Nos. 02-21154 & 03-20056
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOUGLAS SPECTOR, et al.,

Plaintiffs – Appellants/Cross-Appellees

v.

NORWEGIAN CRUISE LINE, LIMITED
d/b/a NORWEGIAN CRUISE LINE,

Defendant – Appellee/Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS/CROSS-APPELLEES AND URGING AFFIRMANCE IN PART AND REVERSAL IN PART

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

RULE:

REGULATIONS:

REGULATIONS (continued): **PAGE**

MISCELLANEOUS:

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INTEREST OF THE UNITED STATES

The United States submits this brief pursuant to Fed. R. App. P. 29(a). This appeal concerns whether Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189, governs the operations of foreign-flagged cruise ships that do business in the United States. The Attorney General, who has substantial responsibilities for enforcement of Title III of the ADA, has determined that Title III applies to such ships that operate in the internal waters of the United States.

The Attorney General has also determined that the absence of new construction and alterations standards for cruise ships does not exempt such ships from the barrier removal requirements of Title III. This Court's resolution of this appeal may significantly affect the ability of the United States to enforce Title III consistent with its longstanding interpretation of the statute.

QUESTIONS PRESENTED

The United States addresses the following two issues:

1. Whether Title III of the ADA applies to foreign-flagged cruise ships calling at U.S. ports to embark or disembark passengers; and

2. Whether cruise ships are exempt from the barrier removal requirements of Title III of the ADA because the regulatory agencies (the Department of Justice and Department of Transportation) have not issued new construction and alterations standards for cruise ships.

STATEMENT OF THE CASE

Plaintiffs in this case include individuals with mobility impairments requiring them to use either a wheelchair or an electric scooter (the "mobility-impaired plaintiffs") and individuals without disabilities who traveled on cruises with two of the mobility-impaired plaintiffs (the "companion plaintiffs"). The defendant Norwegian Cruise Line Limited d/b/a/ Norwegian Cruise Lines ("NCL") is a corporation organized under the laws of the Bahamas, with its principal place of business in Miami, Florida.

Plaintiffs, who alleged that they took cruises on two of NCL's ships during

1998 and 1999, filed suit against NCL on August 1, 2000, alleging that NCL discriminated against the mobility-impaired plaintiffs on the basis of their disabilities and against the companion plaintiffs because of their association with disabled persons. The complaint alleged that NCL violated Title III of the ADA by imposing a surcharge on passengers who request an accessible cabin, failing to remove architectural barriers to access in existing facilities or to offer services in alternative settings when it was readily achievable to do so, and failing to make reasonable modifications to its policies, practices, and procedures. First Amended Original Complaint ¶¶ 27-33. Plaintiffs sought declaratory and injunctive relief, as well as reasonable attorneys' fees and costs. *Id.* at ¶ 41.

Defendant Norwegian Cruise Lines (NCL) moved to dismiss the complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). It argued that requiring foreign-flag cruise ships to comply with the ADA is an impermissible extraterritorial application of the statute. It also argued that NCL is not required to remove barriers to access by persons with disabilities from its ships because the administrative agencies charged with enforcement of Title III have failed to promulgate regulations governing new construction and alterations of cruise ships.

On September 10, 2002, the district court issued an order granting in part and denying in part defendant's motion to dismiss. The court held that Title III applies to foreign-flagged cruise ships, but dismissed plaintiffs' barrier removal claims. On November 26, 2002, the district court entered an order denying

plaintiffs' motion for entry of final judgment pursuant to Fed. R. Civ. P. 54(b), with respect to their barrier removal claim, but granted the defendant's motion to certify its September 10 order for appeal pursuant to 28 U.S.C. 1292(b). The court stated that there is substantial ground for difference of opinion as to both the coverage and barrier removal issues, and that immediate appeal of both issues may materially advance the ultimate termination of the litigation. On January 15, 2003, this Court granted defendant's petition for permission to appeal the September 10 order pursuant to Section 1292(b).[1]

SUMMARY OF ARGUMENT

The district court correctly held that Title III of the ADA applies to foreign-flagged cruise ships when those ships voluntarily enter the ports and internal waters of the United States. The Department of Justice and the Department of Transportation have reasonably determined that foreign-flagged cruise ships are subject to the ADA when they voluntarily enter United States ports or other internal waters. See 28 C.F.R. Pt. 36, App. B at 664; 56 Fed. Reg. 45,584, 45,600 (September 6, 1991).

Application of the ADA to foreign-flagged cruise ships is not an unlawful extraterritorial application of United States statutes because the alleged discrimination took place in the United States, when plaintiffs paid for their tickets

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[1] On October 8, 2002, plaintiffs filed a notice of appeal of the September 10, 2002, order (No. 02-21154). This Court consolidated that appeal with defendant's Section 1292(b) appeal (No. 20056).

and when they boarded the ship in Texas ports.

Nor is a different construction of the ADA required to avoid a conflict with international law. As a general rule, ships that voluntarily enter United States ports or other internal waters must comply with United States laws. See, *e.g.*, *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923). Title III does not implicate the internal order of a foreign-flagged ship, but rather involves the accessibility of the ship to United States residents.

The district court erred, however, in dismissing plaintiffs' claims seeking removal of architectural barriers to access by persons with disabilities. The lack of regulations addressing new construction and alterations for cruise ships does not excuse NCL from complying with the statute's barrier removal requirements. Although the absence of guidelines specific to cruise ships may be a factor that a court takes into account in determining whether a particular requested barrier removal is readily achievable, it should not be dispositive, and therefore is not an adequate reason for a Rule 12(b)(6) dismissal of that portion of the complaint.

ARGUMENT

I

TITLE III OF THE ADA APPLIES TO FOREIGN-FLAGGED CRUISE SHIPS DOING BUSINESS IN THE UNITED STATES

A. *Title III Applies To Cruise Ships In General*

Title III of the ADA prohibits discrimination against persons with disabilities by private entities in their operation of places of public accommodation. 42 U.S.C. 12182(a). A "place of public accommodation" is a facility, operated by a private entity, whose operations affect commerce and which falls within one or more of the 12 broad categories of facilities listed in the statute. See 42 U.S.C. 12181(7).[2] The Department of Justice, which is responsible for interpreting and enforcing Title III of the ADA, 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. 45,584, 45,600 (1991); 28 C.F.R. Pt. 36, App. B at 664; Title III Technical Assistance Manual III-1.2000(d) (1994 Supp.). As Congress directed the Department of Justice to issue regulations to implement Title III, see 42 U.S.C. 12186(b), this determination is entitled to deference. See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998); *Johnson* v. *Gambrinus Co./Spoetzl*

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[2] These categories include places of lodging, establishments serving food or drink, places of "exhibition or entertainment," and places of "exercise or recreation." See 42 U.S.C. 12181(7); 28 C.F.R. Pt. 36, App. B at 664 (2002).

Brewery, 116 F.3d 1052, 1060 (5th Cir. 1997).

In addition, Title III of the ADA prohibits 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). "Specified 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 service (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, 42 U.S.C. 12186(a)(1), has determined that cruise ships are covered by Section 12184 of the ADA. 56 Fed. Reg. 45,584, 45,600 (1991) (noting that "[c]ruise 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 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. Part 36, App. B at 664; Technical Assistance Manual III-1.2000(D) (1994 Supp.); 49 C.F.R. 37.5(f) (requiring providers of transportation services to comply with the Department of

Justice regulations).

Any argument that cruise ships are not covered because the ADA does not mention them specifically would be without merit. Facilities embraced within broad definitions are just as clearly covered by the ADA as those that are mentioned by name. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206 (1998) (ADA covers state prisons even though they are not specifically mentioned in statute).

B. *Title III Applies To Foreign-Flagged Cruise Ships When Those Ships Are Voluntarily In The Ports Or Other Internal Waters Of The United States*

Virtually all cruise ships serving United States ports are foreign-flag vessels. 56 Fed. Reg. 45,584, 45,600 (1991). The fact that a cruise ship sails under a foreign flag or is registered in a foreign country does not exempt it from generally applicable laws of the countries in which it does business. As this Court has recognized, "[i]t is well settled that when a foreign-flag shipping line chooses to engage in foreign commerce and use American ports it is amenable to the jurisdiction of the United States and subject to the laws thereof." *Armement Deppe, S.A.* v. *United States*, 399 F.2d 794, 797 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969). See also *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957); accord *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 124 (1923); *Mali* v. *Keeper of the Common Jail*, 120 U.S. 1, 12 (1887).

As the Supreme Court explained in *Cunard*, 62 U.S. at 124, the jurisdiction of the country whose territorial limits a ship voluntarily enters

> 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. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion.

The ADA does not exempt from coverage public accommodations or transportation operated by foreign corporations. See 42 U.S.C. 12182, 12184. 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. The Department of Justice Technical Assistance Manual provides that foreign flag 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) (1994 Supp.). The Department of Transportation has similarly determined 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. 56 Fed. Reg. 45,584, 45,600 (1991).

1. *The presumption against extraterritorial application of U.S. law does not apply because the relevant conduct occurred in U.S. internal waters.*

While it is true that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States," *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248

(1991), applying the ADA in this case does not represent an extraterritorial application of the statute. Plaintiffs' claims arose while the ship was operating within the United States. See *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1242 (11th Cir. 2000). The alleged acts of discrimination took place in the United States when plaintiffs booked their cruises in Houston and were required to pay more for the cruise than non-disabled passengers, and when they boarded the ship in Houston and found it contained numerous architectural barriers to accessibility.

The Supreme Court's decision in *Cunard*, 262 U.S. at 123-124, makes clear that activity that occurs on a ship within United States waters or ports is not extra-territorial. In *Cunard*, the Court held that the Volstead Act, which outlawed the importation and transportation of alcoholic beverages within the United States, prohibited foreign-flag vessels from bringing alcohol into American ports. Although the Court concluded that the statute was not intended to apply extraterritorially and did not govern the activities of foreign-flag ships while they were outside the territorial waters of the United States, *id.* at 123-124, it held that the Act did apply to such vessels while they were docked in an American port or otherwise in American waters. *Id.* at 124. Because the beverages were brought into United States ports and harbors, the Court found it irrelevant that the alcoholic beverages were kept sealed in storage to be used only when the ship was outside United States waters. *Id.* at 130. See also *Grogan* v. *Hiram Walker & Sons*, 259 U.S. 80, 89-90 (1922) (Volstead Act prohibited transfer of alcoholic beverages from one British vessel to another in New York harbor) (Holmes, J.).

Similarly, in *EEOC* v. *Kloster Cruise Ltd.*, 939 F.2d 920 (11th Cir. 1991), the court held that an employer operating a foreign-flagged cruise ship had to comply with an agency subpoena issued in connection with the investigation of complaints filed by two cruise ship employees alleging that they had been terminated in violation of Title VII. *Id.* at 924. Rejecting the argument that the EEOC lacked jurisdiction to investigate the complaint, the court held that the EEOC was entitled to discover information that would be relevant to its jurisdiction, such as "the nature and extent of [the employer's] business operations in Miami, the extent to which the employment activities occurred in Miami, and whether the acts of alleged discrimination occurred in Miami." *Id.* at 923.

2. *Congress intended that Title III be applied to foreign-flagged cruise ships.*

In the cases cited by NCL (Br. 8), the Supreme Court examined the intent of Congress under the National Labor Relations Act (NLRA) to regulate the relevant activity. For example, in *Benz*, 353 U.S. at 142, the Court concluded that Congress did not fashion the NLRA "to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S. at 143. Instead, the Court noted that the "whole background of the Act is concerned with industrial strife between American employers and employees." *Id*. at 143-144.

In the ADA, Congress has identified a strong interest in protecting American citizens from discrimination based upon their disabilities. As the Eleventh Circuit concluded in *Stevens*, although Congress "might not have

specifically envisioned the application of Title III to ships," it is clear that "Congress did intend that the ADA have a broad reach." 215 F.3d at 1241 (citing the Act's explicit statement that it was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and that it invoked "the sweep of congressional authority," 42 U.S.C. 12101(b)(1) & (4)). The court in *Stevens* also noted that the Supreme Court in *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), applied the ADA to state prison systems despite lack of indication that Congress specifically envisioned its application in that context. In *Yeskey*, state officials had argued that the Court could not find the ADA applicable to state prisons "absent an 'unmistakenly clear' expression of intent to 'alter the usual constitutional balance between the States and the Federal Government.'" 524 U.S. at 208-209, quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991). Assuming, without deciding, that the "plain-statement rule" would be applicable, the Court found that the "statute's language unmistakably includes State prisons and prisoners within its coverage," despite the fact that prisons were not mentioned either expressly in the statute or in the legislative history. *Id.* at 209.[3] It did so because state prisons fell squarely within the definition of "public entity," 42 U.S.C. 12132, "*without* any exception that could cast the coverage of prisons into doubt." 524 U.S. at 209-210 (emphasis in original). If that was sufficient to

[3] See also *Florida Paraplegic Ass'n* v. *Miccosukee Tribe*, 166 F.3d 1126, 1128 (11th Cir. 1999) (applying Title III to Indian reservations).

satisfy the "plain-language" rule and to overcome the reluctance of the Court to interpret the ADA in a way that would upset the federal-state balance of power, then the fact that cruise ships fall squarely within the definition of "place of public accommodation" and that no exception is made for foreign-flag cruise ships should be sufficient to evidence Congress's intent to apply Title III to foreign-flag cruise ships.

This Court's decision in *Armement Deppe, S.A.*, *supra*, does not stand for the proposition that a statute can be applied to a foreign-flagged vessel only where Congress explicitly states such an intent. The Shipping Act involved in that case was silent concerning its application to foreign-owned shipping lines.[4] Nonetheless, this Court found congressional intent for such application from examining the purpose of the statute, *i.e.*, regulation of the exclusive patronage contract system of ocean common carriers. It found that this purpose would be frustrated if foreign-flagged shipowners, who dominate the industry, were exempted from its requirements. 399 F.2d at 799-800. Since virtually all cruise ships serving United States ports are foreign-flag vessels, 56 Fed. Reg. 45,584, 45,600, an exemption of foreign-flag cruise ships would frustrate Congress's intention to apply the "sweep" of its authority to eliminate discrimination based

[4] The Court did note, however, that foreign-flagged ships sought an exemption from the statute during hearings on the bill, but Congress did not grant one. *Id.* at 799.

upon disability. 42 U.S.C. 12101(b)(1) & (4).[5]

3. *Title III does not regulate the internal affairs of foreign-flagged ships.*

Nor does this case implicate the separate presumption against application of American law to the "internal management and affairs" of a foreign-flag ship. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963); *Benz*, *supra*. That narrow presumption is applicable only in contexts involving "the pervasive regulation of the internal order of a ship." See *McCulloch*, 372 U.S. at 19 n.9. In cases subsequent to *McCulloch* and *Benz*, for example, the Supreme Court has held that the NLRA governs the interaction of foreign-flag ships with American citizens and businesses, even though the Act does not specifically state that it applies to foreign-flag vessels. See *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970)

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[5] NCL cites several statutes in which Congress has explicitly either included or excluded foreign-flagged ships from coverage (Br. 10-12). Since those statutes regulate customs, maritime, or transportation, it is not surprising that coverage of foreign-flagged vessels would be specifically addressed by those statutes. In contrast, Title III of the ADA is a broadly worded provision that deals with myriad places of public accommodation. The fact that Congress did not specifically address coverage of foreign-flagged cruise ships, or even cruise ships in general, is not, therefore, determinative of coverage.

Similarly, Congress amended Title VII of the Civil Rights Act of 1964 and Title I of the ADA to address coverage of United States citizens employed in foreign countries in reaction to the Supreme Court's decision in *ARAMCO, supra* (see NCL's brief at 12-13). The Age Discrimination in Employment Act was also amended "after several courts had held that [it] did not apply overseas." *ARAMCO*, 499 U.S. at 258-259. There has been no analogous impetus for Congress to amend Title III of the ADA to address explicitly the coverage of foreign-flagged cruise ships.

(NLRA protected union picketing protesting substandard wages paid by foreign-flag vessel to American longshoremen working in American ports); *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 218 (1982) (NLRA prohibited secondary boycott by unions refusing to unload shipments from Soviet ships destined for American importers).

The Supreme Court has applied similar principles in construing the Jones Act, 46 U.S.C. 688, a statute that previously authorized suits by "any seaman" who was injured in the course of his employment.[6] The Court established an eight-factor test to determine whether to apply United States law to such maritime actions. See *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).[7] 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-flag 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.

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[6] The Jones Act has subsequently been amended to restrict such actions. See 46 U.S.C. 688 (1994 App.).

[7] The factors that are 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 contracts with the forum state. See Hellenic Lines Ltd., 398 U.S. at 308-309; *Lauritzen*, 345 U.S. at 583-591.

The accessibility of a cruise ship and policies and practices that discriminate against persons with disabilities are not issues internal to a ship's operations, but concern the relations of the cruise line with persons using its services. Because application of the ADA directly protects the interests of persons with disabilities who board cruise ships in U.S. ports, the principles cautioning restraint when regulating the relations between foreign ships and their foreign crews are not applicable. *Stevens*, 215 F.3d at 1242.

4. *Application of Title III to foreign-flagged cruise ships does not violate international law.*

The district court also properly concluded that application of the ADA to a foreign-flag cruise ship doing business in U.S. ports does not, *a priori*, violate customary international law or any specific provisions in international treaties to which the United States is a party. While customary international law generally recognizes the authority of a flag state to regulate the physical structure of ships under its flag, *McCulloch*, 372 U.S. at 21, it also recognizes the authority of a port state to regulate ships entering its ports for commercial purposes. *Benz*, 353 U.S. at 142.[8]

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[8] For example, the United Nations Convention on the Law of the Sea (UNCLOS), which the United States has generally accepted as customary international law, respects the authority of states to regulate ships within its ports. UNCLOS Art. 18, 21 I.L.M. 1261, 1273 (1982). The Convention on the High Seas requires signatory states to take steps to ensure that ships that fly their flag are constructed in a manner that ensures safety at sea. Convention on the High Seas, Apr. 29, 1958, Art. 10, T.I.A.S. No. 5200, 450 U.N.T.S. 82. Similarly, the International Convention for the Safety of Life at Sea (SOLAS) establishes safety

(continued...)

The United States has recognized that Title III should not be applied in a way that would conflict with international treaties. For example, the Department of Justice has stated that foreign flag 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." Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.). See also 56 Fed. Reg. 45,584, 45,600 (1991) (DOT 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).

NCL's emphasis (Br. 15-17) on the potential conflicts between the proposals of the Passenger Vessel Access Advisory Committee and international treaties is misplaced. To the extent that removing an architectural barrier would directly conflict with any existing treaty provision or jeopardize the safety of the ship, such a step should be considered not "readily achievable." See Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.). Accordingly, the potential for conflicts as to some of plaintiffs' claims does not justify dismissal of its entire suit.

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[8](...continued)
standards for the construction, equipment, and operation of ships that should be followed by all Contracting Governments. SOLAS, Art. 1(b) (1974). Nothing in the Convention on the High Seas or SOLAS, however, prevents the United States, *a priori*, from imposing accessibility requirements on foreign-flag ships in order to receive passengers at U.S. ports, provided those specific requirements do not conflict with a construction or equipment standard in SOLAS or an applicable federal safety standard.

II

THE DISTRICT COURT ERRED IN DISMISSING THE BARRIER REMOVAL CLAIMS BECAUSE OF THE ABSENCE OF STANDARDS FOR NEW CONSTRUCTION AND ALTERATIONS AS TO CRUISE SHIPS

Plaintiffs alleged, *inter alia*, that NCL violated Title III by failing to remove architectural barriers in existing facilities or to offer services in alternative settings, when it was readily achievable to do so. First Amended Original Complaint ¶ 31. The district court erred in holding that the barrier removal provisions of the statute are not enforceable as to cruise ships because the regulatory agencies have not issued new construction and alterations standards for cruise ships. Slip op. 25.

Title III of the ADA specifies that the discrimination prohibited by the statute includes a "failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities * * * where such removal is readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv). See also 42 U.S.C. 12184(b)(2)(C) (entities primarily engaged in transportation). This is a statutory obligation; it exists independent of the existence of regulations.

Barrier removal is considered "readily achievable" if it is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). The Department of Justice has promulgated regulations that provide numerous examples of measures that may be readily achievable, depending upon the facts of a given case. 28 C.F.R. 36.304. When barrier removal is not readily achievable, public accommodations must take whatever

alternative measures are readily achievable to provide their goods and services to persons with disabilities in a non-discriminatory manner. 42 U.S.C. 12182(b)(2)(A)(v); 28 C.F.R. 36.305. Since cruise ships have been determined to be public accommodations and to provide specified public transportation, they are required to comply with the barrier removal provisions of Title III.

A separate section of Title III governs requirements for "new construction and alterations in public accommodations." 42 U.S.C. 12183. Section 12183(a)(1) provides that discrimination for purposes of the statute occurs where a public accommodation designs and constructs facilities for first occupancy after January 26, 1993, and fails to design and construct such facilities so that they are "readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements" established by regulation. In addition, public accommodations that make alterations to facilities in a manner that affects the usability of the facilities are required to make such alterations "in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(2).

These separate standards reflect Congress's recognition that retrofitting an existing facility can be quite expensive, while accessibility can often be more conveniently and economically incorporated in the initial stages of design and construction. Thus, barrier removal in an existing facility is required only when it is readily achievable (easily accomplishable without much difficulty or expense).

In contrast, designing and constructing new facilities to be readily accessible is required unless it is structurally impracticable to do so, and alterations must be accessible to the maximum extent feasible.

Because standards for new construction and alterations of cruise ships have not yet been developed, the Department of Justice does not interpret the new construction and alterations provisions to apply to cruise ships. 28 C.F.R. Pt. 36, App. B at 664.[9] The Department has stated, however, that although there is "no requirement that ships be constructed accessibly[,] * * * [c]ruise ships would still be subject to other title III requirements * * *." Title III Technical Assistance Manual III-5.3000 (1993). The Department has explained 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*. Currently, however, a ship is not required to comply with specific accessibility standards for new construction or alterations, because specific accessibility standards for new construction or alteration of cruise ships have not yet been developed.

Id. at III-1.2000(D) (1994 Supp.) (emphasis added).

The district court's holding that the barrier removal provisions of Title III are unenforceable as to cruise ships is contrary to the administrative construction

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[9] The Architectural and Transportation Barriers Compliance Board ("Access Board") established a Passenger Vessel Access Advisory Committee (PVAAC) to make recommendations for cruise ship accessibility. 63 Fed. Reg. 15175 (March 30, 1998). The PVAAC issued its final report on November 17, 2000, with recommendations to the Access Board for shipboard accessibility regulations. See http://www.access-board.gov/pvaac/status.htm. The Access Board is considering those recommendations in preparation for issuing a Notice of Proposed Rulemaking.

of the statute by both the Department of Justice and the Department of Transportation. 28 C.F.R. Pt. 36, App. B at 664; 49 C.F.R. Pt. 37. "As the agency directed by Congress * * * to render technical assistance explaining the responsibilities of covered individuals and institutions, [see 42 U.S.C.] § 12206(c), and to enforce Title III in court, § 12188(b), the Department of Justice's views are entitled to deference." *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (citing *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); *Johnson* v. *Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir. 1997).[10] In *Bragdon*, 524 U.S. at 646, the Supreme Court drew guidance from the Department of Justice's Title III Technical Assistance Manual and several technical assistance letters. See also *Olmstead* v. *Zimring*, 527 U.S. 581, 582 (1999) ("well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" quoting *Bragdon*, 524 U.S. at 642, and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

In support of its argument that the barrier removal provisions of Title III are unenforceable absent new construction and alterations requirements concerning cruise ships, NCL relies on the fact that the regulations implementing the barrier removal provisions reference the new construction and alterations requirements.

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[10] In *Johnson*, this Court gave deference to the Department of Justice's interpretive commentary to the ADA regulation, which it found was not inconsistent with the language of the regulation. 116 F.3d at 1061.

The barrier removal regulations state that, if readily achievable, "measures taken to comply with the barrier removal requirements of this section shall comply with the applicable [new construction and alterations requirements] for the element being altered." 28 C.F.R. 36.304(d)(1). As explained in the appendix to the regulations (28 C.F.R. Pt. 36, App. B at 690), the references to the new construction and alterations requirements were incorporated into the regulation to set a limit on what is required under the barrier removal provisions. See also 28 C.F.R. 36. 304(g) ("the [barrier removal] requirements of § 36.304 shall not be interpreted to exceed the standards for [new construction and alterations] in subpart D of this part"). The reference to subpart D was not intended to exclude from the barrier removal requirements any public accommodation for which new construction and alterations standards are in not place.

The interpretive comments state that the final regulation requires public accommodations to comply with the subpart D standards where it is readily achievable to do so, but that where compliance with those standards is not readily achievable, other "safe readily achievable measures must be taken." 28 C.F.R. Pt. 36, App. B. at 690. A similar approach can also be used where no subpart D standard is applicable to any court-ordered relief for a barrier removal claim.

We recognize that barrier removal claims that could require changes to the structure of a ship involve complex issues that are absent in dealing with land-based facilities, such as the need for uniformity of design, construction, and equipment requirements of ships that move in interstate commerce. Nonetheless,

the district court relied too heavily on this consideration in dismissing the barrier removal claims in their entirety. The "accepted rule" is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Walker* v. *South Cent. Bell Tel. Co.*, 904 F.2d 275 (5th Cir. 1990).

Claims seeking removal of physical barriers to accessibility should be considered on a case-by-case basis to determine whether there is a readily achievable remedy. For example, there are barrier removal measures identified in the regulations, such as rearranging tables and chairs, that have no applicable new construction or alterations standards. In addition, there are barrier removal issues that are not unique to cruise ships, and for those, cruise ships can refer to new construction and alterations standards applicable to other facilities. Examples include lowering the height of countertops, repositioning telephones, repositioning paper towel dispensers and paper cup dispensers, and replacing high-pile, low-density carpeting. Finally, in areas where barrier removal might not be readily achievable because it would require structural changes that could impact the safety and stability of the vessel, the ship would be still required to implement alternatives to barrier removal, *e.g.*, providing assistance, conducting activities in accessible areas of the ship. See 28 C.F.R. 36.305.[11]

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[11] A cruise ship may demonstrate, for example, that a proposed modification
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Accordingly, if this Court were to reverse the district court's order insofar as it dismissed the barrier removal claims, NCL could argue on remand that particular remedies requested by the plaintiffs were not "readily achievable." The absence of regulations is one factor, among many, that may be considered in the analysis. But the fact that specific remedies might ultimately be unavailable is not grounds for dismissal of the entire barrier removal claim. See *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506, 511 (2002), quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence * * *, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.").

The fact that the barrier removal provisions can be enforced in the absence of new construction and alterations standards is demonstrated by the decision in *Association for Disabled Americans, Inc.* v. *Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001). Although the court in *Concorde Gaming* observed, *id.* at 1369, that the lack of regulations for commercial, passenger

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[11](...continued)
is not readily achievable because it would violate an applicable safety standard mandated by federal law or an international treaty, such as the International Convention for the Safety of Life at Sea (SOLAS). See Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) ("unless there are specific treaty prohibitions that preclude enforcement * * * places of public accommodation aboard ships must comply with all of the title III requirements, including removal of barriers to access where readily achievable"); see also 56 Fed. Reg. 45,584, 45,600 (1991).

vessels made its analysis more difficult, it was nonetheless able to analyze a number of barrier removal claims concerning a casino vessel, including the gangway connecting the ship to the land, access to the upper decks, the height of the craps tables, and numerous requested modifications to the first deck restrooms. It found violations only with respect to the restrooms, requiring the ship's owners to install grab bars behind the accessible toilets, move the toilet paper dispensers, and lower the mirrors, paper towel dispensers, and coat hooks. 158 F. Supp. 2d at 1368. Weighing conflicting expert testimony, the court found that plaintiffs had failed to satisfy their burden as to the weight and closing speed of the restroom doors, the space in the women's restroom, and the clearance under the accessible lavatories. *Ibid.*

In addition, as the district court here recognized (slip op. 24), the court in *Access Now, Inc.* v. *Holland America Line-Westours, Inc.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001), specifically rejected the argument that the agencies' failure to create guidelines excuses cruise ships from the barrier removal provisions of Title III.[12] The court in *Holland America Line-Westours* observed that although

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[12] The district court characterized the decision in *Resnick* v. *Magical Cruise Company*, 148 F. Supp. 2d 1298 (S.D. Fla. 2001), as having reached a different result. In fact, however, as the district court here acknowledges (slip op. 25), the court in *Resnick* stated that it was not holding that a "claim for denial of access to or on a cruise ship cannot be maintained as a matter of law even in the absence of regulations." 148 F. Supp. 2d at 1305. Rather, it interpreted plaintiff's claim in that case to be based upon the defendant's failure to comply with standards for new construction and alterations applicable to buildings and facilities. Since those standards have been "deemed by their promulgating body as inapplicable to cruise

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"regulations (or other input from the DOJ) would (a) aid the adjudication of this case and (b) serve the cruise industry well by establishing uniform standards," such regulations or guidance are "not a prerequisite to maintain a Title III access action." *Id.* at 1312-1313, citing *Paralyzed Veterans of America* v. *Ellerbe Becket Architects & Eng'rs, P.C. (PVA)*, 950 F. Supp. 393, 394 (D.D.C. 1996), aff'd, 117 F.3d 579 (D.C. Cir. 1997).[13]

Defendant's reliance (Br. 26-27) on *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000), is misplaced. *Lara* involved Section 4.33.3 of the ADA accessibility standards, which requires theaters to provide wheelchair-bound patrons with "lines of sight comparable to those for members of the general public." The court held that this standard did not "require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons." 207 F.3d at 789. *Lara* simply

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[12](...continued)
ships," *ibid.*, the court in *Resnick* granted summary judgment to defendants on the claim based upon those standards.

[13] *PVA* involved issues of new construction, rather than barrier removal in an existing facility. The issue in *PVA* was not that there were no applicable standards regarding the design and construction of the arena, but rather that the Department's interpretation of the standards was not sufficiently developed to permit a determination whether the plans for the arena were in compliance with the statute. In *PVA*, the district court criticized the Department of Justice for not providing "concrete guidance for architects and builders." 950 F. Supp. at 394. Nonetheless, the court did not dismiss the plaintiffs' claims, but rather found that the proposed designs of the MCI Center in Washington, D.C. failed to provide a sufficient number of wheelchair spaces with lines of sight over standing spectators and failed adequately to disperse wheelchair spaces throughout the seating bowl.

interpreted an existing accessibility standard, and thus does not support the district court's holding in this case that the absence of specific regulations completely exempts cruise ships from Title III's barrier removal requirements.

CONCLUSION

This Court should affirm the district court's September 10 order insofar as it finds that Title III of the ADA applies to foreign-flag cruise ships. It should reverse that order, however, insofar as it dismissed plaintiffs' barrier removal claims, and remand for a factual determination concerning whether the modifications plaintiffs seek are "readily achievable."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 6909 words.

2. The Brief has been prepared in proportionally spaced typeface using Word Perfect 9.0 in Times New Roman 14-point font.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief For The United States As Amicus Curiae Supporting Plaintiffs-Appellants/Cross-Appellees And Urging Affirmance In Part and Reversal In Part was served on the parties to this appeal by sending two paper copies and one computer readable disk copy by Federal Express courier service to counsel of record at the following addresses:

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