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 UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Title III of the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.*, applies to foreign-flagged cruise ships operating in the ports and internal waters of the United States.

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the application of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181-12189, to foreign-flagged cruise ships that pick up passengers at United States ports. With exceptions not relevant here, the Secretary of Transportation is charged with promulgating regulations concerning specified transportation services under Title III, 42 U.S.C. 12186(a), while the Attorney General has responsibility for issuing regulations to carry out the remainder of Title III. 42 U.S.C. 12186(b). The Attorney General also has substantial enforcement responsibilities under Title III. 42 U.S.C. 12188(b). The United States filed briefs as amicus curiae in the district court and the court of appeals in this case and also participated as amicus curiae in *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), reh'g denied, 284 F.3d 1187 (11th Cir. 2002), arguing that Title III applies to foreign-flagged cruise ships docking at United States ports. The United States has an interest in defending its interpretation of the ADA in this case.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as * * * public accommodations, * * * transportation, [and] recreation." 42 U.S.C. 12101(a)(3).

Title III of the ADA provides that

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). It defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and that falls within one or more of the 12 broad categories of facilities listed in the statute. See 42 U.S.C. 12181(7). Those categories include places of lodging, establishments serving food or drink, places of "exhibition or entertainment," and places of "exercise or recreation." 42 U.S.C. 12181(7). Pursuant to its responsibility to interpret Title III, see 42 U.S.C. 12186(b), the Department of Justice has determined that cruise ships function as one or more of the types of places of public accommodation enumerated in the statute, since they typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities. See 56 Fed. Reg. 35,551 (1991); 28 C.F.R. Pt. 36, App. B at 677; Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994).

In addition, Title III of the ADA prohibits discrimination on the basis of disability 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). "[S]pecified public transportation" is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter service) on a regular and continuing basis." 42 U.S.C. 12181(10). The Department of Transportation, which promulgates regulations under Title III concerning specified public transportation services, see 42 U.S.C. 12186(a)(1), has determined that cruise ships are covered by Section 12184. 56 Fed. Reg. 45,600 (1991) ("Cruise ships easily meet the definition of 'specified public transportation.' Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce.").

As places of public accommodation and as providers of specified public transportation services, cruise ships must comply with all Title III requirements applicable to the provision of goods and services, which requirements include nondiscriminatory eligibility criteria; reasonable modifications in policies, practices, and procedures; provision of auxiliary aids; and the removal of architectural barriers in existing facilities. 28 C.F.R. Pt. 36, App. B at 677; Technical Assistance Manual III-1.2000(D) (Supp. 1994); 49 C.F.R. 37.5(f) (requiring providers of transportation services to comply with the Department of Justice regulations).

Both the Department of Justice and the Department of Transportation have determined that foreign-flagged cruise ships are subject to the requirements of the ADA when they voluntarily enter the ports or internal waters of the United States. Shortly after passage of the ADA, the Department of Transportation made the determination that foreign-flagged cruise ships serving United States ports are covered by Title III:

> 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. A state has complete sovereignty over its internal waters, including ports. Therefore, once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state. In addition, a State may condition the entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. 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. 45,600 (1991). The Department of Justice included a similar statement in its Technical Assistance Manual in 1994. See Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) ("Ships registered under foreign flags 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.").

In their initial rulemakings, however, both Departments determined that further study was required before they issued separate rules governing the new construction or alterations of passenger vessels. See 28 C.F.R. Pt. 36, App. B at 677; Title III Technical Assistance Manual III-5.3000 (1993) (noting that although there is currently "no requirement that ships be constructed accessibly[,] * * * [c]ruise ships would still be subject to other title III requirements"). The Department of Justice has explained that, although "a ship is not required to comply with specific accessibility standards for new construction or alterations" until specific accessibility standards for new construction or alteration have been developed, "[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." Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) (emphasis added).

Since that time, the Architectural and Transportation Barriers Compliance Board (Access Board) established a Passenger Vessel Access Advisory Committee (PVAAC) to make recommendations for, *inter alia*, cruise ship accessibility. 63 Fed. Reg. 15,175 (1998). The PVAAC issued its final report in December 2000, with recommendations to the Access Board for shipboard accessibility regulations. See <http://www.access-board.gov/pvaac/status.htm>. The Access Board considered those recommendations and prepared draft guidelines governing accessibility standards for large passenger vessels. On November 26, 2004, the Access Board published a Notice of Availability of Draft Guidelines in the Federal Register. 69 Fed. Reg. 69,244. On that same day, the Department of Transportation published in the Federal Register an Advance Notice of Proposed Rulemaking seeking comments on its consideration of issuing rules based on the Access Board's draft guidelines. *Id.* at 69,246. The Advance Notice of Proposed Rulemaking reiterated the Department of Transportation's longstanding positions that "[c]ruise ships clearly fall into the categories of public transportation and public accommodation and, thus, are subject to the requirements of the ADA," and that "the ADA applies to foreign-flag vessels operating within the internal waters of the United States." *Id.* at 69,249.

2. Petitioners Douglas Spector, Julia Hollenbeck, and Rodger Peters, who have mobility impairments requiring them to use wheelchairs or electric scooters, took cruises in 1998 and 1999 on the M/S Norwegian Sea and the M/S Norwegian Star, ships that sail to and from the Port of Houston, Texas, and are owned and operated by respondent Norwegian Cruise Line Limited d/b/a/ Norwegian Cruise Lines (NCL), a corporation organized under the laws of the Bahamas, with its principal place of business in Miami, Florida. Pet. App. 16a. Petitioners Ana Spector and David

T. Killough (the companion petitioners) are non-disabled individuals who accompanied Douglas Spector and Julia Hollenbeck, respectively, on the cruises. *Ibid.*

On August 1, 2000, petitioners filed suit on behalf of themselves and all persons similarly situated, alleging that NCL discriminated against the petitioners with mobility impairments on the basis of their disabilities and against the companion petitioners because of their association with disabled persons, in violation of Title III of the ADA. Pet. App. 17a-18a. Petitioners sought declaratory and injunctive relief, alleging that they reasonably expected to take future cruises on NCL's ships. *Id.* at 18a.

The alleged ADA violations included imposing higher fares and surcharges for accessible cabins and for assistance and accommodations, 42 U.S.C. 12182(b)(2)(A)(i); using standards or criteria that had the effect of discriminating based upon disability, 42 U.S.C. 12182(b)(1)(D); failing to make reasonable modifications to policies, practices, and procedures, 42 U.S.C. 12182(b)(2)(A)(ii); and failing to remove barriers to access that deprived petitioners of the full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations of the ship, where doing so was readily achievable, 42 U.S.C. 12182(b)(2)(A)(iv). The companion petitioners alleged violations of 42 U.S.C. 12182(b)(1)(E), which proscribes the denial of equal treatment to an individual because of the known disability of an individual with whom he or she is known to have a relationship or to associate.

Petitioners alleged in their complaint that, although each ship can carry hundreds of passengers, each has only four cabins that are considered to be accessible to persons who use wheelchairs or scooters for mobility. Pet. App. 17a. Passengers who require accessible cabins, as well as their traveling companions, are subjected to additional surcharges for their use and for assistance from crew members. *Ibid.* Contrary to representations made to petitioners before their

cruises, NCL's programs, services, and activities were not open and equally accessible to persons with mobility impairments. *Ibid.* For example, NCL placed evacuation equipment and training programs in inaccessible locations. *Ibid.* The barriers to accessibility not only prevented mobility-impaired individuals from participating in the services, programs, and activities on the cruise ships, but also required the companion petitioners to choose between missing inaccessible activities and leaving their mobility-impaired companions alone. *Ibid.*

NCL moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); Pet. App. 18a. The motion argued that requiring foreign-flagged cruise ships to comply with the ADA is an impermissible extraterritorial application of the statute. Pet. App. 19a. It also argued that, even if the statute applies, NCL need not remove barriers to access for persons with disabilities because the administrative agencies charged with enforcement of Title III (the Department of Justice and the Department of Transportation) have failed to promulgate regulations governing new construction and alterations of cruise ships. *Ibid.*

3. The district court granted the motion to dismiss to the extent that it sought dismissal of the claims for removal of barriers to access but denied the motion with respect to the remaining claims. Pet. App. 47a. The court held that Title III applies to cruise ships in general, both as "public accommodations" and as "specified public transportation." *Id.* at 19a-25a. Relying on this Court's decision in *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100 (1923), the district court held that foreign-flagged ships that operate in the ports and internal waters of the United States must comply with United States law and that application of Title III to such ships does not involve an extraterritorial application of the statute. Pet. App. 28a-36a. The court rejected NCL's alternative argument that, even if Congress had the

authority to apply the ADA to foreign-flagged cruise ships, it did not intend to exercise that authority. *Id.* at 35a. It found that "failure to accommodate disabled domestic passengers while in domestic territorial waters directly implicates the territorial sovereign's interest in protecting its citizens' rights," *ibid.*, and that, in light of the "intended broad scope of Title III," failure to apply it in these circumstances would "impugn the dignity of the United States ports in which NCL chooses to solicit its customers," *id.* at 34a-35a (finding persuasive the reasoning in *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1242-1243 (11th Cir. 2000)).

Although acknowledging that the remaining issue was a difficult one, the district court held that the failure of the Department of Justice and the Department of Transportation "to create guidelines for new construction or alterations of cruise ships * * * bars enforcement of Title III's existing barrier removal guidelines." Pet. App. 42a. Petitioners and respondent appealed.

4. The court of appeals reversed on the coverage issue and accordingly did not reach the barrier removal issue. Pet. App. 1a-15a. The court agreed that a foreign-flagged ship that voluntarily enters United States waters subjects itself to the laws and jurisdiction of the United States. *Id.* at 4a (citing *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957)). It concluded, however, that Congress must clearly evince an affirmative intent to apply a particular law to foreign vessels entering United States waters. Pet. App. 5a (citing *Benz*, 353 U.S. at 147). It found no such clearly expressed intent in either the statutory text or the legislative history of the ADA. *Id.* at 8a.

The court also concluded that Title III should be narrowly construed against application to foreign-flagged cruise ships because requiring removal of physical barriers to access on a ship could have extraterritorial effects. As a result, the court concluded, barrier removal standards might potentially

violate international treaties, such as the International Convention for Safety of Life at Sea (SOLAS). Pet. App. 8a-9a (citing *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

The court also concluded that the longstanding position of the Departments of Justice and Transportation that Title III applies to foreign-flagged cruise ships entering United States ports was too "informal" to be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 13a (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). The court declined to accord the agencies' positions any "respect" under *Christensen* because it found them "not persuasive." *Id.* at 14a.[1]

SUMMARY OF ARGUMENT

Title III of the ADA applies to *all* cruise ships, including foreign-flagged vessels, that enter the internal waters and ports of the United States to pick up American passengers. Congress enacted the ADA to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). It intended the ADA to eliminate, to the full extent of Congress's authority, discrimination against persons with disabilities in such areas as public accommodations, transportation, and recreation. There can be no dispute that cruise ships fall within the ADA's prohibition of discrimination in "public accommodation[s]," as well as in the provision

[1] The court of appeals did not reach the question whether the absence of new construction or alteration regulations for passenger vessels precludes application of Title III. See Pet. App. 14a n.10. That issue is therefore not presented here. As explained in the government's amicus brief below (Gov't C.A. Br. 18-26), the absence of new construction or alteration regulatory guidelines in no way excuses passenger vessels from complying with other Title III requirements, including the obligation to remove barriers to access where doing so is readily achievable.

of "specified public transportation services." 42 U.S.C. 12182(a), 12184(a).

Contrary to the court of appeals' conclusion below, the foreign-flag status of a cruise ship does not affect the authority of the United States to protect its citizens within United States territory. Moreover, because virtually all cruise ships serving American ports are foreign flagged, the decision below would effectively leave disabled passengers and their traveling companions in an entire segment of the United States travel industry without any protection against discrimination. There is no reason to believe Congress would have intended such a result.

Instead, there is every reason to believe that Congress intended the ADA to apply to foreign vessels in United States ports based on the plain terms of the Act and the longstanding principle that foreign-flagged ships voluntarily entering the ports and internal waters of the United States subject themselves to the jurisdiction and laws of the United States. See, *e.g.*, *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923). Nothing in the ADA exempts foreign-flagged ships (or any other foreign entity doing business within the United States) from Title III's non-discrimination and accessibility requirements, and any such exemption would be inconsistent with the statute's unambiguous and broad text, as well as its underlying purposes. As in *Cunard*, failure to apply United States' law to the foreign-flagged cruise ships at issue here would "embarrass [the] enforcement" of Congress's comprehensive, nationwide scheme and "national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12102(b)(1), and would "defeat the attainment of [the ADA's] obvious purpose." 262 U.S. at 126.

Contrary to the court of appeals' analysis, this case does not involve an extraterritorial application of United States law such as was at issue in *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 247-248 (1991), but instead

involves a straightforward application of United States law within the territory of the United States. As *ARAMCO* and a host of other cases make clear, the general rule is that a law applies in United States territory without regard to whether it applies to foreign entities within that territory or indirectly causes such entities to alter their conduct abroad.

Nor does this case implicate this Court's decisions in *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), in which the Court declined, absent an affirmative expression of intent by Congress, to apply the National Labor Relations Act to disputes between a foreign-flagged vessel and its foreign crew that concerned solely the internal management and affairs of the ship. Those cases reflect a longstanding distinction in this court's maritime cases between actions on board a foreign-flagged ship that affect only "the peace of the ship"—i.e., the internal management and order of the vessel—and those that are "of a nature to disturb the public peace" or "affect those on shore or in the port." *Mali* v. *Keeper of the Common Jail (Wildenhus's Case)*, 120 U.S. 1, 17 (1887). There can be no question that the type of discrimination prohibited by Title III significantly affects the rights and interests of the American public and is not limited to the "peace of the ship." That is particularly true given that the Title III requirements at issue here apply only to *public* accommodations and specified *public* transportation services within United States territory. As this Court explained in *Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 240 (1931), in a case involving whether United States law should apply to torts committed on foreign vessels docked in United States ports, it would be "extraordinary" to deny the application of United States law to Americans on board a foreign ship in a United States port.

The court of appeals was also incorrect in concluding that application of Title III to these foreign-flagged cruise ships is likely to involve a conflict with customary international

law or treaties. Both the Department of Justice and the Department of Transportation have interpreted the statute to apply to foreign-flagged ships, except to the extent that enforcing ADA requirements would conflict with a treaty. Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994); 56 Fed. Reg. 45,600 (1991). Moreover, to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered "readily achievable" within the meaning of Title III. See 42 U.S.C. 12182 (b)(2)(A)(iv); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994). Thus, the requirements of Title III can be readily harmonized with the requirements of the International Convention for Safety of Life at Sea (SOLAS) and other international conventions governing passenger vessels. But far from attempting to harmonize the ADA with SOLAS or other treaties, as this Court's cases require, the court of appeals presumed "potential[] conflict[s]" between Title III's barrier-removal standards and SOLAS without identifying a single such conflict—presumed or actual. Pet. App. 9a n.6. Moreover, the relevant regulatory agencies have recently published notices concerning draft accessibility guidelines for passenger vessels that are specifically designed to comply with all United States treaty obligations.

ARGUMENT

TITLE III OF THE ADA APPLIES TO FOREIGN-FLAGGED CRUISE SHIPS OPERATING IN THE PORTS AND INTERNAL WATERS OF THE UNITED STATES

A. Cruise Ships Are Subject To Title III's Non-Discrimination And Accessibility Requirements

1. *Title III Clearly Applies To Cruise Ships*

Title III of the ADA, by its plain terms, applies to cruise ships in the internal waters and ports of the United States. Indeed, cruise ships plainly fit within two separate provi-

sions of Title III's non-discrimination and accessibility requirements.

First, cruise ships fit within Title III's prohibition of discrimination in "public accommodations." Cruise ships qualify as public accommodations in a number of respects, including as "place[s] of lodging," 42 U.S.C. 12181(7)(A); "restaurant[s], bar[s], or other establishment[s] serving food or drink," 42 U.S.C. 12181(7)(B); "place[s] of exhibition or entertainment," 42 U.S.C. 12181(7)(C); and "place[s] of exercise or recreation," 42 U.S.C. 12181(7)(L). Cf. *Daniel* v. *Paul*, 395 U.S. 298, 304-308 (1969) (concluding that lakeside amusement park with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar was a "public accommodation" under Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, which served as the model for Title III of the ADA). Cruise ships are, thus, a quintessential public accommodation. The Department of Justice, which promulgates regulations under those provisions of Title III not related to transportation, see 42 U.S.C. 12186(b), has determined that cruise ships function as one or more of the types of places of public accommodation enumerated in the statute, because cruise ships typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities. See 56 Fed. Reg. 35,551 (1991); 28 C.F.R. Pt. 36, App. B at 677 (concluding, *inter alia*, 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'" to the provision of the services or accommodations being offered); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) (concluding that cruise ships "must comply with the applicable requirements of title III").

Second, cruise ships fit comfortably within Title III's guarantee of "full and equal enjoyment of specified public transportation services." 42 U.S.C. 12184(a). Title III

defines "specified public transportation" to include "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter services) on a regular and continuing basis." That definition is plainly broad enough to encompass cruise ships, which constitute an important segment of the United States travel market and annually transport millions of United States residents on cruises departing from United States ports. The Department of Transportation, which promulgates regulations under Title III concerning public transportation services, see 42 U.S.C. 12186(a)(1), has so determined. See 56 Fed. Reg. 45,600 (1991) ("Cruise ships easily meet the definition of 'specified public transportation.' Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce.").

Thus, by its terms, Title III unambiguously applies to cruise ships. That conclusion is underscored by the breadth of Title III's inclusive terms and this Court's analysis in *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998). In *Yeskey*, this Court held that the prohibition of discrimination by any "public entity" in Title III of the ADA applies to state prisons. In so holding, the Court was willing to assume that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners,'" but it concluded that the ADA's "unambiguous statutory text" rendered that assumption "irrelevant." *Id.* at 212. The Court emphasized that "the fact that a statute," such as the ADA "can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Ibid.* (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).

For the reasons explained, the text of Title III unambiguously applies to all cruise ships in the internal waters and ports of the United States. But even if some ambiguity existed, the contemporaneous and consistent regulatory

determinations of both agencies charged with implementing Title III that it applies to cruise ships are entitled to deference. See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984)).

2. *Foreign-Flagged Cruise Ships Are No Less Subject To Title III*

Nothing in the statute exempts foreign-flagged ships (or any other foreign entity doing business within the United States) from Title III's non-discrimination and accessibility requirements, and any such exemption would be inconsistent with the statute's unambiguous and broad text, as well as its underlying purposes. Congress enacted the ADA to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). It therefore intended the ADA to eliminate, to the full extent of Congress's authority, discrimination against persons with disabilities in such areas as public accommodations, transportation, and recreation. Accordingly, both the Department of Transportation and the Department of Justice have concluded that Title III applies to *all* cruise ships that enter the ports or internal waters of the United States, regardless of their flag status. See 45 Fed. Reg. 45,600 (1991); Title III Technical Assistance Manual III-1.2000(D) (1994); see also 69 Fed. Reg. 69,244, 69,246 (2004).

Indeed, as the Department of Transportation recognized in determining that Title III applies to foreign-flagged cruise ships entering United States ports, "[v]irtually all cruise ships serving U.S. ports are foreign-flag vessels." 45 Fed. Reg. 45,600 (1991). Thus, the regulatory conclusion that cruise ships are covered by Title III necessarily reflects a conclusion that foreign-flagged cruise ships are covered. Likewise, any exclusion from Title III's coverage for foreign-flagged cruise ships would leave disabled passengers and

their traveling companions wide open to discrimination in an entire segment of the United States travel industry. Congress could not have intended such a result. The court of appeals' contrary conclusion in this case was premised on an erroneous understanding of settled principles of international maritime law and this Court's cases.

Because of the ADA's broad prohibition of discrimination and the absence of any exception for state prisons, the Court in *Yeskey* held that the ADA more than satisfied the requirement that Congress make an "'unmistakably clear'" expression of intent before a court will conclude that it intended to alter the usual constitutional balance between the States and the federal government. 524 U.S. at 208-209. That same conclusion applies here, such that even if a clear statement of congressional intent were required before Title III could be applied to foreign vessels in United States ports, the text of Title III would readily satisfy that requirement.

B. As This Court Has Long Recognized, Foreign-Flagged Ships Voluntarily Entering The Ports And Internal Waters Of The United States Are Subject To United States Laws

Because Congress intended the ADA's "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" to reflect the full "sweep of congressional authority," 42 U.S.C. 12102(b)(1) and (4), the statute does not exempt from coverage public accommodations or transportation services operated by foreign corporations. See 42 U.S.C. 12182, 12184. There is no reason to believe that Congress intended any different result for cruise ships that voluntarily enter United States ports to engage in business inside United States territory. That is particularly true given that Congress expressly defined the term "commerce" as used in Title III, consistent with the full range of its power over foreign commerce, to include "travel, trade, traffic, commerce, transportation, or communication

* * * between any foreign country or any territory or possession and any State." 42 U.S.C. 12181(1) and (1)(B). While the conclusion that Title III encompasses foreign-flagged ships is particularly clear in light of Congress's express aim of creating a comprehensive ban on discrimination against individuals with disabilities throughout the Nation, it also follows from the more general maritime principle that a ship sailing under a foreign flag or registered in a foreign country is subject to the generally applicable laws of the countries in which it chooses to do business. See *Patterson* v. *Bark Eudora*, 190 U.S. 169, 176 (1903) ("[W]hen a foreign merchant vessel comes into our ports, *like a foreign citizen coming into our territory*, it subjects itself to the jurisdiction of this country.") (emphasis added).

Thus, as this Court explained in *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 124 (1923), "a merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter," and this "jurisdiction attaches in virtue of her presence, just as with other objects within those limits." While present within the sovereign territory of another country, the foreign-flagged ship "is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them." *Ibid.*; accord *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) ("It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country.").

Courts have recognized this principle from the earliest stages of our Nation's history. Chief Justice Marshall, for example, writing for the Court in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812), explained that "when 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."

This understanding, moreover, is reflected in settled principles of international maritime law, which draw a distinction between ships that merely seek "innocent passage" through a nation's territorial sea and ships, such as respondent's cruise ships, that do business in a nation's ports. In the "innocent passage" context, the coastal state "may adopt laws and regulations relating to innocent passage through the territorial sea only with regard to safety of navigation, protection of cables and pipelines, fishing, the prevention of pollution, scientific research, and the enforcement of customs, fiscal, immigration, and sanitary regulations." Restatement (Third) of Foreign Relations Law § 513(2)(b) (1986). But the coastal state's jurisdiction over foreign-flagged ships entering its internal waters and ports is much broader. It has the same sovereignty over those areas as it has over its land territory. Thus, a coastal state "may condition entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations." *Ibid.*, cmt. c; see *ibid.*, Reporter's Note 5 ("Once a [foreign] commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state.").

This Court's decision in *Cunard*, which reflects these international maritime principles, is particularly apposite. *Cunard* involved the National Prohibition Act (ch. 85, § 1, 41 Stat. 305), which was enacted pursuant to the Eighteenth Amendment. The Attorney General construed the Act to prohibit all ships, whether sailing under domestic or foreign flag, from bringing intoxicating liquors intended for beverage purposes into the territorial waters of the United States. 262 U.S. at 120. Foreign corporations owning passenger ships of foreign registry operating between United States ports and foreign ports challenged the Attorney General's interpretation and argued that the Act did not apply to alcoholic beverages that were taken on board at foreign ports

for the use of passengers and crew members during the voyage. *Id.* at 119-120.

The Court noted that the Eighteenth Amendment "could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States" and was "made to cover both when within those limits," since it contained no exception of ships of either class and such an exception would "embarrass its enforcement and [] defeat the attainment of its obvious purpose." 262 U.S. at 125-126. The Court concluded that the National Prohibition Act, enacted to enforce the Amendment, was intended to have the same broad scope.

The rationale of *Cunard* strongly supports application of Title III of the ADA to foreign-flagged cruise ships operating in United States ports and internal waters. Like the National Prohibition Act, Title III of the ADA establishes a comprehensive, nationwide scheme, as well as a "national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12102(b)(1). The court of appeals distinguished *Cunard* based on the "all-pervasive reach of the Eighteenth Amendment and its enforcing statute," Pet. App. 10a, but provided no reason for concluding that Congress intended the ADA to be any less "pervasive." None exists. Moreover, as was true of the Act in *Cunard*, failure to apply Title III to foreign-flagged cruise ships would "embarrass [the] enforcement" of the comprehensive scheme created by Congress and would "defeat the attainment of [the scheme's] obvious purpose," 262 U.S. at 126, *viz.*, the comprehensive, nationwide protection of Americans with disabilities from unlawful discrimination.

C. This Case Does Not Involve An Extraterritorial Application Of United States Law

The court of appeals declined to follow the clear import of this Court's decision in *Cunard* based on a mistaken application of the presumption against extraterritorial application

of United States laws. Pet. App. 10a (citing *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991)). It found that the barrier removal requirements of Title III would inevitably have an extraterritorial application because of the likelihood that required structural changes would be permanent and would therefore continue to have effects after the ship left United States waters. Pet. App. 11a. Such extraterritorial effects, it concluded, were not presented by the application of the National Prohibition Act to foreign-flagged ships at issue in *Cunard*.

In *Cunard* itself, however, application of the National Prohibition Act inevitably had an extraterritorial effect. Although the steamship company in *Cunard* had offered to keep the liquor under lock and key while the ship was in a United States port, this Court held that merely bringing alcoholic beverages into the territorial waters of the United States was sufficient to violate the Act. 262 U.S. at 130. Accordingly, the owners of the ship had to modify their conduct outside United States territorial waters, either by ceasing to carry liquor on board altogether if it planned to come into United States internal waters, or by jettisoning all remaining liquor before entering those waters. See *Grogan* v. *Hiram Walker & Sons*, 259 U.S. 80, 89-90 (1922) (Holmes, J.) (Volstead Act prohibited transfer of alcoholic beverages from one British vessel to another in New York harbor).

More fundamentally, this case does not involve the kind of extraterritorial application that triggers the *ARAMCO* presumption. In *ARAMCO*, the EEOC sought to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to protect American workers employed by American employers abroad. The proposed application of Title VII would have been *entirely* extraterritorial. This Court rejected that extraterritorial application, explaining that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"

499 U.S. at 248 (citation omitted). This case, by contrast, involves the application of Title III "within the territorial jurisdiction of the United States," which, of course, includes the internal waters and ports of the United States. The default presumption, as *ARAMCO* itself makes clear, is that a law applies in United States territory to all entities, including foreign entities, regardless whether it indirectly causes such entities to alter their conduct abroad.

Many applications of United States laws to foreign entities present in the United States give rise to similar or greater risks of affecting the foreign entity's practices outside United States territory. Certainly, for example, foreign manufacturers shipping goods into the United States may alter their manufacturing practices overseas in response to United States product liability or environmental safety standards, but that does not constitute an "extraterritorial" application of United States law. The same potential for altering actions overseas would result from applying tort liability under the Jones Act, 46 U.S.C. App. 688 (1994), to foreign vessels present in United States ports or internal waters, but that did not stop this Court from doing precisely that, without any clear statement requirement. See, *e.g.*, *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959).

D. This Court's Cases Limiting The Application Of United States Labor Laws To Avoid Pervasive And Unwarranted Regulation Of The Internal Management And Order Of Foreign Ships Are Inapposite

The court of appeals also erred in relying (Pet. App. 5a-8a) on this Court's decisions in *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 143-147 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-22 (1963), in which this Court declined, absent an affirmative expression of intent by Congress, to apply the National La-

bor Relations Act to disputes between a foreign-flagged vessel and its foreign crew that concerned solely the internal management and affairs of the ship. That narrow presumption is applicable only in contexts involving "the pervasive regulation of the internal order of a ship," and the Court in *McCulloch* expressly noted that its decision would not foreclose application of United States statutes in a different context (such as application of the Jones Act), where such pervasive regulation of internal order may not be present. 372 U.S. at 19 n.9.

Moreover, as the Court in both *Benz* and *McCulloch* explained, its holdings were merely an extension of the rule expressed in *Mali* v. *Keeper of the Common Jail (Wildenhus's Case)*, 120 U.S. 1, 12 (1887), that "by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require." Where, however, crimes or other conduct on board a foreign-flagged ship are "of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority." *Ibid.* Thus, the Court in *Wildenhus's Case* upheld the application of New Jersey's murder statute to prosecute the murder of one Belgian national by another aboard a Belgian vessel while docked in a New Jersey port, even though the statute made no specific reference to foreign ships and the murder was witnessed only by other crew members.

In so holding, the Court in *Wildenhus's Case* emphasized that the relevant question was whether the on-board con-

duct "is of a nature to disturb the public peace" and "is of a character to affect those on shore or in the port when it becomes known." 120 U.S. at 17. If so, "it is a 'disorder,' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done." *Id.* at 18. Thus, the Court concluded: "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." *Ibid.*

Justice Holmes, writing for the Court in *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 (1931), applied that same analysis and concluded that a Jones Act tort committed on a foreign vessel in a United States port implicated more than the mere "peace of the ship." Relying on *Cunard*, the Court observed that "[t]he jurisdiction and the authority of Congress to deal" with such a tort on a foreign vessel "are unquestionable and unquestioned." *Id.* at 238. It characterized such tortious conduct as of "universal concern" and emphasized that "[t]he rights of a citizen within the territorial limits of the country are more extensively determined by the scope of actions for torts than even by the law of crimes." *Ibid.* "There is strong reason," the Court concluded, "for giving the same protection to the person of those who work in our harbors when they are working on a German ship that they would receive when working upon an American ship in the next dock." *Ibid.* Because "[i]t always is the law of the United States that governs within the jurisdiction of the United States" and because the alleged tortious conduct went "beyond the scope of discipline and private matters that do not interest the territorial power," the Court concluded that "[i]t would be extraordinary to apply German

law to Americans momentarily on board of a private German ship in New York." *Id.* at 240.

Here, application of Title III of the ADA likewise plainly involves far more than the mere "peace of the ship." At issue is not merely the internal management or affairs of foreign-flagged ships, but their accessibility to and treatment of Americans with disabilities and their traveling companions who board those vessels in United States ports. The discrimination alleged by petitioners is precisely the type of private action Congress sought to prohibit by enacting the ADA. Indeed, Title III's application to places of *public* accommodation and *public* transportation services makes clear that those ships that Title III reaches will necessarily implicate the *public* peace. Like the murder statute in *Wildenhus's Case* and the Jones Act tort standard in *Uravic*, Title III prohibits discrimination "of a nature to disturb the public peace" and "of a character to affect those on shore or in the port when it becomes known." 120 U.S. at 17. Although, as in *Wildenhus's Case* and *Uravic*, application of United States law in this context may have an incidental effect on the duties of some foreign crew members, the primary purpose and effect is not to regulate the internal affairs of the foreign ship but to regulate relations between the foreign ship and Americans granted rights and protections under United States law. Moreover, ships that do not constitute places of public accommodation or provide public transportation will not be subject to the Title III requirements at issue here and their internal peace will remain undisturbed.

In analogous situations involving application of the NLRA to the relationship between foreign-flagged ships and American workers at United States ports, this Court has not hesitated to apply United States law, even though there was no specific reference to foreign vessels. See *International Longshoremen's Ass'n Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970). The Court has applied similar principles

in construing the Jones Act, 46 U.S.C. App. 688 (1994), a statute that previously authorized suits by "any seaman" injured in the course of his employment.[2] The Court established an eight-factor test to determine whether to apply United States law to such maritime actions. See *Rhoditis*, 398 U.S. at 306; *Romero*, 358 U.S. at 354; *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).[3] In applying this test, the Court has held that international law principles do not prohibit a court from applying American law to a maritime action by a foreign crew member against a foreign-flagged ship when the injury occurs in American waters and the ship has a substantial base of operations in the United States. *Hellenic Lines Ltd.*, 398 U.S. at 308-309.

Far from requiring a clear statement of congressional intent, these cases make clear that where conduct on a foreign ship in United States ports or internal waters affects the rights of United States citizens and residents, there is a strong presumption that United States law, not the law of the flag state, applies. This Court has consistently applied United States law whenever conduct on a foreign ship in a United States port had any meaningful impact on citizens and residents of the United States, and Title III's application to places of public accommodations and public transportation guarantees such an impact. Indeed, in *Uravic* the Court viewed as "extraordinary" the notion that foreign law would apply to Americans on a foreign ship in a United States port.

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[2] The Act has subsequently been amended to more clearly delineate its jurisdictional reach by restricting its availability to U.S. seamen in certain circumstances. See 46 U.S.C. App. 688(b) (1994).

[3] The factors considered include: (1) the place of the wrongful act; (2) the law of the flag; (3) the nationality of the injured party; (4) the nationality of the shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the ship owner's base of operations and the extent of his or her contacts with the forum state. See *Hellenic Lines Ltd.*, 398 U.S. at 308-309; *Lauritzen*, 345 U.S. at 583-591.

E. Application Of Title III To Foreign-Flagged Cruise Ships Entering United States Ports And Internal Waters Does Not Violate International Law

The court of appeals was also incorrect in concluding that application of Title III to foreign-flagged cruise ships is likely to involve a conflict with customary international law and treaties. Although it failed to cite any specific conflicts, the court presumed (Pet. App. 8a-9a) that Title III's barrier removal requirements are likely to conflict with international standards for "maritime architecture," in particular the International Convention for the Safety of Life at Sea (SOLAS). Based on those presumed potential conflicts with SOLAS, the court applied this Court's statement in *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains," to preclude any application of Title III to foreign-flagged cruise ships.

But applying Title III to a foreign-flagged cruise ship doing business in United States ports would not create any conflicts with SOLAS or any other provision of international law. First, SOLAS itself makes clear that its main objective "is to specify *minimum* standards for the construction, equipment and operation of ships, compatible with their safety." SOLAS, Technical Provisions, 32 U.S.T. 47 (1974) (emphasis added). Nothing in the language, structure or purposes of SOLAS prevents signatory nations from imposing accessibility requirements on ships that enter their ports, any more than it prevents a signatory nation from imposing such requirements on its own vessels. Indeed, because SOLAS applies to *all* passenger ships on international voyages, the logic of the court of appeals' conclusion that application of Title III would pose irreconcilable conflicts with SOLAS could hinder application of Title III even to a U.S.-flagged ship.

Second, both the Department of Justice and the Department of Transportation, while consistently construing the statute to apply to foreign-flagged ships entering United States ports as a general matter, have recognized that Title III should not be applied in a way that conflicts with United States treaty obligations. The Department of Justice, for example, has made clear that foreign-flagged 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.*" Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994) (emphasis added); see 56 Fed. Reg. 45,600 (1991) (Department of Transportation statement that 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 ADA requirements would conflict with a treaty). But there remain substantial applications of Title III that raise no conceivable conflict with treaty obligations.

Third, to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered "readily achievable" within the meaning of Title III. See 42 U.S.C. 12182 (b)(2)(A)(iv); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994). Thus, the requirements of Title III can be readily harmonized with the requirements of SOLAS and other international conventions governing passenger vessels. But far from attempting to harmonize the ADA with SOLAS or other treaties, as this Court's cases require,[4] the court of appeals presumed "potential[] conflict[s]" between Title III's barrier-removal standards and SOLAS without identifying a

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[4] See *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. * * * When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."); accord *Baker* v. *Carr*, 369 U.S. 186, 212 (1962).

single such conflict—presumed or actual. Pet. App. 9a n.6. But the fact that there may be some situations in which barrier removal might not be "readily achievable" does not warrant a holding that Title III is entirely inapplicable to foreign-flagged cruise ships.

Finally, even aside from the flexibility of the "readily achievable" standard, the type of conflicts presumed by the court of appeals are largely, if not entirely, nonexistent. It appears to be undisputed that respondents could remedy many of the violations of Title III alleged here without unertaking any physical alterations to its ships or engendering any conflict with SOLAS or any other provision of international law. It is only with respect to the removal of physical barriers, which constitute only a portion of petitioners' allegations, that there is even an allegation of a potential conflict with treaty obligations.

With regard to barrier removal, the court of appeals noted (Pet. App. 9a n.6) that the Passenger Vessel Access Advisory Committee (PVAAC), a committee established by the Architectural and Transportation Barriers Compliance Board (Access Board) to make recommendations for cruise ship accessibility, see 63 Fed. Reg. 15,175 (1998), issued a report identifying a relatively small number of potential conflicts between recommended revisions to the ADA Accessibility Guidelines (ADAAG) and SOLAS. See PVAAC Report Ch. 13, Pts. I-II, <http://www.access-board.gov/news/pvaac-rept.htm>. The PVAAC Report, however, does not identify the kind of insuperable conflicts envisioned by the court of appeals, and the Access Board has now worked through the issues identified in the Report and has issued a Notice of Availability of Draft Guidelines setting forth Title III accessibility requirements that are fully consistent with SOLAS. 69 Fed. Reg. 69,244 (2004) (draft guidelines <http://www.access-board.gov/pvaac/guidelines.htm#>). The Report, for example, noted that the recommended revisions to the ADAAG guidelines required that in certain situations at

least one accessible means of egress be an elevator, whereas SOLAS requires at least two means of egress from certain decks and prohibits elevators from being considered as one of those required means of egress. Those requirements do not present any actual conflict, since a vessel could comply with both by providing an elevator in addition to the other means of egress required by SOLAS, and that is precisely how the draft guidelines resolve the issue. See Draft Passenger Vessel Accessibility Guidelines §§ 207.3, 410.3; see also Int'l Maritime Organization, Maritime Safety Comm. Circular No. 846, Annex § 5.2 (providing that "in emergencies, lifts may be used as an additional means of escape," so long as they have an emergency source of power).

Similarly, the Report noted that the recommended revisions to the ADAAG guidelines limited thresholds at doors required to be accessible to a maximum of 1/2 inch, whereas SOLAS requires coamings of "ample height" to allow doorways to be weathertight. Coamings on cruise ships are typically three to six inches. The Access Board's draft guidelines resolve this issue by, *inter alia*, proposing the use of ramps or removable coamings under certain conditions where non-accessible coaming heights are deemed necessary. See Draft Passenger Vessel Accessibility Guidelines § V404.2; Discussion of Draft Guidelines § V404, *available at* <http://www.access-board.gov/pvaac/guidelines.htm#>.

In its original ADA rulemaking, the Department of Transportation indicated that "[b]efore promulgating any specific requirements affecting foreign-flag ships, the Department would see if any treaty provisions (*e.g.*, provisions of the Convention on Safety of Life at Sea) would conflict with ADA requirements" and "would structure any regulatory requirements to avoid such conflicts." 56 Fed. Reg. 45,600 (1991). As its Advance Notice of Proposed Rulemaking and the Access Board's Notice of Availability of Draft Guidelines demonstrate, the Department is working to finalize acces-

sibility guidelines that are fully consistent with United States treaty obligations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2004