No. 03-1388

IN THE

Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether and to what extent Title III of the Americans With Disabilities Act applies to companies that operate foreign-flagged cruise ships within United States waters.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Julia Hollenbeck, David T. Killough, and Ana Spector. Rodger Peters was a party to the proceedings below but has since passed away.

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The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-15a) is published at 356 F.3d 641. The district court's memorandum and order granting in part and denying in part respondent's motion to dismiss (Pet. App. 16a-47a), dated September 9, 2002, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2004. This Court granted certiorari on September 28, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Petition Appendix at 50a-74a.

STATEMENT

This case concerns the application of Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181 *et seq*., to cruise lines operating within U.S. waters and in U.S. ports. The Fifth Circuit's ruling in this case gives cruise lines carte blanche to discriminate against U.S. passengers with disabilities simply because their ships fly a foreign flag of convenience. The court of appeals did not dispute that, by its terms, the ADA applies to both cruise line operators and their ships, which plainly are "public accommodations" and means of "public transportation" covered by the statute. But it found dispositive that the statute does not expressly state that it governs foreign-flagged vessels, which account for approximately ninety-seven percent of the cruise industry's operations.

The Fifth Circuit's conclusion that Congress exempted cruise line operations in U.S. territory from the ADA is implausible. It is impossible to believe – and contrary to

centuries of this Court's precedents to presume – that Congress intended that cruise lines such as respondent that engage in the façade of foreign flagging would be free to discriminate against *Americans* when operating *in U.S. territory*. As this case illustrates perfectly, respondent's operations have an overwhelming U.S. nexus. Petitioners are U.S. citizens who took a cruise that both departed from and returned to a U.S. port. Respondent cruise line has its principal place of business in the U.S. and derives most of its revenue from passengers who are U.S. citizens. Petitioners traveled using tickets that were issued in this country and that, by respondent's own design, include a U.S. choice-of-law clause. And, most importantly, petitioners' claims involve respondent's conduct in U.S. territory. There is no serious basis to conclude that Congress intended to carve this recurring factual scenario out of the ADA's "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

1. Respondent Norwegian Cruise Line Ltd. (NCL) is a multi-billion-dollar corporation with its principal place of business in Miami, Florida. Pet. App. 16a. NCL operates cruise ships that regularly sail from, and return to, U.S. ports. The ships generally sail under foreign flags – in this case, the flag of the Bahamas. Resp. C.A. Br. 4; Pet. App. 16a-17a.

Petitioners consist of two groups of individuals, all U.S. citizens. The first are persons with disabilities – specifically, mobility impairments – covered by the ADA. J.A. 9 (Compl. ¶ 6). The second are the companion petitioners: individuals who accompanied the petitioners with disabilities and whom the ADA also protects against discrimination. See *ibid*.; 42 U.S.C. 12182(b)(1)(E).

In 1998 and 1999, petitioners purchased tickets, issued by respondent in this country for travel on respondent's cruise ships. J.A. 11 (Compl. ¶ 17); *id*. 18-19 (NCL Passenger Ticket). NCL tickets provide that disputes between the parties will be governed by U.S. law. *Id.* 19, ¶ 28. Petitioners

embarked on their round-trip cruises from the Port of Houston, Texas, located at the end of the Houston Ship Channel, fifty miles inland from the Gulf of Mexico. *Id.* 10-11 (Compl. ¶¶ 13, 15, 17).

Petitioners allege that respondent's discriminatory policies, programs, and practices denied them the "full and equal enjoyment" of its "goods, services, privileges, advantages or accommodations" in violation of Title III of the ADA. J.A. 11-12, 14 (Compl. ¶¶ 17, 19, 27); 42 U.S.C. 12182(a); *id*. § 12182(b)(1)(E). The statute prohibits discrimination against persons with disabilities in the provision of places of public accommodation, *id*. § 12182(a), and "specified transportation services," *id*. §§ 12184(a), 12181(1)(A)-(C). With respect to the ADA's application to physical barriers to access, the statute requires the place of public accommodation or public transportation service to remove barriers in existing facilities "where such removal is *readily achievable*." *Id*. § 12182(b)(2)(A)(iv) (emphasis added); *id*. § 12184(b)(2)(C). Acting pursuant to a congressional delegation of authority, *id*. § 12186(a)(1), (b), the Departments of Justice (DOJ) and Transportation (DOT) have concluded that the ADA applies to foreign-flagged cruise ships. 28 C.F.R. pt. 36, App. B, at 677 (2004); 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991).

The petitioners with disabilities allege that, both prior to and during their cruises, respondent subjected them to a variety of discriminatory practices and policies. For example, respondents charged petitioners higher fares to reserve one of the few accessible cabins on board, excluded them from important safety programs, and failed to make reasonable modifications to barriers to access. J.A. 11-12, 15 (Compl. ¶¶ 14, 16, 17, 19, 31). The companion petitioners allege that respondent discriminated against them on account of their association with the disabled petitioners: it required them to pay higher fares to reserve accessible cabins and effectively restricted them from leaving their companions with disabilities alone, forcing them to miss events in inaccessible

locations. *Id*. 11-12 (Amended Compl. ¶¶ 16, 18); Pet. C.A. Br. 5 n.2, 6; Pet. Dist. Ct. Br. 2 n.1, 20 n.19.

2. In 2000, petitioners filed this putative class action in the U.S. District Court for the Southern District of Texas, seeking declaratory and injunctive relief under Title III of the ADA to remedy respondent's widespread, unlawful discriminatory practices and policies. Petitioners, joined by the U.S. government as *amicus curiae*, argued that the ADA applies to respondent and its foreign-flagged ships. The district court accepted that argument, agreeing with rulings of the Eleventh Circuit and another district court that "Title III applies to all cruise ships within the territorial waters of the United States, including those registered under foreign flags." Pet. App. 35a. See *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (CA11 2000) (per curiam), *amended on denial of reh'g*, 284 F.3d 1187 (CA11 2002); *Deck* v. *Am. Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999), *dismissed on other grounds*, 121 F. Supp. 2d 1292 (D. Haw. 2000). Cruise ships, the district court explained, fit within the definitions of both "public accommodation" and "specified public transportation." Pet. App. 23a, 25a. Moreover, the district court found that the determinations of both DOT and DOJ that Title III applies to cruise ships were entitled to deference. See *id*. 22a-25a.

The district court furthermore rejected respondent's argument that the ADA could not be applied to respondent's ships because in a few isolated respects Title III supposedly conflicts with the International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, *reprinted in* SOLAS: CONSOLIDATED EDITION 2001 (Int'l Mar. Org. ed., 2001). Pet. App. 25a-28a. That argument necessarily addressed only claims seeking permanent structural modifications to respondent's ships; it did not address petitioners' myriad other claims. *Id*. 28a. Even as to structural modifications, the district court concluded that the mere "possibility" of such a conflict was insufficient to justify dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6). *Id*. 26a. The

court also held that the ADA addressed potential conflicts with "new construction and alteration standards external to the ADA" – including those imposed by SOLAS – by requiring only "readily achievable" modifications. *Id*. 26a-27a (citing 42 U.S.C. 12182(b)(2)(A)(iv)). The court reasoned that if a particular modification conflicted with a treaty, it would not be "readily achievable." In such cases, the statute would instead require respondent only to "make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable." *Id*. 27a-28a (citing 42 U.S.C. 12182(b)(2)(A)(v)).

The district court granted respondent's motion to dismiss, however, with respect to a narrow group of petitioners' claims implicating permanent structural alterations to the ships. Although the ADA's general requirement of "readily achievable" barrier removal in existing facilities is self-executing, see 42 U.S.C. 12182(b)(2)(A)(iv), the court found it significant that, at that time, DOJ and DOT had not yet issued cruise-ship-specific Title III regulations regarding new construction and alterations.[1] Pet. App. 41a-42a. While acknowledging that there are "significant differences" between regulations governing *new* construction and

[1] Under the ADA, the Architectural and Transportation Barriers Compliance Board ("Access Board") is responsible for adopting, pursuant to a rulemaking process, guidelines for the accessibility of facilities and vehicles. 42 U.S.C. 12204(a); *id*. § 12186(c); 69 Fed. Reg. 69,246, 69,247 (Nov. 26, 2004). DOJ and DOT are then required to "adopt, in their regulations, minimum standards that are consistent with the Access Board's guidelines." 69 Fed. Reg. at 69,247.

On November 26, 2004, the Access Board issued an Advance Notice of Proposed Rulemaking (ANPRM) and made draft guidelines for large passenger vessels available for public comment. See Draft Passenger Vessel Accessibility Guidelines and Supplementary Information, *available at* http://www.access-board.gov/pvaac/guidelines.htm. On the same day, DOT issued its own ANPRM, which will lead, following a rulemaking process, to regulations consistent with the final Access Board guidelines. 69 Fed. Reg. at 69,247.

alterations, see *id*. 37a (citing 42 U.S.C. 12183), and regulations concerning "barrier removal in *existing* facilities," see *id*. 37a-38a (citing 42 U.S.C. 12182) (emphasis added), the district court nonetheless held that the absence of regulations governing the former precluded petitioners' claims relating to the latter. *Id*. 42a.

3. Both sides appealed, with the United States again supporting petitioners. The Fifth Circuit accepted the district court's certification of its decision for interlocutory appeal. The court of appeals assumed without deciding that Title III generally applies to cruise ships and the companies that operate them. Pet. App. 4a n.3. But it held that all of petitioners' Title III claims were categorically barred.

The court of appeals rested its holding on its conclusion that Title III lacks a required express statement of Congress's intent to apply "domestic statutes to foreign-flagged ships." *Id*. 7a-8a. It derived that "plain statement" requirement from precedents of this Court addressing whether U.S. labor law conferred rights on foreign seamen on foreign-flagged ships. *Id*. 4a-5a (citing *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). The court of appeals also stated that its holding was supported by what it asserted was a "stark likelihood of conflicts" between petitioners' permanent barrier removal claims and "the standards set out in [SOLAS]." *Id*. 9a. And it further held that Title III lacks a required "plain statement" of intent to apply domestic law extraterritorially. The court reasoned that "many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters." *Id*. 11a.

The Fifth Circuit acknowledged that its ruling was contrary not only to the decisions of other courts but also to the judgment of the administrative agencies to which Congress had delegated authority to implement the ADA.

But the Fifth Circuit rejected those rulings and refused to defer to the agencies' conclusions, which it deemed mere "informal administrative opinions." Pet. App. 13a (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)).

4. The full Fifth Circuit denied a petition for rehearing *en banc*. Pet. App. 48a-49a. This Court subsequently granted petitioners' petition for certiorari. See 125 S. Ct. 26 (2004).

SUMMARY OF ARGUMENT

The Americans With Disabilities Act is the nation's promise to millions of persons with disabilities that they will be treated as full citizens, protected against arbitrary discrimination and barriers to their opportunity to pursue their lives to the fullest. Respondent Norwegian Cruise Line, however, claims that it has the right to flout that promise, and the Fifth Circuit agreed. There is no dispute that petitioners are U.S. citizens, that they bought tickets from respondent in this country, that the tickets call for the application of U.S. law to disputes between petitioners and respondent, and that the discrimination in question takes place in our nation's territory. But the court of appeals held that the ADA does not apply to respondent because of a single fact: that, purely as a matter of convenience, respondent has adopted the façade of flying the flag of a foreign nation. That holding cannot stand.

I. Title III of the ADA applies to cruise ships, and the Fifth Circuit did not contend otherwise. Respondent's vessels are both places of "public accommodation" and covered "means of public transportation" under the statute. Indeed, a cruise ship typifies the type of facility that Congress determined should be accessible to the disabled, as it contains lodging, restaurants, and multiple forms of entertainment in close proximity to each other and each of the ship's destinations, an ideal format for persons with mobility impairments in particular.

No characteristic unique to cruise ships entitles them to an implied exemption from Title III. Respondent's acts of discrimination are indistinguishable from on-land conduct

that courts and regulatory authorities have repeatedly found to be unlawful. This discrimination is in no way necessitated by the nature of cruise ships, for much of NCL's illegal conduct is entirely unrelated to physical barriers onboard the ships and respondent's competitors do not engage in it. For example, respondent requires persons with disabilities to identify themselves as having a disability, waive any potential medical liability, and travel with a companion who has no disability. Respondent provides far less favorable accommodations to persons with disabilities, yet charges them higher prices. Respondent reserves the right to remove a person with disability from the vessel if her presence endangers the "comfort" of other guests. It provides no accessible restrooms in its boarding area, yet requires the passengers with disabilities to wait there for long periods before boarding. And it holds evacuation drills on decks of the ships that are not accessible to passengers who use a wheelchair or scooter.

The barriers to access on the ships are serious, but could easily be remedied by NCL. None of the public restrooms are accessible. Given other obstacles onboard, persons such as petitioners with mobility impairments can literally spend hours attempting to reach an accessible restroom in their cabins, but merely switching the direction of the doors in bathroom stalls could make many public bathrooms accessible. The coamings at the base of some doors that create barriers to access could easily be ramped or accessible routes could be identified. Plainly, then, application of the ADA to respondent's operations and ships is essential to effectuate Congress's determination to eliminate arbitrary and unwarranted discrimination against persons with disabilities.

II. The Fifth Circuit's contrary holding rests on the fact that Congress did not include in Title III an express statement that the statute applies to foreign-flagged vessels. That ruling fails under any of the three arguably relevant lines of this Court's precedents.

The controlling decisions are those in which the Court has addressed the applicability of U.S. law in U.S. territory for the protection of U.S. citizens (as opposed to a foreign crew) in relation to a foreign-flagged vessel. In *every* case in which this Court has confronted that issue, it has held that the statute applied to foreign-flagged vessels despite the absence of the plain statement required by the Fifth Circuit in this case. Certainly, nothing in the ADA overcomes the presumption established by those decisions that Congress intends U.S. law to apply in U.S. territory to protect U.S. citizens. To the contrary, given that the ADA by its terms applies to cruise ships and that almost every cruise ship is foreign-flagged, it necessarily follows that Congress did not intend to exempt respondent's foreign-flagged operations.

If this Court were nonetheless to look instead to decisions addressing the application of U.S. law to the *crew* of a foreign-flagged vessel, petitioners would still prevail. The most analogous precedents involve maritime torts, with respect to which the Court has not adopted a plain-statement requirement but instead has applied a multi-factor choice-of-law test. Under that standard, Title III unquestionably applies, for the relevant conduct occurred in the United States, petitioners are U.S. citizens, the contract calls for the application of U.S. law and was formed in this country, petitioners cannot secure relief in another forum, the suit was filed here, and respondent is based in the United States. The Court has definitively held that the one factor on which the Fifth Circuit rested its decision – respondent's choice of a foreign flag of convenience – is a "façade" entitled to "minor weight[]." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970).

The Fifth Circuit instead looked to yet a third line of decisions addressing whether U.S. unionization rights apply the world over to foreign crews who happen to stop in this country and whether federal labor law applies to efforts to pressure foreign-flagged ships to use more expensive U.S. crews wherever they travel. Although those cases bear no

resemblance to this one, petitioners prevail if they apply. For the Court has held that when the rights of Americans in the U.S. territory are at stake, federal labor law *does* apply to foreign-flagged vessels despite the absence of any plain statement to that effect in the relevant statute. *Int'l Longshoremen's Ass'n* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970).

Nor is the decision below supported by the suggestion that application of Title III to cruise ships would conflict with our nation's treaty obligations. Most of petitioners' claims have nothing to do with the issue addressed by treaty: the physical construction of ships. Even as to physical barriers to access, the court of appeals relied on a report suggesting the existence of only two such conflicts. Newly proposed regulations obviate even those incidental concerns. To the extent actual conflicts are later identified, they (i) are properly resolved by the U.S. regulatory authorities charged with implementing the ADA and the treaty, and (ii) are addressed within the framework of the statute, which calls for the removal of barriers to access only when "readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv), a standard that would not require removal if removal would be contrary to a treaty obligation.

The judgment below should accordingly be reversed.

ARGUMENT

I. THE ADA CLEARLY PROHIBITS CRUISE LINES FROM DISCRIMINATING AGAINST PERSONS WITH DISABILITIES.

In enacting the ADA, Congress sought nothing less than "the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Indeed, the ADA's chief sponsor, Senator Tom Harkin, deemed the Act "the 20th Century Emancipation Proclamation for people with disabilities." BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT xi (1990); see also 135 CONG. REC. S10,708, S10,714 (1989) (statement of Sen.

Hatch) (characterizing the ADA as "the most sweeping piece of civil rights legislation since the Civil War era").

Accessible cruise ships are prototypical attractive vacation options for persons with disabilities. They are effectively "personal floating resorts" that offer "lectures on interesting topics, first class entertainment, casinos, gyms, pools and spas" all in one place. Alexandria Berger, *For the Disabled, Cruises Are Now An Easy Vacation*, VIRGINIAN-PILOT (Norfolk, VA), Jan. 7, 2002, at E3. Cruises are also "a convenient way for people with disabilities to travel," as they can visit different ports of call without having to pack and unpack, see Humberto & Georgina Cruz, *A Medical Difficulty Is No Reason to Sit At Home*, SUN-SENTINEL (Fort Lauderdale, FL), Sept. 22, 2002, at 6E, and, at the same time, have access to the ship's medical services, see Tricia A. Holly, *Serving a Special Niche*, TRAVEL AGENT, Apr. 2, 2001, at 28. Indeed, a recent survey of Americans with disabilities revealed that twelve percent of those surveyed had taken a cruise within the last five years; of those twelve percent who had taken a cruise, fifty-nine percent reported that they had booked a subsequent cruise. See Curtis D. Edmonds, *Won't You Let Me Take You on a Sea Cruise: The Americans With Disabilities Act and Cruise Ships*, 28 MAR. LAW. 271, 271 (2004).

The cruise industry is also a major and expanding part of the U.S. travel industry and is thus squarely encompassed within the ADA's broad sweep. In 2003, there were 7.48 million cruise line passengers who were U.S. residents, as compared to 6.09 million in 2000. Bus. Research & Econ. Advisors, The Contribution of the North American Cruise Industry to the U.S. Economy 2 tbl.ES-1 (2004), *at* http://www.iccl.org/resources/2003_economic_study.pdf. At an average gross revenue of $1,498 per passenger, *id.* at 16 tbl.3, the cruise industry earned over $11 billion last year from U.S. residents. The United States therefore has an overwhelming interest in the operation of this industry and the safety and dignity of its U.S. resident passengers.

A. Cruise Ships Are Subject to Title III.

1. Cruise ships are subject to Title III's nondiscrimination and accessibility requirements because they fall within two of the categories identified by the text of the statute. First, cruise ships contain various "public accommodations," including: "place[s] of lodging" – *viz.*, the cabins where passengers stay, 42 U.S.C. 12181(7)(A); "restaurant[s], bar[s], or other establishment[s] serving food or drink," *id*. § 12181(7)(B); "place[s] of exhibition or entertainment," *id*. § 12181(7)(C); and "place[s] of exercise or recreation," *id*. § 12181(7)(L).

Second, cruise ships are means of "specified public transportation." "The term 'specified public transportation' means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." *Id*. § 12181(10); see also *id*. § 12181(1)(B), (C) (defining the "commerce" regulated by Title III to include "transportation * * * between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country").

2. The text of Title III thus clearly encompasses cruise ships. But even if Title III were less than plain, any ambiguity would be resolved by the regulations issued by DOJ and DOT. DOJ has concluded that cruise ships are subject to Title III.[2] Similarly, DOT has concluded that cruise

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[2] See 28 C.F.R. pt. 36, App. B, at 677 (2004) (noting, for example, that "a cruise line could not apply eligibility criteria to potential passengers in a manner that would screen out individuals with disabilities, unless the criteria are 'necessary'" under Title III). Similarly, DOJ's Title III Technical Assistance Manual, which outlines "what businesses * * * must do to ensure access to their goods, services, and facilities," see DOJ, ADA Regulations and Technical Assistance Manuals, *available at* http://www.usdoj.gov/crt/ada/publicat.htm, expressly indicates that Title III applies to cruise ships. See, *e.g.*, DOJ, Title III Technical Assistance Manual III-4.1100, -5.3000 (1993) (using cruise ships as examples in two

ships "clearly are within the scope of a 'specified public transportation service'" subject to Title III. 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991).

The DOJ and DOT conclusions have all the hallmarks of agency determinations entitled to deference. First, Congress specifically authorized both agencies to issue implementing regulations under Title III. See 42 U.S.C. 12186(b); *id.* § 12186(a). Second, the agencies issued the regulations after a public notice-and-comment period and, indeed, both agencies received comments concerning whether cruise ships were covered. 56 Fed. Reg. 35,544, 35,544-45 (July 26, 1991) (DOJ); 56 Fed. Reg. 45,584, 45,599 (Sept. 6, 1991) (DOT). Third, both agencies have maintained the same position consistently for almost thirteen years, see *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002) (longstanding interpretation entitled to deference), and Congress has never questioned that construction of the statute in amending Title III, see *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002) (Congress is deemed to have acquiesced to regulatory constructions it leaves in place); see, *e.g.*, Pub. L. No. 104-59, 341, 109 Stat. 568, 608 (1995) (amendment to 42 U.S.C. 12186).

3. Title III treats existing facilities – like the ships at issue in this case – differently from new facilities and newly altered facilities. Existing facilities are subject to the "readily achievable" standard of 42 U.S.C. 12182(b)(2)(A)(iv) – defined as "easily accomplishable and able to be carried out without much difficulty or expense," *id.* § 12181(9). By contrast, newly constructed and newly altered facilities are required to be "readily accessible to and usable by people with disabilities," *id.* § 12183(a)(1), a standard that imposes a greater obligation on those facilities' owners. DOJ and DOT

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illustrations), *available at* http://www.usdoj.gov/crt/ada/taman3.html; *id.* III-1.2000(d) (1994 Supp.) (cruise ships "must comply with the applicable requirements of title III"), *available at* http://www.usdoj.gov/crt/ada/taman3up.html.

promulgated regulations regarding existing facilities on cruise ships over a decade ago. Nonetheless, the district court (but not the court of appeals, Pet. App. 14a n.10) found that the lack of regulatory guidance for *new-ship construction* excused cruise lines from compliance with the regulations concerning *existing-ship* compliance. It reasoned that because the existing-ship regulations provided that the requirements for barrier removal "shall not be interpreted to exceed standards for new construction," 28 C.F.R. 36.304(g)(2) (2004), the existing ship regulations would remain too undefined to be enforceable until the new-construction standards were promulgated. Pet. App. 36a-42a.

The district court's reasoning is untenable and conflicts with the agencies' interpretations of their own regulations. DOJ and DOT have made it clear that the absence of regulations fleshing out the specific ADA obligations governing newly constructed facilities does not exempt cruise ships from the other obligations of Title III. See 28 C.F.R. pt. 36, App. B, at 677; 56 Fed. Reg. 45,584, 45,600. That regulatory determination is eminently correct, for the existing regulations already provide precisely the guidance needed to render cruise ships such as respondent's ADA-compliant. See *supra* at 12-13. The fact that one *particular* regulatory provision affecting barrier removal is not defined – namely the upper limit on regulatory requirements set by 28 C.F.R. 36.304(g)(2) – does not render the remainder of the existing-ship regulations unenforceable. Hence, although draft guidelines for newly constructed and altered ships that would set that upper bound have only recently been issued, see *supra* at 5 n.1, DOJ has long taken the position that "[p]laces of public accommodation aboard ships must comply with all of the title III requirements, *including removal of barriers to access where readily achievable*." DOJ, Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (emphasis added), *available at* http://www.usdoj.gov/crt/ada/taman3up.html.

4. Because cruise ships are "public accommodations," respondent must comply with Title III's general requirement that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment" of its "goods, services, privileges, advantages or accommodations." 42 U.S.C. 12182(a). Respondent must also comply with the more specific rules that flesh out that general prohibition, including the requirement that public accommodations "make reasonable modifications in policies, practices, and procedures" to allow people with disabilities to participate in their activities, *id*. § 12182(b)(2)(A)(ii); see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 681-82 (2001), as well as the requirement that public accommodations "remove architectural barriers, and communications barriers that are structural in nature," so long as "such removal is readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv).

The statute also prohibits discrimination against any individual because of the disability of anyone with whom that individual "is known to have a relationship or association." 42 U.S.C. 12182(b)(1)(E). Thus, respondent cannot discriminate against the companions of disabled individuals by denying those companions the full enjoyment of its facilities.

Further, because cruise ships are "specified transportation services," respondent must comply with Title III's general prohibition on disability-based discrimination "in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. 12184(a). There can be no doubt that respondent is "primarily engaged in the business of transporting people." Nor can there be any doubt that its operations – transporting people from ports in a number of states to foreign countries and back – "affect commerce." See *id*. § 12181(1) (defining "commerce" to mean, *inter alia*, "travel, trade, traffic, commerce, transportation, or communication" between states or between a state and a

territory or foreign country). The statute moreover requires providers of "specified public transportation" to "make reasonable modifications consistent with those required under" the reasonable-modification provision that applies to public accommodations, and to "remove barriers consistent with the requirements of" the barrier-removal provisions that apply to public accommodations. *Id*. § 12184(b)(2)(A), (C).

B. The Breadth of Respondent's Pervasive Discrimination Against Passengers With Disabilities Confirms That the ADA Should Apply to Respondent's Cruise Ships

Congress enacted the ADA to "allow people with disabilities to boldly go where everyone else has gone before." Arlene S. Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does it Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291, 301 (2003) (More than a decade after the ADA's enactment, however, respondent still engages in systemic discrimination against persons with disabilities and furthermore refuses to make reasonable modifications to eliminate or minimize either the effects of its discriminatory practices and policies or the physical barriers on its ships.

There is no merit to respondent's suggestion that it is somehow excused from complying with the ADA because cruise ships are "fundamentally different" from other places of public accommodation and transportation. Resp. C.A. Br. 27. Rather, as outlined below, the breadth of petitioners' claims demonstrate that respondent discriminates in ways that have nothing to do with the supposedly unique characteristics of cruise ships. And, as evidenced by the conduct of other cruise lines, respondent could comply with the ADA with little difficulty.

1. Respondent Subjects Passengers With Disabilities to Discriminatory Practices and Policies That Are Unrelated to the Physical Construction of Its Ships.

Respondent's argument that it cannot be required to comply with the ADA because its cruise ships are physically "different" from other forms of public accommodation or specified public transportation obviously carries no weight with regard to petitioners' claims that have nothing to do with the physical construction of the ship. Such practices are indefensible and are not employed by other cruise lines.

a. Respondent Discriminates Against Passengers With Disabilities Even Before Boarding.

Beginning with the first steps of the ticketing process, respondent discriminates against passengers with disabilities by requiring them to identify themselves as disabled and to disclose the nature of their disabilities, even if they do not need any special accommodations or wish to disclose such personal information. See NCL, Important Passenger Information: Guests with Special Needs, *at* http://www.ncl.com/more/special_services.htm. It also requires passengers with disabilities to obtain a physician's note indicating that they are fit for travel, NCL, Affirmation and Liability Release 3 (July 12, 1999), and – although no such requirement is imposed on passengers without disabilities – to waive NCL's liability for any damages or personal injuries resulting from either medical treatment or lack of medical treatment while on board, even if those injuries are entirely unrelated to their disabilities. *Ibid*.[3]

Respondent provides its passengers with disabilities with substantially fewer – and less desirable – options than its passengers who do not require accessible rooms. While

[3] For example, if an NCL physician failed to treat four passengers' food poisoning properly, one mobility-impaired passenger seemingly could not recover, while her companions could.

passengers without disabilities have access to a range of options – for example, penthouse suites, luxury suites, ocean-view staterooms with a balcony, deluxe ocean-view staterooms, and inside staterooms, see NCL, Accommodations, *at* http://www.cruiseweb.com/NCL-ACCOMMODATION.HTM – the few accessible cabins available on ships such as respondent's Norwegian Star and Norwegian Sea are far less desirable, interior cabins located on one deck of the ship. See NCL, Site Map (providing links to the deck plans for each of NCL's cruise ships), *at* http://www.ncl.com/sitemap.htm. Other cruise lines provide disabled passengers with a wide range of options.[4]

Respondent generally requires even fully self-sufficient passengers with disabilities to travel with a companion who does not have a disability. See Letter from Passenger Courtesy, NCL, to Douglas Spector (July 12, 1999). That policy is unlawful, because "[r]equiring a traveling companion as an eligibility criterion violates the ADA, unless the cruise line demonstrates that its policy is necessary for some compelling reason." DOJ, Title III Technical Assistance Manual III-4.1100 (1993), *available at*

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[4] Petitioners traveled on either the Norwegian Star, which has approximately 800 cabins, or the Norwegian Sea, which accommodates approximately 1500-1800 passengers. J.A. 11 (Compl. ¶¶ 14, 16). Notably, all four of the allegedly accessible cabins available on both ships are interior cabins lacking both portholes and balconies. Pet. C.A. Br. 6.

By contrast, Princess Cruise Lines currently has 136 accessible rooms on ten ships and plans to have 154 more accessible rooms in its new ships by the end of 2004; its "accessible cabins are available in a variety of categories including inside, outside, balcony and mini-suites." Princess Cruises, Policy Statements: Accessibility for Passengers with Disabilities, *at* http://www.princess.com/about/policy.jsp?policyID=na405. Similarly, Carnival Cruise Lines provides a choice of accessible cabins "dispersed on different decks and placed at both exterior and interior cabins," see Exhibit 1 to Joint Motion for Conditional Class Certification, Fairness Hearing, a Stay, and Approval of Settlement, *Access Now, Inc.* v. *Cunard Line Ltd., Co.*, No. 00-7233-CIV-Moreno (S.D. Fla. 2001) [hereinafter Carnival Settlement Agreement] ¶ 2.2.

http://www.ada.gov/taman3.html. The policy is also unnecessary, as other cruise lines do not employ it. See, *e.g.*, Holland America Line, Planning & Advice: Disability Accommodations (traveling companions required only for "[g]uests who are unable to care for their basic needs (e.g. dressing, eating and attending safety drills)"), *at* http://www.hollandamerica.com/guests/category.do?category=disability&topic=disability.[5]

Respondent requires passengers with disabilities to pay a premium to ensure that they have an accessible cabin.[6] Indeed, even the disabled passengers' mandatory traveling companions must pay the premium for an accessible cabin – for which they have no need. For example, petitioners Douglas and Ana Spector paid nine hundred dollars more for their accessible cabin than their non-disabled relatives paid for nicer cabins on the same cruise. See *Eye on America: The Courts*, (CBS News broadcast, Oct. 26, 2004); *Supreme Court To Hear Cruise Case*, NEW MOBILITY MAG., Nov. 2004, *available at* http://www.newmobility.com/review_article.cfm?id=938&action=browse.[7] This policy effectively

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[5] Although NCL agreed in another ADA suit brought by the government to discontinue its companion requirement for passengers with visual impairments, it maintains the companion requirement for passengers with other disabilities. See *United States* v. *Norwegian Cruise Lines, Ltd.*, No. 01-0244-CIV-King/O'Sullivan (S.D. Fla. Aug. 22, 2001) (Consent Order ¶ 17.1(1)), *available at* http://www.usdoj.gov/crt/ada/ncruise.htm; see also DOJ, *Norwegian Cruise Line Agrees With Justice Department To Keep Its Ships Open to Blind Persons* (Sept. 10, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/September/456cr.htm.

[6] When passengers with disabilities and/or their traveling companions complained about paying more for "accessible cabins" than passengers without disabilities paid for similar or better cabins, NCL contended that its unfair pricing scheme was allowed because it was not subject to the ADA. See J.A. 12-13 (Compl. ¶ 20); *Eye on America: The Courts* (CBS News broadcast, Oct. 26, 2004).

[7] Persons with disabilities pay higher prices because respondent makes very few accessible cabins available. As a consequence, persons with disabilities are regularly unable to secure so-called "run of the ship" discounts available to other passengers.

places an unlawful surcharge on tickets sold in the U.S. for cruises on vessels sailing to and from U.S. ports. See 42 U.S.C. 12182(b)(1)(A)(ii) (making it unlawful "to afford an individual or class of individuals, on the basis of a disability or disabilities * * * the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals"); 28 C.F.R. 36.301(c) (2004) (prohibiting the assessment of surcharges on persons with disabilities to fund a public accommodation's compliance with Title III); DOJ, Title III Technical Assistance Manual at III-4.1400 (1993) ("Although compliance may result in some additional cost, a public accommodation may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses."), *available at* http://www.ada.gov/taman3.html; see also J.A. 11-15 (Compl. ¶¶ 14, 32).

Even if a would-be passenger with a disability complies with all of the additional requirements imposed by respondent, NCL still reserves the right to exclude her from traveling – including for subjective and offensive reasons, such as the possibility that she "may endanger the * * * *comfort* of other guests." See NCL, Important Passenger Info.: *Guests with Special Needs* (emphasis added), *at* http://www.ncl.com/more/special_services.htm; J.A. 12 (Compl. ¶ 19). This is conduct based on nothing more than unwarranted fears and stereotypes and is prohibited by the ADA. See, *e.g.*, H.R. Rep. No. 101-485, pt. 2, at 30 (1990) (describing, as paradigmatic cases of discrimination that would be prohibited by the ADA, instances in which a child with cerebral palsy was excluded from school because a teacher claimed that "his physical appearance 'produced a nauseating effect' on his classmates").

To prevent such discrimination, Title III allows exclusion of an individual with a disability *only* if the individual "poses a direct threat to the health or safety of others." 42 U.S.C. 12182(b)(3). That demanding standard is met only when an

individual with a disability poses a significant safety risk that cannot be eliminated by a "modification of policies, practices, or procedures or by the provision of auxiliary aids or services," as confirmed by "medical or other objective evidence," *Bragdon* v. *Abbott*, 524 U.S. 624, 648-49 (1998) (citing 42 U.S.C. 12182(b)(3)).

b. Once On Board, Respondent Continues to Discriminate Against Passengers With Disabilities and Their Companions.

Respondent continues its pattern of discrimination while passengers with disabilities check in and board the ship. For example, respondent does not provide accessible restrooms during the long delays that often accompany boarding. Nor does respondent permit the simple accommodation of early boarding, unlike other cruise lines. See, *e.g.*, Royal Caribbean Int'l, Mobility Impairments, *at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=0000SiRwMEAk20qKYe6qTTP1VgQ:v2mocb1m. Early boarding is a readily achievable practice that NCL extends to other passengers, such as members of its "frequent cruisers" club. See NCL, Cruise News (Aug. 8, 1999) (newsletter distributed to passengers aboard NCL cruise ships).

On board, respondent imposes various other discriminatory policies. For example, the decks on which respondent's safety evacuation drills occur are not accessible. See J.A. 12 (Compl. ¶ 19). Although passengers with mobility impairments are thus effectively excluded from these important events – which, on petitioners' cruises, took place even before the ship left the Port of Houston, see generally, *e.g.*, NCL, Cruise News: M/S Norwegian Sea (Aug. 1, 1999) (newsletter distributed to passengers aboard the M/S Norwegian Sea) – respondent does not conduct any alternative drills for these passengers, nor does it provide them with any plan regarding how they will be evacuated in the event of an emergency. Rather, the only "safety"

accommodation that respondent provides to passengers with disabilities is to discriminate by requiring them to bring a traveling companion. See NCL, Release Form (release form signed by Douglas Spector on July 12, 1999) ("In order to assure your safety during the cruise, we request that you travel with an individual who is not mobility impaired. This person should be able to provide assistance in the unlikely event of an emergency aboard the ship.").

By contrast, other cruise lines sailing to and from U.S. ports have recognized the importance of both maintaining and communicating safety evacuation plans for passengers with disabilities. See, *e.g.*, Princess Cruises, Policy Statements: Accessibility for Passengers with Disabilities, *at* http://www.princess.com/about/policy.jsp?policyID=na405; Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.B.

2. Respondent Also Discriminates Against Persons With Disabilities Through Barriers to Access.

The final category of ADA violations involves the barriers to access that respondent refuses to remove or minimize through reasonable modifications. See 42 U.S.C. 12182(b)(2)(A)(iv) (requiring removal of "architectural barriers" in existing facilities "where such removal is readily achievable"); *id*. § 12182(b)(2)(A)(v) (requiring "alternative methods" of access if barrier removal is not "readily achievable"). Cruise ships are essentially floating hotels that, like large hotels on land, contain a variety of facilities: rooms, restaurants, theaters, and retail stores. See *Stevens*, 215 F.3d at 1241. Equivalent facilities on land must comply with the ADA, and there is no reason why cruise ships should not; removal of most barriers aboard would not require structural changes that could affect the safety and stability of the vessel. As the Eleventh Circuit noted in *Stevens*, "a restaurant aboard a ship is still a restaurant." *Ibid*.

For example, on the ships on which petitioners sailed, none of the public restrooms were accessible to passengers

with mobility impairments, thereby requiring the disabled petitioners to return to their cabins whenever they needed to use the restroom. Because the Norwegian Star, on which several petitioners sailed, is 710 feet long and has nine guest decks, see NCL, Norwegian Star Deck Plans, *at* http://www.ncl.com/fleet/06/deckplans.htm, trips to use the restroom in the accessible cabins can necessarily be lengthy ones, particularly for passengers with mobility impairments.[8] In many cases, however, the public restrooms could be rendered accessible merely by changing the direction in which the doors to the toilet stalls swing. Other cruise lines provide accessible public restrooms. See, *e.g.*, Exhibit 1 to Carnival Settlement Agreement, *supra*, at II; Princess Cruises, Policy Statements: Accessibility for Passengers With Disabilities, at http://www.princess.com/about/policy.jsp?policyId=na405.

Passengers with mobility impairments who travel on respondent's cruise ships are also frequently unable to use any swimming pool or Jacuzzi spa because those facilities lack the hydraulic lifts that would make them accessible. Such lifts are routinely provided by other cruise lines. See, *e.g.*, Royal Caribbean Int'l, Mobility Impairments, *at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=0000W9rfkWlP2Fh_0NLeuz6YbqU:v29bc620.

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[8] It frequently took passengers using wheelchairs and scooters on the Norwegian Sea between forty-five minutes to and three hours to travel back to their cabins to use the restrooms, leading to many physically uncomfortable and embarrassing situations. Dylan Otto Krider, *Access Denied: Once the Handicapped Come Aboard Norwegian Cruise Lines, They May Never Leave No Matter How Badly They Want To*, HOUSTON PRESS, Nov. 15, 2001, *available at* http://www.houstonpress.com/issues/2001-11-15/news/news2_print.html; John T. Fakler, *Accessibility Suit Targets Norwegian Cruise Lines*, SO. FLA. BUS. J., Dec. 7, 2001, *available at* http://www.bizjournals.com/southflorida/stories/2001/12/10/story2.html.

Coamings – the raised edges around a ship's doors – render many doorways inaccessible to passengers with mobility impairments, and in particular to those who must use wheelchairs or scooters. Many of the inaccessible doorways could be made accessible without reducing the ship's seaworthiness by eliminating or ramping the coamings, as is obvious from the practices of other cruise lines. See, *e.g.*, Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.A; Princess Cruises, Policy Statements: Accessibility for Passengers With Disabilities, *at* http://www.princess.com/about/policy.jsp?policyId=na405.

To the extent that the doorways cannot be made accessible, respondent could – but has chosen not to – mitigate the problem by providing disabled passengers with deck plans showing alternate routes of travel, just as other cruise lines have done. See, *e.g.*, Royal Caribbean Int'l, Mobility Impairments, *at* http://www.royalcaribbean.com/allaboutcruising/accessibleseas/mobilityImpairment.do;jsessionid=0000W9rfkWlP2Fh_0NLeuz6YbqU:v29bc620; Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.B.[9]

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At virtually every step of the cruising experience, respondent imposes discriminatory policies and practices and physical barriers that are unlawful under the ADA. Although other cruise lines have taken steps to ensure that their programs and ships are accessible, respondent refuses. This

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[9] The Carnival settlement agreement makes clear that numerous other adjustments to make cruise ships more accessible can be reasonably undertaken. See, *e.g.*, Exhibit 1 to Carnival Settlement Agreement, *supra*, at I.B, I.K, IV.D, I.J, & I.E (agreeing to make stairs more accessible to passengers with visual impairments by lowering the handrails and blocking the open spaces behind the steps, and to make ship more accessible to passengers with mobility impairments by, for example, "lower[ing] at least one phone at each phone bank location," "provid[ing] accessible fountains * * * or * * * cup dispensers," "lower[ing] all pull stations to be within the range of reach," and providing lower elevator controls for at least one elevator per bank).

is precisely the type of discrimination that the ADA was designed to address. It is thus clear that Title III of the ADA has an essential role to play in ensuring that respondent's services and facilities are accessible to passengers with disabilities. For the reasons outlined below, Title III clearly applies to respondent and its foreign-flagged ships.

II. THE ADA SPECIFICALLY APPLIES TO FOREIGN-FLAGGED SHIPS OPERATING IN U.S. TERRITORY.

The regulatory agencies charged by Congress with implementing the ADA have determined that foreign-flagged cruise ships are subject to Title III. DOJ has stated that foreign-flagged cruise ships "that operate in United States ports may be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement." See DOJ, Title III Technical Assistance Manual III-1.2000(d) (1994 Supp.), *available at* http://www.usdoj.gov/crt/ada/taman3up.html. In furtherance of that determination, it has brought a Title III enforcement action (ultimately resulting in a consent decree) against respondent for its treatment of blind passengers on its foreign-flagged ships. See *United States* v. *Norwegian Cruise Lines Ltd.*, No. 01-0244-CIV-King/O'Sullivan (S.D. Fla. Aug. 22, 2001), *available at* http://www.usdoj.gov/crt/ada/ncruise.htm. For its part, DOT explicitly concluded in its regulatory preamble that foreign-flagged cruise ships were covered by the statute: "Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they are in U.S. ports, subject to treaty obligations.* * * The United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports." 56 Fed. Reg. 45,584, 45,600.

For the reasons that follow, that regulatory determination is sound. The Fifth Circuit erred in holding that, because Title III of the ADA contains no express statement that it

applies to foreign-flagged ships, the statute does not protect Americans in U.S. territory. In fact, this Court's precedents establish that U.S. law presumptively applies to foreign-flagged vessels in U.S. ports and waters except when the statute in question is directed at the relationship between the vessel and a foreign crew. Indeed, even if this Court were to apply the case law involving ships' crews, petitioners prevail. Those cases establish a maritime choice-of-law test that, given the overwhelming nexus between respondent's operations and the United States, dictates that Title III applies in U.S. territory. The case law cited by the court of appeals involving the narrow and distinct question of the labor rights of the crew compels the same conclusion, for those cases hold that U.S. law applies to protect crew members who are U.S. citizens even when it does not protect foreign crew members.

A. Both the Plain Text and Congress's Express Purpose in Enacting the ADA Establish That the Statute Applies to Foreign-Flagged Cruise Ships.

1. The Fifth Circuit applied a presumption – surmountable only by a plain statement of congressional intent – that U.S. law does not apply to protect U.S. citizens on foreign-flagged ships operating in U.S. territory. Pet. App. 7a-8a. In fact, this Court's precedents dictate the opposite presumption: absent some expression of congressional intent, U.S. law applies to conduct on a foreign-flagged ship that occurs within U.S. territory and that principally affects U.S. citizens rather than a foreign crew.

Preliminarily, it is settled as a matter of international law that (within limits related to the right of "innocent passage" that this case does not implicate) a sovereign's authority extends completely to conduct in its ports and territorial waters, including conduct aboard foreign-flagged ships. Restatement (Third) of Foreign Relations § 512 (1987) ("Subject to § 513 [guaranteeing the right of free passage], the coastal state has the same sovereignty over its territorial sea * * * as it has in respect of its land territory."); *id*. § 513.

The coastal state is "entitled to enforce its laws against the ship and those on board" as soon as the ship enters the internal waters or ports of that state. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 54 (1988); see also Restatement (Third) § 512 note 5 ("Once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state.").[10]

As a consequence, "[a] coastal state can condition the entry of foreign ships into its ports on compliance with specified laws and regulations." Restatement (Third) § 512 note 3; see also *id*. § 511 cmt. e ("A state also has complete sovereignty over its seaports."). Because the United States maintains full territorial sovereignty over its internal waters, "there is no right of innocent passage through internal waters such as exists through the territorial sea." CHURCHILL & LOWE, *supra*, at 51. Notably, only in cases of innocent passage is the coastal state prohibited from applying domestic "laws and regulations" to a foreign ship's "design, construction, manning or equipment." United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 21(2), 21 I.L.M. 1261, 1274. See also *American Banana Co.* v.

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[10] In *United States* v. *Louisiana*, 394 U.S. 11 (1969), this Court explained:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

Id. at 22-23 (footnotes omitted). "Inland waters" include "all ports, estuaries, harbors, bays, channels, straits, historic bays, sounds, and also all other bodies of water which join the open sea." *Id.* at 40 n.45 (quoting H.R. Rep. No. 83-215, at 4 (1953)).

United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, ch. II, § 18 (Hilliard, Gray & Co., 1834) ("Every nation possesses an exclusive sovereignty and jurisdiction within its own territory.").[11]

For centuries, this Court has presumed that, in U.S. statutes, Congress *exercises* its sovereign authority over foreign-flagged vessels in U.S. territory, at least insofar as conduct aboard the vessel affects Americans rather than the vessel's foreign crew. The classic statement of the principle was announced by Chief Justice Marshall in *The Schooner Exchange* v. *McFaddon* (*The Exchange)*, 11 U.S. (7 Cranch) 116, 144 (1812):

> [W]hen merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits.

In *Mali* v. *Keeper of the Common Jail of Hudson County, N.Y.*, 120 U.S. 1 (1887), the Court invoked the principle of

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[11] Although the United States has not yet ratified the Convention, the U.S. recognizes that the Convention reflects customary international law to which it adheres. See President's Statement on United States Ocean Policy, 1983 PUB. PAPERS OF PRESIDENT RONALD REAGAN 378 (Mar. 10, 1983). On March 11, 2004, the Senate Committee on Foreign Relations unanimously recommended that the full Senate ratify the Convention pursuant to suggested declarations and understandings. See Sen. Comm. on Foreign Relations, 108th Cong., Report on United Nations Convention on the Law of the Sea 6 (Comm. Print Mar. 11, 2004) (Exec. Rpt. 108-10).

The Exchange to hold that New Jersey law applied even to the murder of one foreign crew member by another on a foreign-flagged ship in U.S. territory, despite the lack of any specific statement of legislative intent. See *id*. at 12 ("As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled."). In applying the principle that U.S. law applies in U.S. territory to conduct affecting Americans, the Court distinguished activities on foreign-flagged ships that affected Americans from those that involved only the vessel and its crew:

> The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction.

Id. at 18.

Subsequently, *Cunard Steamship Co., Ltd.* v. *Mellon*, 262 U.S. 100 (1923), also invoking *The Exchange*, held that the Prohibition-era Volstead Act prohibited foreign-flagged steamships from carrying or serving alcohol in U.S. waters despite the absence of an express statement of purpose regarding such vessels. "A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them." *Id*. at 124. Indeed, the Court found the Act's silence to be evidence in *favor* of applicability: After recognizing that the Act outlawed alcohol in "'all territory subject to [U.S.] jurisdiction,'" the Court

went on to note that "[t]here is in the act no provision * * * making it inapplicable to merchant ships, either domestic *or foreign*, when within [U.S.] waters, save in the Panama Canal." *Id*. at 127 (emphasis added). "Such an exception would tend to embarrass its enforcement and to defeat the attainment of [the Eighteenth Amendment's] obvious purpose, and therefore cannot reasonably be regarded as implied." *Id*. at 126.

In *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 (1931), this Court unanimously held – in an opinion by Justice Holmes – that the Jones Act applied to the death of a U.S. citizen on a German vessel flying the German flag in a U.S. port, despite the absence of an express statement in the Act that it applied to foreign-flagged vessels. Invoking *The Exchange* once again, the Court explained: "It is *always* the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own. There hardly seems to be a reason why it should adopt a different rule for people subject to its authority because they are upon a private vessel registered abroad." *Id*. at 240 (citations omitted) (emphasis added). The Court thus saw "no reason for limiting the liability for torts committed [aboard a German vessel] when they go beyond the scope of discipline and private matters that do not interest the territorial power." *Ibid*.[12]

In *International Longshoremen's Ass'n* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970), this Court unanimously held that the National Labor Relations Act applied to a dispute over picketing regarding the working conditions paid both to Americans and foreign crewmembers performing longshore work for foreign-flagged cruise ships in U.S. ports despite any express statement of congressional intent. See *id*.

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[12] Although *Uravic* was subsequently overruled on statutory grounds, its rationale regarding Congress's exercise of its sovereign authority remains unaffected. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 348 (1991).

at 200. The Court explained that "this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work." *Id*. at 199; see also *id*. at 201 (White, J., concurring) (agreeing with majority in relevant part).

2. The Fifth Circuit's requirement of a plain statement as a prerequisite to any application of U.S. law to foreign-flagged vessels is thus contrary to this Court's precedent. Indeed, this Court has recognized that flags of convenience are an artifice to evade U.S. law that carry little if any genuine element of sovereignty. It has refused to blind itself to the fact that "a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries," a practice that has naturally led U.S. courts to look "beyond the formalities of more or less nominal foreign registration" in enforcing U.S. law against foreign-flagged ships. *Lauritzen* v. *Larsen*, 345 U.S. 571, 587 (1953).

The Court has concluded that "the *façade*" of foreign registry "must be considered as minor, compared with the *real* nature of the operation and a cold objective look at the *actual* operational contacts that [the] ship and [its] owner have with the United States." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970) (emphases added). A contrary rule would allow the facile circumvention of U.S. law and give "an advantage over citizens engaged in the same business by allowing [the foreign-flagged vessel's owner] to escape the obligations and responsibility" imposed by our statutes. *Ibid*.

3. Neither respondent nor the court of appeals has been able to produce any evidence that Congress intended to restrict the ADA's presumptive scope; indeed, they have failed even to articulate a genuine *reason* that Congress would have intended to exempt respondent from the disabilities laws. To the contrary, there is every indication that Congress intended Title III of the ADA to apply in these

circumstances. Indeed, the statute is sufficiently clear that, even if applicable, the presumption that the Fifth Circuit erroneously erected is overcome.

In enacting the ADA, Congress "invoke[d] the sweep of congressional authority, * * * including the power * * * to regulate commerce." 42 U.S.C. 12101(b)(4). Title III expressly defines the "commerce" it regulates to include "transportation * * * between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country." *Id.* § 12181(1)(B), (C). The activities of cruise ships – whether U.S.- or foreign-flagged – fall squarely within this invocation of congressional authority.[13]

Further, in light of the dearth of U.S.-flagged cruise ships, the fact that the text of Title III demonstrates Congress's intent to apply the statute to cruise ships means that Congress would *ipso facto* have intended it to apply to *foreign-flagged* cruise ships operating in U.S. waters. When the ADA was passed in 1990, seventy-five of the seventy-seven cruise ships servicing U.S. ports were foreign-flagged. See H.R. Rep. No. 102-357, at 2 (1991). Between 2001 and June 2004, *no* cruise ship flew the U.S. flag. Mary Lu Abbott, *Pride of Aloha Slowly Living Up to Its Name*, CHI. TRIB., Nov. 21, 2004, at 14; Iver Peterson, *Leading Passengers to Water*, N.Y. TIMES, Sept. 28, 2003, § 5, at 8. Respondent's *Pride of Aloha*, which launched in June 2004, is currently the only U.S.-flagged cruise ship. Thus, a contrary interpretation of Title III, which was intended to be "the most sweeping piece of civil rights legislation since the Civil War

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[13] As this Court noted in finding that Title II applies to state prisons, even if it could be concluded that Congress did not explicitly consider Title III's application to foreign-flagged ships, the statute's sweeping prohibition against discrimination "does not demonstrate ambiguity. It demonstrates breadth." *Pa. State Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)). Accord *Stevens*, 215 F.3d at 1241 (noting that "a statute is not vague or ambiguous just because it is broad").

era," 135 Cong. Rec. at S10,714, would effectively render its protection for persons with disabilities aboard cruise ships meaningless. Congress could not possibly have intended such an ineffectual result when it set out "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2).

It also would have made no sense for Congress to permit the protections afforded U.S. citizens to turn on the formalism of a ship's registry. For example, while the ships on which petitioners sailed were registered in the Bahamas, respondent's ships are flagged in four different nations. Congress could not have intended the rights of respondent's similarly situated U.S. passengers to turn solely upon which particular ship within the company's fleet they board in a U.S. port.[14]

Under this Court's precedents establishing a presumption that U.S. laws apply to conduct affecting U.S. citizens in U.S. territory, even on foreign-flagged vessels, there is accordingly no basis to conclude that Congress intended to exclude foreign-flagged cruise ships from the reach of Title III of the ADA.

B. Title III of the ADA Applies to Respondent's Operations Even Under Precedents Governing the Application of U.S. Law to the Crew of Foreign-Flagged Vessels.

The Fifth Circuit in this case did not follow this Court's decisions applying U.S. law to the conduct of foreign-flagged vessels in U.S. territory affecting *U.S. citizens* (see *supra* Part II.A) but instead looked to decisions addressing the application of U.S. law to the vessel's *foreign crew*. The court of appeals misapplied even those precedents, however.

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[14] Nor could Congress have intended to defer to other nations' disability laws, because when the ADA was passed in 1990, no other flagging nation had implemented a disability non-discrimination law. See Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305 app. A (2002).

To the extent those cases are relevant at all, they actually dictate that Title III of the ADA applies to respondent's conduct, given the overwhelming nexus between its operations and the United States.

The most analogous cases among those that deal with crewmembers are those addressing whether the Jones Act – which then provided recovery for "[a]ny seaman who shall suffer personal injury in the course of his employment," see *Rhoditis*, 398 U.S. at 307 n.1[15] – applied to injuries sustained by seamen aboard foreign vessels. As discussed above, when the injured party was a U.S. citizen, the Court concluded without hesitation that U.S. law applied in a case under the related provisions of the Jones Act. See *supra* at 29-30 (discussing *Uravic*, 282 U.S. 234). But even in cases involving *foreign* plaintiffs, the Court has applied a balancing test that can result in the application of U.S. law. The balancing test is not limited to Jones Act cases, but is instead "intended to guide courts in the application of maritime law generally." *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959).

The Court has identified eight factors to consider in a maritime choice-of-law case: (1) the place of the wrongful act, (2) the law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of contract, (6) inaccessibility of a foreign forum, (7) the law of the forum, and (8) the shipowner's base of operations. *Rhoditis*, 398 U.S. at 309; *Lauritzen*, 345 U.S. at 583-92.

Six of these factors – the first, third, fifth, sixth, seventh, and eighth – unquestionably favor petitioners. The events giving rise to petitioners' claims actually took place in U.S. territory. As detailed above, petitioners were subjected to myriad discriminatory policies and practices long before they ever boarded respondent's cruise ships, and their remaining claims arise out of events that occurred in U.S. waters –

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[15] The Jones Act was subsequently amended to restrict such actions. See 46 U.S.C. App. 688(b) (amended 1982).

principally internal waters, including the Port of Houston and the Houston Ship Channel. See *supra* Part I.B. The victims of respondent's discrimination are U.S. residents. See J.A. 9.

Petitioners and respondent formed their respective contracts – that is, petitioners' tickets – within the United States. By respondent's own design, these contracts are to be governed "in all respects" by U.S. law. J.A. 19, (Compl. ¶ 28). And the contract further requires that "any and all claims, disputes or controversies * * * arising from or in connections with" it must be brought in Dade County, Florida, thereby *precluding* petitioners from seeking relief in any foreign forum. *Ibid*. Moreover, petitioners brought their claims in a U.S. forum. Finally, respondent has its base of operations in Miami, Florida. See J.A. 10. Respondent promotes its headquarters in Miami, where its public relations, employee recruitment, hiring, benefits, and human resources departments are centered.

The remaining two factors – the ship's foreign registry and the company's foreign incorporation – are not significant in light of this overwhelming U.S. nexus. In *Rhoditis*, this Court held that the Jones Act applied to an injury sustained by a Greek citizen – who had been retained under a Greek contract with a Greek choice-of-law clause on a Greek-flagged ship owned by a company incorporated in Greece – that could have been redressed in a Greek forum. 398 U.S. at 310. The Court found the Greek contacts to be "minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country." *Ibid*. (noting that the injury occurred in this country, that the defendant had its principal place of business in the United States and engaged in significant U.S. commerce, and that the suit was brought in a U.S. forum). *Ibid*. The Court cautioned that "[t]he significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction," *id.* at 309, and concluded that the "liberal purposes of the Jones Act" dictate that "the façade of the operation must be

considered as minor, compared with * * * the actual operational contacts * * * with the United States. *Id*. at 310.

This case involves a closer U.S. nexus than that presented by *Rhoditis*, one that encompasses all the factors the Court found dispositive there. And the "liberal purposes" of the ADA demand, if anything, an even *broader* construction than do those of the Jones Act. See *supra* Part I (discussing the ADA's broad sweep). *A fortiori*, then, application of the same balancing test means that Title III applies to respondent's operations.[16]

C. The Precedents on Which the Fifth Circuit Relied Involve the Application of U.S. Labor Law to Foreign Vessel Crews and Are Inapposite.

The Fifth Circuit derived its contrary plain-statement requirement from cases addressing the application of U.S.

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[16] In *EEOC* v. *Kloster Cruise, Ltd.*, 939 F.2d 920 (CA11 1991), the Eleventh Circuit relied on the Jones Act cases to reject a cruise line's argument that its ships' foreign flags precluded the EEOC from enforcing an administrative subpoena to investigate allegations of employment discrimination by the cruise line. The court of appeals employed the *Lauritzen* balancing test rather than *Benz*/*McCulloch* "plain statement" requirement, explaining that the "violations alleged in the instant case are sufficiently similar to Jones Act torts and sufficiently dissimilar to the pervasive regulation of the National Labor Relations Board involved in *McCulloch* such that we cannot conclude at this early stage that the EEOC clearly lacks jurisdiction." *Id*. at 924. The court of appeals further noted that "even if the 'law of the flag' were dispositive" with regard to activities that occurred on the cruise line's ships, discovery would nonetheless be appropriate insofar as it could establish "that part of the activities of the employees occurred in Kloster's main offices in downtown Miami or elsewhere in the United States and not aboard the foreign flag vessel." *Id*. at 923 n.4; see also *Rainbow Line, Inc.* v. *M/V Tequila*, 480 F.2d 1024 (CA2 1973) (applying *Lauritzen* factors to find that U.S. law applied to a contractually derived maritime lien on a foreign-flagged vessel when overwhelming U.S. contacts outweighed the foreign registration and ownership); *EEOC* v. *Bermuda Star Line, Inc.*, 744 F. Supp. 1109 (M.D. Fla. 1990) (applying *Lauritzen* factors to find Title VII applicable when the captain of a Panamanian vessel refused to hire a female seaman).

labor law to foreign-flagged vessels that happen to visit this country. See Pet. App. 4a-5a (citing *Benz*, 353 U.S. 138 and *McCulloch*, 372 U.S. 10). That issue is obviously very far afield from the question whether U.S. disability law protects American passengers in U.S. territory.

The critical fact in the maritime labor cases is not the vessel's foreign flag (see *supra* at 31) but rather that the application of U.S. labor statutes would directly interfere with the administration of the foreign vessel's relationship with its crew and create a conflict between U.S. and foreign labor law. The plaintiffs in the cases on which the court of appeals relied sought directly to confer labor rights on a foreign crew wherever the ship sailed. This Court refused to extend American labor law so far as to protect the interests of foreign seamen absent a further clear statement of congressional intent, reasoning that the statutes embody a "bill of rights * * * for *American* workingmen and for their employers." *Benz*, 353 U.S. at 144 (emphasis in original).

Contrary to the Fifth Circuit's ruling, the labor cases do not establish a plain-statement requirement for the more general application of U.S. law to foreign-flagged vessels. Indeed, the Court has expressly declined to extend the rule of these cases even to Jones Act cases involving injuries to foreign employees, distinguishing the latter context as one in which "the pervasive regulation of the internal order of a ship may not be present." *McCulloch*, 372 U.S. at 19 n.9; see also *Uravic*, 282 U.S. at 240 (distinguishing the tort action at issue from "discipline and private matters that do not interest the territorial power").

Even within the labor context, "*Benz* and its successor cases have *not* been read to exempt all organizational activities from the [NLRA's] protections merely because those activities in some way were directed at an employer who was the owner of a foreign-flag vessel docked in an American port." *Windward Shipping (London) Ltd.* v. *American Radio Ass'n, AFL-CIO*, 415 U.S. 104, 112 (1974)

(emphasis added). Thus, *Ariadne Shipping Co.* held that the Act applied to a picket protesting the wages paid to Americans engaging in longshore work on a foreign cruise ship. See *supra* at 30-31. The U.S. longshoremen in *Ariadne*, the Court explained, "were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work" and were not "involved in any internal affairs of either ship which would be governed by foreign law." 397 U.S. at 199. Such a "short-term, irregular and casual connection with the respective vessels plainly belied any involvement on their part with the ships' 'internal discipline and order,'" and the application of U.S. law "would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." *Ibid*.

The Court in *Ariadne* accordingly distinguished the very cases on which the Fifth Circuit relied here:

> In *Benz* a foreign-flag vessel temporarily in an American port was picketed by an American seamen's union, supporting the demands of a foreign crew for more favorable conditions than those in the ship's articles which they signed under foreign law, upon joining the vessel in a foreign port. In *McCulloch* an American seamen's union petitioned for a representation election among the foreign crew members of a Honduran-flag vessel who were already represented by a Honduran union, certified under Honduran labor law.

397 U.S. at 198. The Court explained that the plain-statement requirement applicable in that distinct and narrow context was directly tethered to the prospect that application of U.S. labor law would generate conflicts of international law and interfere with the administration of the ship's crew, conflicts that were not implicated when U.S. law was instead invoked to protect Americans:

> In [*Benz* and *McCullough*], we concluded that, since the Act primarily concerns strife between American

> employers and employees, we could reasonably expect Congress to have stated expressly any intention to include within its coverage disputes between foreign ships and their foreign crews. Thus we could not find such an intention by implication, particularly since to do so would thrust the National Labor Relations Board into "a delicate field of international relations." Assertion of jurisdiction by the Board over labor relations already governed by foreign law might well provoke "vigorous protests from foreign governments and * * * international problems for our Government" and "invite retaliatory action from other nations."

Id. at 198-99 (internal citations omitted; second alteration in original).

To the extent maritime labor precedents are relevant at all, this case is much closer to *Ariadne* than to *Benz* and *McCullough*. Just as the NLRA is a "bill of rights * * * for American workingmen and for their employers," *Benz*, 353 U.S. at 144, that this Court held fully applicable to the claims of American longshoremen in *Ariadne*, so too the ADA is our nation's bill of rights for Americans with disabilities. Petitioners argue for the application of that law in the territory of this country, not the world over. Their Title III claims are based on the rights of passengers, who have a "short-term, irregular and casual," *Ariadne*, 397 U.S. at 199, relationship with respondent's vessels. See also Draft Passenger Vessel Accessibility Guidelines and Supplementary Information V201.1, *available at* http://www.access-board.gov/pvaac /guidelines.htm (regulations apply to passenger areas).[17] Thus, there is no reason why the narrow rule of comity underlying the *Benz* cases should interfere with the ADA's "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

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[17] By contrast, Title I of the ADA – which is not at issue in this case – governs the rights of disabled *employees*. 42 U.S.C. 12111-12117.

D. There Is No Conflict With SOLAS, Nor With Any Principle of International Law, That Would Justify Exempting Foreign-Flagged Ships From the ADA.

1. The Fifth Circuit erred in concluding that application of the ADA to foreign-flagged ships would give rise to international discord because of conflicts with the International Convention for the Safety of Life at Sea (SOLAS). As discussed *supra* at 26-28, the settled rule under international law is that vessels within U.S. internal waters, as well as within U.S. territorial waters (subject to some limits grounded in the right of "innocent passage"), are as fully subject to domestic law as would be an equivalent facility on U.S. land. Federal and state law are thus quite frequently and without incident applied to the operations of cruise ships doing business in the United States. See, *e.g.*, *Silivanch* v. *Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241 (S.D.N.Y. 2001), *aff'd*, 333 F.3d 355 (CA2 2003) (dismissing a cruise line's appeal of a mass tort verdict finding it liable for negligence when its whirlpools caused passengers to contract Legionnaire's Disease); *Gibbs* ex rel. *Gibbs* v. *Carnival Cruise Lines*, 314 F.3d 125, 128 (CA3 2002) (Becker, C.J.) (finding that federal maritime law applied to injuries to a minor aboard a cruise ship, and noting Carnival's concession of that fact); *Benson* v. *Norwegian Cruise Line Ltd.*, 859 So. 2d 1213 (Fla. Dist. Ct. App. 2004) (allowing a wrongful death suit alleged act of medical malpractice took place in Florida's territorial waters).

Respondent has moreover *voluntarily* consented to the application of U.S. law by including a U.S. choice-of-law clause in its ticket contract. J.A. 19, ¶ 28. Such clauses are ubiquitous in the cruise industry. See Curtis E. Pew, *Book Review:* Cruise Ships (Volume 10 of Benedict on Admiralty), 12 U.S.F. MAR. L.J. 389, 390 (2000) (noting that choice-of-law and choice-of-forum clauses "have virtually come to define cruise ship litigation"). Notably, respondent nowhere in its contract suggests to individuals that there is *one* U.S.

law – Title III of the ADA – that for some reason does not apply.

Nor does the prospect that different legal regimes will apply in foreign waters prevent the application of U.S. law while the ship is in U.S. territory. After all, the petitioner ships in *Cunard* traveled to foreign ports where the on-board transport and/or sale of intoxicating liquors was expressly *required*. *Cunard*, 262 U.S. at 119. Nevertheless, this Court held that the Volstead Act prohibited these activities while the ships were in U.S. waters. *Id*. at 127-31.

2. The court of appeals' conclusion regarding potential international discord was principally based on the possibility of conflicts between the requirements of Title III and this nation's obligations under SOLAS. That conclusion lacks merit. Because SOLAS applies equally to U.S.- and foreign-flagged ships, the logical consequence of the court of appeals' reasoning is that *all* cruise ships are exempt from the ADA, a result that Congress plainly did not intend. See *supra* Part I.A.

Moreover, because an act of Congress such as the ADA enjoys full constitutional parity with a treaty,[18] it must be given effect unless it is fully irreconcilable with a treaty: "when there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) (citations omitted); see also *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (quoting same); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936); *Frost* v. *Wenie*, 157 U.S. 46, 58 (1895).

The Fifth Circuit erred in concluding that the only way to reconcile ADA Title III with SOLAS is to hold Title III wholly inapplicable to foreign-flagged ships. In fact, even

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[18] See, *e.g.*, *Reid* v. *Covert*, 354 U.S. 1, 18 n.34 (1957) (quoting *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("By the constitution a treaty is placed on the same footing, and made like an obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.")).

accepting the flawed premise that some of Title III's requirements *do* conflict with those of SOLAS, a more nuanced approach would give far fuller effect to the language and purposes of both enactments. Title III's requirements apply *only when they do not conflict* with the treaty, as is indisputably the case with the great majority of petitioners' claims – for instance, those dealing with respondent's discriminatory pricing policy. There is a textual basis for this distinction, which has been adopted by DOJ and DOT: the provision that barriers to access must be removed only when removal is "readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv); see also *id.* § 12181(9). This Court need only interpret that phrase to exclude modifications that would violate international law, and any conflict with SOLAS would be eliminated.[19] This analysis will not be substantially different than that which federal district courts perform in every Title III barrier removal case. See, *e.g.*, *Ass'n for Disabled Americans, Inc.* v. *Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1365-69 (S.D. Fla. 2001) (evaluating facts and concluding that some, but not all, proposed modifications were readily achievable); *Parr* v. *L&L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1088-89 (D. Haw. 2000) (same).

The court of appeals, however, rejected the notion that "courts can choose to enforce those aspects of Title III that do not conflict with international law." Pet. App. 11a. Its reasoning misread this Court's precedent. This Court has repeatedly held that a single statute applies to foreign-flagged ships in some circumstances but not others. For example, the

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[19] DOJ, Title III Technical Assistance Manual III-1.2000(d) (1994 Supp.) (DOJ interpretation) (foreign-flagged ships "that operate in United States ports may be subject to domestic law, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement"), *available at* http://www.usdoj.gov/crt/ada/taman3up.html; 56 Fed. Reg. 45,584, 45,600 (Sept. 6, 1991) (DOT interpretation) (the United States "appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports" except to the extent that enforcing the ADA requirements would conflict with a treaty).

Court held that the Jones Act was applicable under the circumstances of *Rhoditis* but not in *Lauritzen* and that the NLRA was applicable in *Ariadne* but not in the other cases in the *Benz* line. See *supra* Part II.A.

3. Nor, in any event, is there actually a conflict between Title III and SOLAS even if all of Title III's requirements are applied in full. SOLAS simply establishes minimum safety standards for the construction, equipment, and operation of ships that weigh more than five hundred tons and are engaged in international passage. See generally SOLAS: CONSOLIDATED EDITION 2001 (Int'l Mar. Org. ed., 2001); see also Allen, *supra*, at 578.[20] Nothing in the plain language of SOLAS prevents signatory nations from imposing accessibility requirements on ships that enter their ports.

As an initial matter, many of respondent's Title III violations can be remedied without implicating any physical changes to the ship, much less SOLAS. These include respondent's surcharge for accessible cabins, its exclusion of disabled passengers from emergency evacuation programs,[21] its requirement that all passengers with disabilities be

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[20] Flagging states are responsible for ensuring that ships registered under their flags have met all SOLAS requirements, and port states are permitted to inspect foreign-flagged ships for SOLAS compliance. SOLAS: CONSOLIDATED EDITION 2001, at 17-36 (Int'l Mar. Org. ed., 2001); see also Nat'l Ocean Serv., Int'l Program Office, International Convention for the Safety of Life at Sea (SOLAS), 1960 and 1974, at http://international.nos.noaa.gov/conv/solas.html. Within the United States, the Coast Guard is tasked with enforcing SOLAS compliance by foreign-flagged ships, both through promulgation of regulations and ship inspection. 33 U.S.C. 1602; Allen, *supra*, at 582. See, *e.g.*, 33 C.F.R. §§ 96.110(a), (c), 96.210(a)(3), 96.310(c) (2003) (Coast Guard applying to ships required to comply with Chapter IX of SOLAS, the Management Code for the Safe Operation of Ships).

[21] Interestingly, respondent's violation of the ADA is in this respect itself a violation of SOLAS: "Clear instructions to be followed in the event of an emergency shall be provided for *every* person on board." SOLAS: CONSOLIDATED EDITION 2001 ch. 3, pt. B, reg. 8, at 303 (Int'l Mar. Org. ed., 2001) (emphasis added).

accompanied by a companion, and its failure to provide any accessible exterior cabins.[22]

Nor can respondent seriously dispute that a significant number of even physical barriers on its ships could be removed without affecting SOLAS obligations: furniture blocking hallways and accessible seating could be rearranged to accommodate wheelchairs; restrooms could be made accessible simply by changing the direction in which the door swings; hydraulic lifts could be installed in swimming pools; and telephones, elevator controls, service counters and drinking fountains could be lowered to heights at which passengers using a wheelchair or scooter can reach them. Carnival Cruise Line, another foreign-flagged cruise line that services U.S. ports, recently agreed to enact precisely these kinds of remedial measures. See generally Exhibit 1 to Carnival Settlement Agreement, *supra*. And as detailed in *supra* Part I.B, Princess Cruise Lines complies with accessibility requirements voluntarily. That such changes do not violate SOLAS is apparent from the fact that Princess and Carnival ships, like other ships using U.S. ports, are inspected for SOLAS compliance quarterly by the U.S. Coast Guard.[23]

For its part, the Fifth Circuit did not identify any current conflict between SOLAS and the ADA or its implementing regulations. Rather, it relied upon a report by the Passenger Vessel Access Advisory Committee ("PVAAC"), which itself

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[22] Other Title III violations that can be remedied without making any physical changes to respondent's ships include respondent's requirement that passengers with disabilities self-identify, obtain a doctor's statement before traveling, and waive respondent's liability for personal injuries that occur on its cruises. Similarly, respondent could remedy violations relating to boarding and departure merely by providing passengers with disabilities with assistance and/or allowing them to embark and disembark early. In cases in which ship services such as restaurants and spas are located in inaccessible parts of the ship, respondent could simply provide disabled passengers with the opportunity to experience these services in alternative locations.

[23] See U.S. Coast Guard, Cruise Ship Consumer Fact Sheet, *available at* http://www.uscg.mil/hq/g-m/cruiseship.htm.

purported to identify only *two* conflicts between SOLAS and a series of recommendations for accessibility guidelines that would have applied to newly constructed and altered cruise ships.[24] Pet. App. 9a n.6. But because the PVAAC report discusses only then-proposed regulations, it did not identify any *current* conflicts between SOLAS and Title III. The Court should give the fullest effect to both SOLAS and Title III by requiring foreign-flagged cruise ships in U.S. waters to comply with Title III unless there is a specific, actual conflict with SOLAS. Identification of any such conflicts can properly be left to the expert government regulators that Congress has charged with implementing SOLAS and Title III.

And indeed, as the newer draft guidelines recently released by the Access Board demonstrate, there is in fact no conflict between Title III and SOLAS. The two purported conflicts between the proposed regulations and SOLAS, see PVAAC, Final Report, *supra*, at ch.13, pt. I, were eliminated by the draft guidelines. First, the PVAAC report would have required that at least one accessible exit be an elevator, whereas SOLAS requires two means of egress, neither of which can be an elevator. *Id.* pt. I, at 99. To the extent that these two requirements conflict, any inconsistency is resolved by the draft guidelines, which require only that, in certain situations, an elevator be an additional means of escape for persons with disabilities. See Draft Passenger Accessibility Guideline V207.3, *available at* http://www.

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[24] PVAAC was established by the Access Board to make recommendations for cruise ship accessibility, 63 Fed. Reg. 15,175 (Mar. 30, 1998), and issued its final report on November 17, 2000. See PVAAC, Recommendations for Accessibility Guidelines for Passenger Vehicles: Final Report (2000), *available at* http://www.access-board.gov/pvaac/commrept/commrept.pdf . The draft guidelines released by the Access Board on November 26, 2004 are based on (but not identical to) the PVAAC Report. See Draft Passenger Vessel Accessibility Guidelines and Supplementary Information, at Background, *available at* http://www.access-board.gov/pvaac/guidelines.htm .

access-board.gov/pvaac/guidelines.htm#DRAFT. Second, the PVAAC Report would have "require[d] changes in level greater than ½ inches to be ramped," see PVAAC Report ch.13, pt. I, at 100, while SOLAS simply requires that thresholds be "of ample height and strength" and that doors opening to the weather deck be capable of becoming watertight efficiently. *Id.* pt. 1, at 101. Again, to the extent that these two provisions conflict, any inconsistency is resolved by the draft guidelines, which incorporated substantial changes "to address door coaming issues," and which call for the application of one of three configurations depending on the degree to which the door in question must exclude water. See Draft Passenger Accessibility Guideline V404, *available at* http://www.access-board.gov/pvaac/guidelines.htm#DRAFT.

E. Petitioners' Claims Are Not Subject to the Presumption Against Extraterritorial Application of U.S. Law.

The Fifth Circuit finally erred in asserting (Pet. App. 11a) that its holding was supported by the presumption against the extraterritorial application of U.S. law. That presumption plays no role here for two reasons. First, petitioners seek only *domestic* application of the ADA. This Court assumes "that legislation of Congress, unless a contrary intent appears, is meant to apply only *within the territorial jurisdiction of the United States*." *Aramco*, 499 U.S. at 248 (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)) (emphasis added). The presumption invoked by the Fifth Circuit applies only to the application of U.S. law "beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, 336 U.S. at 285.

Petitioners are not pursuing claims that the statute prohibits, for example, discrimination in the Bahamas. Rather, petitioners contend that respondent must comply with U.S. law when, for example, selling tickets in this country, when boarding and disembarking passengers in this country,

and when traveling to and from U.S. ports in U.S. internal and territorial waters – conduct plainly falling within U.S. territorial jurisdiction.

The Fifth Circuit rejected that conclusion on the ground that "structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters." Pet. App. 11a. The court of appeals thereby implausibly allowed the tail to wag the dog: it allowed the incidental overseas effect of petitioners' claims to control the far more substantial application of federal law to respondent's activity *in this country*. But the presumption applies only to cases that "involve[] the *regulation* of conduct beyond U.S. borders." *Environmental Defense Fund* v. *Massey*, 986 F.2d 528, 531 (CADC 1993) (emphasis added). See also, *e.g.*, *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that in *Romero*, 358 U.S. at 354, "the presumption against extraterritorial application of federal statutes was inapplicable * * * as the actionable tort had occurred in American waters"); Larry Kramer, *Vestiges of* Beale*: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 181 (1991) (noting that the presumption against extraterritoriality "refers to a presumption that laws regulate only acts occurring within the United States") (footnote omitted). In fact, "[e]ven where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." *Massey*, 986 F.2d at 531; see also *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1334 (CA2 1972) (noting that when there is "significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law"). The presumption was designed to "to protect against unintended clashes between

our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. The simplest method of avoiding such conflicts is "to assign prescriptive jurisdiction exclusively on the basis of where the conduct occurs." William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 115 (1998)

The absurd results of the Fifth Circuit's contrary position are obvious. Countless provisions of domestic law affect the overseas manufacture of innumerable products. One need look no further than the tort law that governs respondent's ships while docked in this country and that requires respondent to construct and maintain those ships in a fashion that affects their operations worldwide. Yet under the lower court's rationale, such extraterritorial effects preclude the application of that U.S. law despite the fact that the conduct actually occurs in U.S. territory.

The decision below is specifically contrary to this Court's decision in *Cunard*, which held that the National Prohibition Act – which did not expressly apply extraterritorially – applied to foreign-flagged vessels in U.S. territorial waters but not to those sailing outside that boundary. 262 U.S. at 128-29. The Court reached that conclusion despite the fact that the Act directly affected the transportation of goods to and from this country outside U.S. territorial waters.

Second, the Fifth Circuit in effect erected a double hurdle of presumptions – one relating to foreign-flagged ships and another relating to extraterritoriality – that this Court's jurisprudence does not support. Most of this Court's cases involving foreign-flagged vessels implicate the application of U.S. law outside U.S. territory, because such vessels routinely travel into and outside of the United States. Yet this Court has never employed a distinct presumption that, even if U.S. law does govern foreign-flagged ships, Congress nonetheless must include a *further* plain statement of its intent to apply

that law extraterritorially. Hence, once the Court concludes that the ADA applies to foreign-flagged cruise ships, the legal question presented by this case is resolved.

In all events, "[w]hether Congress has in fact exercised [its extraterritorial] authority is a matter of statutory construction." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). In determining congressional intent, this Court has considered "all available evidence about the meaning" of the statute in question. *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993). The previous sections of this brief have shown Congress's commitment to a broad interpretation of Title III and the necessary conclusion that Title III applies to foreign-flagged cruise ships operating in U.S. waters. That conclusion overcomes any contrary "presumption."

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Fifth Circuit should be reversed.

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