have actively worked with the

state legislature and the BCDC over the years to calibrate state-level regulation.

Local regulation is rigorous and even more detailed. Floating homes in the unincorporated areas of Marin County must obtain permits from the county and must comply with county regulations regarding design specifications and safety measures. *See* Marin County Code § 22.32.075(A). The regulations establish the maximum dimensions of floating homes: no more than sixteen feet above the water line, 46 feet long, and 20 feet wide. *Id.* §§ 19.18.050–051. The regulations also govern many other details of floating home life and construction. *See, e.g., id.* § 19.18.150 (length and type of hose for water); *id.* § 19.18.290 (wiring methods and materials); *id.* § 19.18.280 (connection of fixtures and appliances); *id.* § 19.18.320 (measurement of stability on water). Floating homes in Marin County must also maintain specific types of fire prevention equipment and life saving equipment. *See id.* § 19.18.350.36.

Marin County’s code also closely regulates the marinas in which floating homes are located. *See id.* § 22.32.070(C). In particular, at least 50 percent of the marina’s total water area must be open water; there must be at least six feet between homes, and “particular emphasis shall be placed upon the view of the area from surrounding communities and protection of the water habitat.” § 22.32.070(C)(1)–(5). Floating home marinas can have no more than ten vessels per acre and “shall not be allowed if [their] presence creates adverse effects on the surrounding communities or would be detrimental to water quality.” *Id.* § 22.32.070(C)(6).

Nearby floating homes within the city of Sausalito must comply with a parallel set of detailed regulations. Floating homes²⁴ must have a certificate of occupancy from the city and may only be located in specific areas for which a conditional use permit has been issued. Sausalito Municipal Code §§ 16.08.040, 16.08.030. Every floating home must be “inspected and approved by the director of public works of the city” or another authorized individual “for the problems of buoyance, windage, stability and structure, and for compliance with” the regulations specific to floating homes. *Id.* § 16.08.030(A). Such regulations govern safety, utility connections, mooring equipment, and gangways.

Like Marin County, Sausalito also extensively regulates floating home marinas. The marinas not only must supply the city with detailed information regarding the floating homes (and residents) that are moored there, but also must follow specific requirements for garbage, parking, mooring, and pump-out facilities. Each marina is required to “achieve the best in personal safety and aesthetics for its individual problems.” *Id.* § 16.08.060(D). All floating homes must float “at plus five feet above mean low water,” unless an exception is made. *Id.* § 16.08.060(D).²⁵

²⁴ The Sausalito ordinance speaks of “houseboats,” a term it broadly defines to include floating homes. *See* Sausalito Municipal Code § 16.08.020(B); *see also supra* at 6–7.

²⁵ Floating homes in other areas are subject to comparably extensive state and local regulatory regimes, each tailored to local considerations. In Portland, Oregon, for example, the city code “recognizes” its floating home community “as an important part of the City’s overall vitality and livability”; requires permits and inspections for construction or modification of floating homes; requires each floating home to display a state-

The upshot of all of these provisions is an exacting regulatory scheme for floating homes in the San Francisco Bay Area, which has been crafted with input from floating home residents and many others. Over the years, state and local regulators have developed familiarity with the intricacies of floating homes, and this familiarity informs their regulations.

B. Treating Floating Homes As Vessels Would Create Needless Problems.

1. The existing regulatory scheme is consistent with the tradition of state and local regulation of land use.

The existing regime of state and local regulation of floating homes adheres to our system of federalism, which vests the States with “traditional and primary power over land and water use.” *Solid Waste Agency of N. Cook Cnty. Eng’rs v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001). This Court has long made clear that “regulation of land use [is] a function traditionally performed by local governments,” *Hess v. Port Auth. Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994), and that “[r]egulation of land use . . . is a quintessential state and local power.” *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *see also FERC v. Mississippi*, 456

issued identification number visible from the access walkway; sets out detailed prescriptions for fire safety, life safety, electrical installations, and plumbing; and explicitly gives city authorities discretion to tailor decisions to the “distinctive design requirements” and “different environmental factors” that floating homes confront. Portland City Code § 28.01.010.

U.S. 742, 767–68 (1982) (“[R]egulation of land use is perhaps the quintessential state activity.”).

To be sure, federal regulations govern navigation and maritime commerce, see *United States v. Locke*, 529 U.S. 89, 107, 108 (2000), but local control of land use and shoreline decision-making—and floating homes in particular—has long been the norm. This arrangement enhances autonomy, democracy, and efficiency: It allows those with the closest vantage point to tailor regulation to unique aspects of environment, geography, and social and cultural preferences. Creative solutions to floating home regulation may vary between jurisdictions and “can be adapted to local conditions and local tastes.” Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987); see also Felix Frankfurter, *The Public and Its Government* 49–50 (1930) (“[O]ur federalism calls for the free play of local diversity in dealing with local problems.”).

2. Federal vessel status would senselessly disrupt the status quo and impose undue burdens on floating home residents.

Defining floating homes as vessels would disrupt the carefully drawn state and local regulatory scheme. In some circumstances, the newly applicable federal or maritime law requirements might preempt existing state and local regulations. Even absent preemption, vessel status could lead to undesirable consequences for owners and residents of floating homes. It would portend burdensome new regulations and confusing legal schemes designed primarily for maritime transportation.

1. *Maritime Lien Act.* As an initial matter, this case well illustrates one unfortunate result of federal vessel status: the availability of maritime liens against floating homes pursuant to the Federal Maritime Lien Act, 46 U.S.C. §§ 31301–43. *See* Br. for Petitioner 35–36. The Act’s core provisions permit certain putative creditors to bring a civil action *in rem* to enforce a maritime lien on a vessel, 46 U.S.C. § 31342(a), and in some circumstances to have a vessel arrested without notice or a pre-arrest hearing, *see Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 912 (4th Cir. 1981). The rationale behind this extraordinary provision is that vessels might otherwise “escap[e] their debts by sailing away.” T. Schoenbaum, *Admiralty and Maritime Law*, § 9-1, at 516 (4th ed. 2004); *see also Amstar Corp.*, 664 F.2d at 912. But the provision has no reasonable application to floating homes, which cannot move at all without significant burden, danger, and equipment. *See supra* at 17–21.

In addition to lacking any basis in the Act’s purpose, allowing maritime liens against floating homes would undermine state interests and violate the sanctity of the home. Floating homes, as residences, would otherwise be protected by state homestead exemptions, which allow individuals to protect their residences from creditors in certain circumstances. *See* Wash. Rev. Code § 6.13-040 (Washington homestead exemption);²⁶ Cal. Code Civ. Proc. § 704.720 (California homestead exemption).

²⁶ “The homestead exemption creates an interest in property that attaches to the surplus proceeds from a nonjudicial foreclosure sale under a deed of trust such that a judgment creditor’s claim is limited to funds in excess of the homestead, if any.” *Sweet v. O’Leary*, 944 P.2d 414, 415 (Wash. App. 1997).

Homestead laws “are designed to protect the sanctity of the family home against a loss caused by a forced sale by creditors” and to “preserv[e] the home for the family.” *E.g.*, *Title Trust Deed Serv. Co. v. Pearson*, 132 Cal. App. 4th 168, 174 (2005); *cf. McDonald v. City of Chicago*, 130 S. Ct. 3020, 3105 (2010) (“[O]ur law has long recognized that the home provides a kind of special sanctuary in modern life.”). These laws are founded in a “strong public policy” and therefore require “liberal construction.” *Title Trust*, 132 Cal. App. 4th at 174. There is no good cause for allowing maritime liens to upend this protective scheme.

2. *Maritime safety statutes and regulations.* Defining floating homes as vessels could trigger the extensive federal law pertaining to maritime safety.²⁷ Depending on the precise provisions at issue, some of these federal requirements might preempt local ordinances regarding floating homes. *See generally*, *e.g.*, 46 U.S.C. § 4306 (preempting state regulation of “performance or other safety standard[s]” for recreational vessels and state “requirement[s] for associated equipment” unless identical to federal regulation); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (“The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations”); *Locke*, 529 U.S. at 110 (Title I of Port Safety and Waterways Act preempts conflicting state laws).

²⁷ *See, e.g.*, 46 U.S.C. § 4301 *et seq.* (Federal Boat Safety Act); 33 C.F.R. Chapter 1, Subchapter S (boating safety regulations); 46 U.S.C. § 2101 *et seq.* (codification of shipping laws); *id.* § 115 (defining “vessel” for purposes of Title 46 as having the meaning given that term in 1 U.S.C. §3); 33 U.S.C. § 1223 (authorizing Secretary of Transportation to regulate vessels).

Even apart from preemption, federal vessel status raises the specter of burdensome and ill-fitting new requirements for floating homes. For example, the Federal Boat Safety Act authorizes the Coast Guard to prescribe regulations for recreational vessels

requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, lifesaving devices, signaling devices, ground tackle, life- and grab-rails, and navigational equipment) . . . and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section[.]

46 U.S.C. § 4302(a)(2). Pursuant to this Act, the Coast Guard “has promulgated a host of detailed regulations.” *Sprietsma*, 537 U.S. at 60. These prescriptions could obligate floating homes, *inter alia*, to have navigation lights, *see* 33 C.F.R. §§ 183.801–810, hull identification numbers, 33 C.F.R. § 181.29, and “compliance certification” labels from manufacturers, 33 C.F.R. § 181.7. Such requirements may be a sound way of managing maritime safety and commerce, but they have no sensible application to floating, land-affixed residences.

Federal regulations also require affirmative conduct on the part of vessel operators. For example, Coast Guard regulations require detailed reporting of accidents that occur on certain vessels if a person requires medical treatment (beyond first aid) or property damage exceeds \$2,000. 33 C.F.R. § 173.55. The report must include some 26 categories of information, including weather forecasts and

opinions of the person making the report. *See id.* § 173.57. This might mean that mishaps or injuries in a floating home, or ordinary property damage (a broken refrigerator, a leaky roof) would require a detailed report to the government. It is unlikely that Congress intended to impose such an intrusive requirement on land-affixed residential dwellings simply because they can float.

3 *Employment law.* Federal vessel status could also impose the unique requirements of maritime law onto employment relationships in floating homes. Maritime law confers upon “seamen”—certain workers on vessels, *see Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995)—a series of legal protections that would not make sense in the domestic context of land-affixed floating homes. *See Br. for Petitioner 39–41.* To the extent that nannies, house cleaners, and others who work on floating homes are found to be seamen, they would be afforded, *inter alia*, an inapposite cause of action for “unseaworthiness” and a right to recover “maintenance and cure”—the provision of food, lodging, wages, and medical care—for injuries incurred while working on the vessel, *see generally Atl. Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2568 (2009). Consideration of the latter doctrine underscores the absurdity of importing maritime law into land-affixed homes: It would be odd to say the least if this indefinite obligation of support, born of the perils of life at sea, were owed to those who happen to become injured while working on a land-affixed floating home.

4 *Tort law.* Federal “vessel” status could also burden floating homes with the complex web of maritime tort doctrines. Some of these legal rules,

like the limitation of liability afforded to admiralty defendants through the Limitation of Vessel Owners' Liability Act, 46 U.S.C. § 30505, would ostensibly benefit owners of floating homes by limiting their exposure in tort suits. Other doctrines would be more likely to work against owners of floating homes—like the duty of reasonable care owed to visitors upon vessels, see *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631–32 (1959), the “salvage” doctrine requiring compensation to those who save a vessel or its cargo from peril in certain circumstances, see *The Blackwall*, 77 U.S. (10 Wall.) 1, 12 (1869), or the ability of admiralty tort plaintiffs to sue the vessel in an *in rem* action where the owner would not be liable, see Schoenbaum on Admiralty, § 21-3, at 400. From the perspective of floating home owners, however, the most salient result would be utter confusion regarding the applicable legal rules. There is no good cause for subjecting land-bound homeowners to the topsy-turvy world of sea-based tort doctrines simply because their homes can float.

CONCLUSION

For the reasons stated above and in the Petitioner's brief, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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