No. 03-1388

In the Supreme Court of the United States

DOUGLAS SPECTOR, ET AL.,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Petitioners' position in this case causes serious concern to *amicus* and its members, many of which—as did respondent in this case—choose for good and legitimate reasons to subject themselves to regulation by a foreign sovereign rather than by the United States. Those decisions are no different in kind from decisions businesses make daily throughout the United States about where to situate a corporate headquarters, in which State to incorporate, and what corporate structure to adopt. Like those domestic decisions, international business decisions—including where to incorporate and where to register a ship—take into account tax consequences and other regulatory incentives, as well as non-regulatory factors such as the locations of suppliers and customers and the cost of transport. All of these are fully permissible and legal bases for corporate decision-

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

making. If petitioners' proposed rule is adopted, permitting the application of Title III of the Americans with Disabilities Act (ADA) to foreign ships without affirmative evidence of Congress's intent to apply that statute to entities primarily governed by a different legal regime, a passenger—whether or not a U.S. citizen—could sue a cruise line for an ADA violation if even one ship of its line ever docked in the United States.

Members of *amicus* Chamber also include foreign-owned and foreign-based businesses that have chosen to conduct a substantial portion of their operations in the United States, and thereby to subject themselves to U.S. regulation, in some instances to the exclusion of regulation by their home nation. If the rule of extraterritorial application advanced by petitioners and their *amici* is adopted, foreign countries that have forgone regulating business conduct in deference to U.S. regulation would be encouraged to retaliate against perceived U.S. aggression by likewise enforcing their laws and regulations extraterritorially.

Amicus urges this Court to apply in this case a rule that recognizes its members' legitimate business interest in being subjected to reasonable, predictable, and non-redundant regulation. *Amicus* believes that its and its members' interests are protected by the rule of statutory interpretation this Court long has applied and that Congress long has understood: *domestic* legislation is presumed to apply *domestically*; and an intent to legislate *extraterritorially* must therefore be made express. Such a rule respects the sovereignty of foreign countries and, by giving effect to choices made by multinational businesses, permits those businesses to order their affairs understanding the rules to which they will be subjected.

STATEMENT

This case presents a simple question of a type that this Court many times has addressed in related contexts: whether, as a matter of statutory construction, Congress chose to exercise its power to apply Title III of the ADA, 42 U.S.C. § 12181 *et seq.*, extraterritorially. Petitioners and their *amici* confuse the issue

by citing and discussing authorities considering the distinct question whether Congress *has the power* to regulate extraterritorially. But, as in most cases, the proper resolution of this case depends on correctly understanding what is at issue.

This case presents far greater ramifications than the consequences to respondent's business should it be required to retrofit the bulk of its cruise fleet in order to continue serving the U.S. market. This case carries like implications for myriad companies that, like respondent, "for reasons satisfactory to [themselves]" (*Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 336 (1925)) have chosen to subject some portion of their business to regulation by a foreign sovereign, rather than by the United States. And, like a large and increasing percentage of the federal courts' dockets, this case raises sensitive issues of foreign relations with nations, like the Bahamas, that have enduring positive relationships with the U.S. government and are strong trading partners with this Nation.

A. Global Forum Shopping and Canons of Construction

Increasingly in recent years, plaintiffs have sought the advantages of litigating in U.S. courts issues that might more appropriately be addressed by the authorities of other countries. The U.S. forum is particularly attractive for many reasons. Our legal system offers such plaintiff-friendly features as jury trials, class actions, punitive-damage awards, and attorneys'-fee awards, which are procedural devices not universally employed in other nations' systems. By suing in the United States, plaintiffs gain the advantages of U.S. procedures that likely would not be available to them in a different and perhaps more appropriate forum. Moreover, the federal and many state governments have enacted substantive laws, reflecting political and social policies of interest to their respective electorates, creating causes of action that other sovereign nations—as a matter of their own assessment of competing policies—may have chosen not to endorse. Plaintiffs' exercises in global forum shopping—whether to obtain the benefit of U.S.

procedures or to insist on extraterritorial application of U.S. policies—make litigation one of this Nation's hottest exports.

In many instances, legislative bodies may consider whether to apply their social policies beyond their borders to protect their own citizens in matters that touch on two or more nations. Issues of legislative *power* aside, the question always arises whether the legislature *has in fact chosen* to give the legislation the extraterritorial effect claimed for it. And analysis of that question is advanced not one whit by pious pronouncements about how important the policy objective of the legislation is or by false pretenses that the beneficiaries of the legislation will be left "unprotected" if they have to look to a different sovereign to protect them. Such arguments may have rhetorical appeal but are distractions from the real issue before the Court.

This Court has noted the importance of helping "the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004). Under this Court's case law, that harmony is achieved by respecting principles of "prescriptive comity"—that is, by "constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Ibid.*

The "presumption against extraterritoriality" (*EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*ARAMCO*)) has therefore become firmly ensconced in this Court's jurisprudence. Grounded in an appreciation of courts' limited foreign policy expertise, the presumption recognizes "'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Ibid.* (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). The Court also repeatedly has affirmed the canon of construction that an Act of Congress will not be interpreted to violate customary international law, unless there is no possible alternative interpretation. These canons are

central to the proper interpretation of Title III of the ADA in this case, and thus to the proper resolution of this case.

B. Title III of the ADA

Title III—with which affected members of *amicus* make every effort to comply in their domestic operations—proscribes discrimination on the basis of disability by owners or operators of places of public accommodation. 42 U.S.C. § 12182(a). Compliance with the law requires regulated entities to make permanent changes—"remove architectural barriers * * * that are structural in nature"—to existing facilities if those changes are "readily achievable." *Id.* § 12182(b)(2)(A)(iv). Something is "readily achievable," in turn, if it is "easily accomplishable and able to be carried out without much difficulty or expense." *Id.* § 12181(9).

The Department of Transportation (DOT) is required to issue regulations stating standards for compliance with "the various transportation provisions of the statute, including § 12184." Pet. App. 36a (citing 42 U.S.C. § 12186(a)). Likewise, the Department of Justice (DOJ) "is required to issue regulations carrying out the remaining provisions of Title III." Pet. App. 36a (citing 42 U.S.C. § 12186(b)). By statute, all such regulations were to be promulgated "[n]ot later than 1 year after July 26, 1990." 42 U.S.C. § 12186(a)(1); *id*. § 12186(b)(1). Despite Congress's express instruction, from the enactment of the ADA in 1990 through the entire pendency of this litigation in the lower courts, neither DOJ nor DOT had issued regulations for cruise ships, although both expressed their beliefs that cruise ships were subject to the ADA. Pet. App. 13a. Finally, on November 26, 2004—13 years and four months after the time for doing so had expired, and nearly two months after the grant of certiorari in this case—DOT published draft guidelines for cruise ships. U.S. Br. 5.

Congress enacted the ADA "to provide a clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)

(emphasis added). The congressional findings note that "some 43,000,000 *Americans* have one or more physical or mental disabilities" (*id.* § 12101(a)(1) (emphasis added)) and that "census data [and] national polls" provide support for the decision to regulate in this arena (*id.* § 12101(a)(6)). Also, "the *Nation*'s proper goals regarding individuals with disabilities are to assure equality of opportunity," with the possible benefit of saving "the *United States* billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(8), (9) (emphases added). Nowhere throughout the ADA, Title III in particular, or the legislative history of the Act is there any discussion that Congress was tackling a *world-wide* concern about discrimination against individuals with disabilities.

C. The Proceedings Below

Petitioners took cruises on Bahamian-flagged ships of respondent's line and then sued respondent, a Bermudian corporation, in U.S. District Court. Petitioners claimed that they, and purported classes of similarly situated individuals, had been discriminated against when vacationing on respondent's cruise ships—some as mobility-impaired persons allegedly unable to access portions of the cruise ships and participate in some of the on-board activities, and some as companions of the mobility-impaired persons allegedly discriminated against because of their association with the other plaintiffs. Pet. App. 16a-18a. Although petitioners alleged that respondent's ships were flagged in the Bahamas (J.A. 10), although respondent itself was incorporated under the laws of Bermuda, and although the discrimination petitioners alleged took place outside U.S. territorial waters as well as within, petitioners did not allege that respondent had violated Bahamian law—or any law other than that of the United States (see J.A. 8-17).

1. Respondent moved to dismiss the complaint, and the district court granted the motion in part and denied it in part. Pet. App. 16a. The district court held that the unavailability of regulations instructing cruise lines *how* to comply with the

barrier-removal provisions of Title III on cruise ships—eleven years after Congress instructed DOT to issue regulations—precluded the suit against respondent for discriminating against mobility-impaired persons in violation of Section 12182 by failing to alter existing ships to remove barriers. Pet. App. 42a ("Though they have had over eleven years to do so, DOJ and DOT have failed to fulfill their duty to provide guidance to the owners of cruise ships and other passenger vessels.").[2] Petitioners' claims seeking changes to respondent's ships were therefore dismissed. *Ibid.*

In reliance on the Eleventh Circuit's holding in *Stevens* v. *Premier Cruise Lines*, 215 F.3d 1237 (11th Cir. 2000) (*per curiam*), amended on denial of reh'g, 284 F.3d 1187 (11th Cir. 2002), that the ADA regulates extraterritorially, the district court did not dismiss petitioners' other claims—for example, that respondent charged higher fees to petitioners because of their or their companions' disabilities. Pet. App. 28a, 35a. The court certified its rulings for interlocutory appeal.

2. Unanimously holding that the complaint should have been dismissed in its entirety because Congress, when enacting the ADA, did not "clearly express its intention" to "subject foreign-flagged cruise ships to [the] dictates" of the statute, the court of appeals affirmed in part and reversed in part. Pet. App. 14a-15a. The court of appeals engaged in a careful analysis of this Court's authorities dealing with extraterritorial application of federal statutes. In so doing, the court correctly identified the crux of the issue in this case, which the Eleventh Circuit in

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[2] The agencies argued that the district court should apply guidelines promulgated for other facilities, in the absence of regulations directed to cruise ships, although the agencies' interpretation of the existing regulations expressly declined to apply them to cruise ships. See Pet. App. 39a. As the district court noted, this argument asked the district court to fail to accord deference to the agencies' interpretation of their own regulations, where deference is required, and to defer instead to the agencies' litigation position in this case. The district court declined to follow that suggestion. *Id.* at 39a-40a.

Stevens, the district court in following *Stevens*, and petitioners and their *amici* all have missed.

Although "[i]t is settled that 'a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country'" (Pet. App. 4a (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957)), "the local sovereign is under no obligation to exercise its authority to the outer limits of its jurisdictional reach" (Pet. App. 4a (citing *Benz*, 353 U.S. at 142)). Thus, the court of appeals held, the issue is not whether Congress *could* require all cruise ships docking at the Port of Houston and taking on U.S. passengers to comply with the ADA; the question is whether Congress has "'clearly expressed'" an "'affirmative intention'" to do so. Pet. App. 4a-5a (quoting *Benz*, 353 U.S. at 147). "Under the Supreme Court's framework, Congress may enact legislation that governs foreign-flagged cruise ships operating within United States waters, but it must clearly indicate its intention to do so." Pet. App. 8a. "Absent an affirmative intention, 'such appeal should be directed to the Congress rather than the courts.'" Pet. App. 5a (quoting *Benz*, 353 U.S. at 147).

Thus understanding the issue, the court engaged in straightforward statutory interpretation of the ADA, assuming—as this Court numerous times has instructed courts to do—that "'Congress legislates against the backdrop of the presumption against extraterritoriality.'" Pet. App. 6a (quoting *ARAMCO*, 499 U.S. at 248). Applying the presumption, the court of appeals looked throughout the statute and its "extensive legislative history" for the required clear statement of Congress's intent to apply the statute extraterritorially, but found "no indication" of such an intent. Pet. App. 8a. The only indication argued by plaintiffs was that the ADA was intended to have a "broad reach," but the same "broad reach" in Title VII had been an insufficiently clear expression of intent in *ARAMCO*. Pet. App. 12a-13a. And *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923), holding that the National Prohibition Act applied to foreign vessels while in U.S. territorial waters, was distin-

guishable for two reasons. First, the Court in that case interpreted express statutory language that was clear in its intent to regulate conduct on all vessels in U.S. territorial waters. Pet. App. 10a. Second, unlike this case, in which plaintiffs' hoped-for solution required permanent changes, the effect of the enactment at issue in *Cunard* was limited to U.S. territorial waters, and did not regulate foreign ships outside those waters. *Ibid*.

The court rejected as "unpersuasive" the Eleventh Circuit's prior contrary conclusion in *Stevens*. Pet. App. 12a. It understood that court to have interpreted Congress's silence about whether the statute applied to foreign cruise ships to mean that Title III *was* applicable—thereby ignoring the requirement that Congress "clearly express its intent." *Id.* (citing *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963)). And, contrary to the *Stevens* court's analysis, *Benz*, 353 U.S. 138, and *McCulloch*, 372 U.S. 10, were not distinguishable because those cases dealt with rules affecting the "internal management and affairs" of the ship. The court of appeals noted that plaintiffs' arguments called for structural changes to the ship and changes to the responsibilities and procedures of the crew—precisely the sort of "internal management and affairs" that implicate concerns about the flag state's privilege and responsibility to regulate.[3]

SUMMARY OF ARGUMENT

At bottom, this case requires a simple exercise of statutory interpretation—a responsibility that the court of appeals below undertook carefully and correctly and that the Eleventh Circuit in *Stevens* and the district court essentially abdicated. The solu-

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[3] The court of appeals also refused to accord any deference to DOJ's and DOT's opinions, presented in "technical assistance manuals and public comments, not formal adjudications or rulemaking." Pet. App. 13a. "These informal administrative opinions are not entitled to *Chevron* deference." *Ibid.* (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)).

tion to this case is reached by applying time-tested and well-understood canons of statutory construction to the ADA.

I. Petitioners and their *amici* confuse the issue by misstating the relevant analysis. Arguments that Congress has the power to apply the ADA extraterritorially, or that Congress has legislated with that effect in the past, are beside the point. The essential question is whether Congress exercised that power in this statute.

The presumption against extraterritoriality is a fundamental canon of construction that this Court has applied numerous times, sometimes in settings closely comparable to this case. Its application is simple: it requires courts to inquire whether Congress has "clearly expressed" its "affirmative intention" (*Benz*, 353 U.S. at 147) that an enactment apply extraterrorially. If not, the enactment is presumed to have only domestic effect. In this case, nothing about the ADA or its legislative history overcomes the presumption. As the court of appeals below noted, neither Congress's silence, nor the simple indication of the ADA's "broad reach," qualifies as a clear expression of intent. Pet. App. 12a. A distinct canon—which presumes that Congress does not legislate in violation of customary international law—also applies. Regulations touching on the internal management and affairs of a foreign ship, such as architectural features of the ship, its equipping, and crewing requirements, are left by customary international law to the flag state to promulgate or not, as it sees fit. Unless Congress clearly manifests its intent to the contrary, domestic legislation does not reach so far.

Petitioners' argument that they seek only to apply the ADA to ships in U.S. territorial waters does not change the analysis. A foreign ship is considered an extension of the foreign sovereign; wherever the ship travels, matters relating to its internal management and affairs are matters of foreign sovereign concern. Consistent application of this rule is important to prevent patchwork and redundant regulatory burdens from impinging on seaborne commerce and to prevent re-

taliation by foreign sovereigns faced with aggressive U.S. regulation. Nothing petitioners or their *amici* say overcomes the rule that the flag state has the privilege and responsibility of regulating its vessels.

II. Business decisions made by companies, whether foreign or domestic, about which flag to fly are valid decisions that responsible companies make all the time. The U.S. federal government—which undeniably has the power, should it choose to exercise it, to ban ships of a particular registry from U.S. waters—has demonstrated its approval of the Bahamian registry through statutory enactments, administrative rulemakings, and informal procedures that all reflect its view of the registry's reliability as a watchdog for safety and security concerns. Respondent's decision and decisions by other companies to fly the Bahamian flag or other foreign flags on ships of their lines are entitled to deference. In no way do these choices of registries alter this Court's interpretation of the ADA.

ARGUMENT

"When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). To resolve this case, the Court need look no further than well-understood and long-applied canons of statutory construction. Despite this Court's repeated reaffirmation of "the presumption against extraterritoriality" (*ARAMCO*, 499 U.S. at 260 (Scalia, J., concurring)), by which this Court "presume[s legislation] 'is primarily concerned with domestic conditions'" (*id.* at 248 (opinion of the Court) (quoting *Foley Bros.*, 336 U.S. at 285)), petitioners contend that congressional silence provides justification for applying Title III of the ADA to foreign ships. But Congress knew in 1990 what it must do to legislate extraterritorially, and it nonetheless enacted the ADA without any indication—let alone the kind of "'affirmative intention * * * clearly expressed'" (*ARAMCO*, 499 U.S. at 248 (quoting *Benz*, 353 U.S. at 147))—that would justify the interpretation petitioners urge. Petitioners' interpretation also ignores the

canon of construction that "Congress is generally presumed not to have exceeded [the] customary international-law limits on jurisdiction to prescribe." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). By holding that Title III of the ADA does not apply to foreign cruise ships, the court of appeals below reached the correct result and should be affirmed.

I. Petitioners and Their *Amici* Fundamentally Misstate the Relevant Analysis, Which Asks Whether Congress Intended to Apply the ADA Extraterritorially, Not Whether Congress Has the Power to Do So

The court of appeals below assumed that Congress has the power to subject foreign ships to U.S. regulations, including Title III of the ADA, but noted that the issue was whether Congress had done so. Pet. App. 4a. Petitioners and their *amici* mostly sidestep the relevant question.

1. "It 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.'" *ARAMCO*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" *ARAMCO*, 499 U.S. at 248 (internal citation omitted) (quoting *Foley Bros.*, 336 U.S. at 285, and *Benz*, 353 U.S. at 147). Justice Scalia recently noted these principles in concurrence: "[S]tatutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories." *F. Hoffmann-LaRoche* v. *Empagran*, 124 S. Ct. at 2373.

Applying the *ARAMCO* presumption in this case compels the conclusion that the court of appeals was absolutely correct. Searching the text and the legislative history of the ADA

produces no indication that Congress ever considered that the statute might apply to foreign vessels, whether within or outside U.S. territorial waters. Indeed, as respondent has noted throughout this litigation, "[a]lthough the statute contains a lengthy and exhaustive list of 'public accommodations' and 'specified public transportation,' it does not even mention ships, let alone foreign-flagged ships. Moreover, nowhere in the 3000+ pages of legislative history on the ADA does Congress suggest that Title III applies to foreign-flagged cruise ships." Resp. C.A. Br. 7 (citations omitted). The Fifth Circuit interpreted this "gaping hole" (*ibid.*) in the statute and legislative history the way this Court many times has instructed: "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved." Pet. App. 8a.

Indeed, Congress was not merely silent in the ADA on whether the statute applies extraterritorially. Beyond the *ARAMCO* presumption, powerful enough in itself, there are powerful hints in the text of the statute that the ADA was intended to apply only *domestically*. The congressional findings and statement of purpose—which this Court found "critically" relevant when interpreting the ADA in *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 484 (1999)—observe that "some 43,000,000 *Americans* have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (emphasis added). "*[C]ensus* data, *national* polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society * * *." *Id.* § 12101(a)(6) (emphasis added). "[T]he *Nation's* proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals * * *." *Id.* § 12101(a)(8) (emphasis added). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice * * * costs the *United States* billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(9) (emphasis added). And "[i]t is the purpose of this chapter * * * to provide

a clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities * * *." *Id.* § 12101(b)(1) (emphasis added). Congress expressed its concern with disability discrimination as a *national* problem, which could be rectified by enacting legislation containing a *national* solution. Whether or not a *world-wide* problem of disability discrimination exists, no ambitious intention to take such a problem on can be found in the statute.

2. The Eleventh Circuit's contrary conclusion in *Stevens*, by contrast to the court of appeals below, finds no support either in the text of the ADA or in accepted canons of interpretation. In a per curiam opinion (reversing a district court holding that relied on *ARAMCO* to hold that Title III did not apply to foreign cruise ships) the Eleventh Circuit held that the ADA's "broad reach" meant that the statute must apply to cruise ships, including those bearing a foreign flag. 215 F.3d at 1241. The court also refused to apply the *ARAMCO* presumption, apparently believing that, so long as a foreign ship was in U.S. territorial waters, regulating it was not regulating "extraterritorially"—although the court did not address the ramifications of its rule in light of the inherent mobility of cruise ships.

Petitioners too have seized on the supposed "broad reach" of Title III to support their interpretation. Pet. Br. 32. But it is ineffectual to rely on Congress's desire to "invoke the sweep of congressional authority * * *, including the power * * * to regulate commerce," and Title III's express application to "commerce," including "transportation * * * between any foreign country or any territory or possession and any State; or between points in the same state but through another State or foreign country." Pet. Br. 32 (quoting 42 U.S.C. §§ 12101(b)(4), 12181(1)(B), (C)). This Court expressly has refused to read such "boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas" to give rise to extraterritorial application of a law. *ARAMCO*, 499 U.S. at 251 (citing, among other Acts, the

ADA).[4] "The language relied upon by petitioners—and it is they who must make the affirmative showing—is ambiguous * * *." *Id.* at 250. Just as in *ARAMCO*, any "broad reach" of the ADA cannot bear the weight petitioners and the *Stevens* court have placed on it. See 215 F.3d at 1241.[5]

Petitioners also argue that "neither respondent nor the court of appeals has been able to produce any evidence that Congress intended to restrict the ADA's presumptive scope." Pet. Br. 31. Petitioners' argument demonstrates the false premise underlying their entire brief. "[I]t is they"—*petitioners*—"who must make the affirmative showing." *ARAMCO*, 499 U.S. at 250. Moreover,

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the

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[4] The definition of "commerce" in Title VII of the Civil Rights Act of 1964 does not explicitly mention "transportation * * * between any foreign country * * * and any State" (42 U.S.C. § 12181(1)(B), (C)), as does the definition in the ADA. See 42 U.S.C. § 2000e(g). This Court nonetheless considered interpretations of the jurisdictional reach of the ADA to be informative on the question whether Title VII applied extraterritorially. *ARAMCO*, 499 U.S. at 251. Moreover, other statutes, which do expressly refer to commerce with "any foreign country," have been interpreted, like Title VII in *ARAMCO*, not to apply extraterritorially. See, *e.g.*, *New York Central R.R.* v. *Chisolm*, 268 U.S. 29, 31 (1925) (interpreting the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq*., not to apply extraterritorially although the statute applied to "interstate or foreign commerce" or "commerce between any of the States * * * and any foreign nation"); *Asplundh Tree Expert Co.* v. *NLRB*, 365 F.3d 168, 174 (3d Cir. 2004) (interpreting the NLRA not to apply extraterritorially despite a definition of "commerce" that included "transportation * * * between any foreign country and any State").

[5] Likewise, the antitrust laws expressly reach all conduct "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. But courts "should not impute to Congress an intent to punish all whom its courts can catch." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.).

> achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). In *Rodriguez*, this Court explicitly disapproved just the analysis petitioners urge here—"rel[ying] on [an] understanding of the broad purposes" of a statute to the exclusion of a principled exercise in construction. *Id.* at 525.

Congress has proven itself able to legislate extraterrorially when it wants to, as is evidenced by Congress's changing Title VII of the Civil Rights Act to apply to U.S. citizens employed overseas in light of *ARAMCO*. See Pub. L. No. 102-166, 105 Stat. 1071, § 109(a) (1991) (defining "employee" to include "an individual who is a citizen of the United States" employed "in a foreign country").[6] In light of the settled understanding of the presumption against extraterritoriality, it would do violence to congressional intent to effect an about-face now and apply the ADA to foreign ships that happen to dock in U.S. ports or sail through U.S. territorial waters—as petitioner urges the Court to do. See Pet. Br. 26.

3. Another "wholly independent" (*ARAMCO*, 499 U.S. at 264) doctrine that is well developed in this Court's case law is

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[6] As this Court recognized in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), Congress understands well the presumption against extraterritoriality. When considering other legislation (relevant only contextually here), Congress specifically referenced the presumption. See, *e.g.*, H.R. REP. NO. 104-788, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 4021, 4033 ("To rebut the general presumption against the extraterritoriality of U.S. criminal laws, this subsection makes it clear that the Act is meant to apply to the specified conduct occurring beyond U.S. borders."); H.R. REP. NO. 103-65, at 58 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2488 ("The Court also noted that the presumption can be overcome by a clear expression of congressional intent to apply a particular statute outside the United States.") (citing *ARAMCO*, 111 S. Ct. at 1234).

operative here. In *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804), Chief Justice Marshall wrote for the Court: "'[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains * * *.'" This doctrine also counsels that the ADA should not be construed to regulate the internal management and operations of a foreign ship when there is "[an]other possible construction"—that the Act applies only domestically.

Originating as it did in a shipping case, this venerable canon of construction is unsurprisingly applied with regularity to cases involving foreign ships temporarily present in U.S. waters. "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953). Customary international law, as memorialized in the RESTATEMENT (3D) OF FOREIGN RELATIONS § 502, provides the regulatory privileges and responsibilities of sovereign states with regard to vessels flying their flags:

> (1) The flag state is required
>
> > (a) to exercise effective authority and control over the ship in administrative, technical, and labor matters; and
> >
> > > (b)(i) to take such measures as are necessary to ensure safety at sea, avoid collisions, and prevent, reduce, and control pollution of the marine environment, and
> > >
> > > (ii) to adopt laws and regulations and take such other steps as are needed to conform these measures to generally adopted international standards, regulations, procedures, and practices, and to secure their implementation and observance.

> (2) The flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship.

Applying U.S. law to foreign ships violates this customary apportionment of regulatory authority; therefore, if any way exists for this Court to construe the ADA otherwise, it should. See *Murray* v. *Schooner Charming Betsy*, 2 Cranch at 118; *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (holding that the law of the flag state controls).

4. "The principle of deference to the law of the flag had its origins in the fiction that the vessel was an extension of the sovereign territory of the country whose ensign it flew." *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 313 n.1 (1970) (Harlan, J., dissenting). The United States completely ignores this principle in arguing that petitioners' proposed rule would not apply extraterritorially. See U.S. Br. 19-21.

Petitioners and their *amici* also gloss over an important reality in this case: although they purport to seek only regulation in U.S. territorial waters, the structural changes that would be required for respondent's ships to comply with Title III are *permanent* in nature. Even if applying the ADA during a ship's temporary visit to U.S. waters is *not* applying the law extraterritorially, the law will become extraterritorial as soon as the ship leaves U.S. waters. Contrary to the views of the Government (U.S. Br. 22-23), the modifications petitioners seek to respondent's ships are utterly unlike the prohibition on carrying liquor at issue in *Cunard*, 262 U.S. 100, which in no way prevented ships from carrying liquor when *outside* U.S. territorial waters.[7]

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[7] In fact, owners of passenger ships reportedly received an economic boost during the prohibition era because of the ability of their ships to serve alcohol once outside U.S. territorial waters. Cf. Allan E. Jordan, *Echoes of Yesteryear: Fond Remembrances of Some Forgotten Element of Cruising – Cruising's Classic Past*, Jan.-Feb. 2004 CRUISE TRAVEL, available at http://www.findarticles.com/p/articles/mi_m0FCP/is_4_25/ai_112354814 (noting prohibition-era voyages into international

And, as respondent has argued throughout this litigation, purporting to limit the application of the ADA to ships while they are in U.S. territorial waters cannot possibly be the solution. "NCL's purported obligation to make modifications would exist for the duration of the cruise. (For example, the Plaintiffs surely would not be satisfied if ramps were placed before doorways for the few minutes that the ship was in United States territory, but then removed once the ship entered international waters)." Resp. C.A. Br. 21. Petitioners have complained about

> NCL's deliberate refusal to provide accessible passage for its mobility-impaired customers to or from its ports of call (although such transportation is provided to non-disabled passengers and, in fact, is included in the cruise fare), thus excluding mobility-impaired passengers from participating in "shore excursions" at the various ports of call and leaving these passengers stranded on the ship.

Pet. C.A. Br. 7. Petitioners, thus, apparently seek ADA regulation of transfer operations in foreign ports, which of course take place *entirely* outside of U.S. territorial waters.

Because, as this case exemplifies, operations in U.S. territorial waters represent only a portion—likely even a small one—of the overall operations of a foreign ship engaged in multinational commerce, it is appropriate to treat legislation that regulates *generally* the goings-on on foreign ships as extraterritorial, and not to try to rescue some application for the legislation by construing it to apply only during the times when the ships are in U.S. territorial waters. See *Hellenic Lines*, 398 U.S. at 313 n.1 (Harlan, J., dissenting). Petitioners' and their *amici*'s arguments that their proposed rule applies only to ships operating in U.S. territorial waters (Pet. Br. 25-26; U.S. Br. 20-21) do not prevent extraterritorial application.

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waters to permit passengers legally to imbibe alcohol, known as "booze cruises").

5. The danger of interpreting the ADA to apply to a Bahamian-flagged ship is several-fold. The "fiction" that a vessel is an extension of the sovereign whose flag it bears is not a simple legal convenience. The rule arguably is essential for multinational commerce via sea to exist at all. Respect for the regulatory authority of a foreign sovereign serves to protect "principles of comity embodied in international and maritime law that are designed to 'foster amicable and workable commercial relations.'" *Hellenic Lines*, 398 U.S. at 318 (Harlan, J., dissenting) (quoting *Lauritzen*, 345 U.S. at 582). As the Court noted in *Lauritzen*:

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

345 U.S. at 581. The problem presented by petitioners' proposed rule of applying the ADA to Bahamian-flagged ships in U.S. territorial waters is that *every* sovereign port nation may have its own regulations that could just as well be applied to ships of respondent's line as they pass through those nations' waters, or dock at their ports.

Another concern, in addition to that of overregulation, exists. This Court also has noted:

> [W]e cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen, 345 U.S. at 582. Recognizing instead, as the Restatement does (Section 502), that the nation of the flag has the privilege and responsibility to regulate the ship, can avoid such

overwhelming regulatory burdens, which pose serious threats to hamper seaborne commerce.

In addition to the concerns that this Court recognized in *Lauritzen*, regulation by this Nation of Bahamian-flagged vessels, without a clear mandate from Congress, threatens to interfere with the sovereign authority and responsibility of the Bahamas to regulate "administrative, technical, and labor matters"; to prescribe rules to "ensure safety at sea"; and to prescribe rules to ensure compliance with "international standards, regulations, procedures, and practices." REST. (3D) FOREIGN RELATIONS § 502.

Petitioners argue that the ADA does not actually conflict with the International Convention for the Safety of Life at Sea (SOLAS) (Pet. Br. 40), and presumably would make the same argument with regard to Bahamian law.[8] That argument—a first-principles attack on the rationales underlying the presumption against extraterritoriality and the *Schooner Charming Betsy* presumption—is beside the point. The *potential* for such conflicts requires interpreting legislation to apply domestically; for this reason, customary international law limits regulatory authority to the flag nation.[9] As petitioners themselves acknow-

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[8] Petitioners also rely on the statutory exception for modifications that are not "readily achievable" (Section 12182(b)(2)(A)(iv)), arguing that a change might be considered not readily achievable if it would create a conflict with SOLAS or another treaty. Pet. Br. 42. "Readily achievable" was defined by Congress to preclude the necessity of unduly expensive or difficult modifications (Section 12181(9))—*not* to protect against conflicts with foreign law. Petitioners' suggested reading of the statute tortures its language in a manner that would make it implausible at best even in the absence of the required canons of construction. Considering the *ARAMCO* and *Schooner Charming Betsy* presumptions, interpreting Title III to require a foreign vessel to justify its interpretation of Bahamian law or international treaty to avoid ADA liability is utterly insupportable.

[9] Logically, this must be so. If the question involved application of the Supremacy Clause, U.S. CONST. Art. VI, cl. 2, which declares "Trea-

ledge, "[f]lagging states"—in this case, the Bahamas—"are responsible for ensuring that ships registered under their flags have met all SOLAS requirements." Pet. Br. 43 (citing SOLAS, CONSOLIDATED EDITION 2001, at 17-36 (Int'l Mar. Org. ed., 2001)).[10] Thus, the presumption protects against conflicts that might, or might not, arise, as well as conflicts that actually exist.

The presumption also prevents courts from applying congressional enactments where the foreign sovereign with regulatory privilege and responsibility may simply have decided, as a matter of its own social and political policy, that there should be no regulation. For this reason, it is not an answer to say that such overregulation is not a problem *in fact* because (by comparison to the United States) the Bahamas does not impose burdensome regulations on ships flying its flag. Whether the Bahamas does, or does not, decide to impose certain regulations is a matter of its own policy, which may change in the future. If petitioners' proposed rule were the law, the nation with regulatory authority—in this case, the Bahamas—would be required to take care when legislating to ensure

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ties" as well as the Constitution to be "the supreme Law of the Land," then the Court would examine the ADA for conflict with SOLAS *as it currently exists* and would invalidate any conflicting provisions. The very distinct issue of *statutory interpretation* before the Court, however, asks whether Congress *intended* to *run the risk* of a clash with SOLAS, as it existed at the time or might exist at any *future* time. Analysis of that question is not materially advanced by isolating the present provisions of SOLAS that might raise issues.

[10] Although, as petitioners note (Pet. Br. 43), port states may inspect foreign ships for SOLAS compliance, that power is limited to times when "there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention." U.S. Env'tl Protection Agency, *Cruise Ship White Paper* 10 (Aug. 22, 2000) (*White Paper*), available at http://www.epa.gov/owow/oceans/cruise_ships/white_paper.pdf. The U.S. Coast Guard monitors compliance with safety procedures by flag state, and has found no reason to suspect that Bahamian-flagged ships are not compliant. See pp. 27-28, *infra*.

that its laws did not conflict with those of the United States, simply because the United States happened to legislate first.

Petitioners argue that respondent and the court of appeals have not "articulate[d] a genuine *reason* that Congress would have intended to exempt respondent from the disabilities laws." Pet. Br. 31. Apart from the dispositive fact that respondent does not have that burden (*ARAMCO*, 499 U.S. at 250), myriad good reasons exist. This Nation's responsibilities under treaties to which it is signatory provide justification in themselves. The Convention on the International Maritime Organization (IMO Conv.), to which both the United States and the Bahamas are signatory, has as its purpose "provid[ing] machinery for cooperation among Governments in the field of governmental regulation * * * affecting shipping in international trade." IMO Conv. Art. 1(a). Such cooperation hardly is facilitated by the imposition on Bahamian-flagged ships of U.S. substantive laws and litigation procedures that the Bahamas has chosen not to adopt.

6. This is not to say that Congress cannot, if it so chooses, exercise its power to regulate conditions on board foreign ships. *Amicus* recognizes that there are circumstances in which Congress has exercised its power to do so, when Congress has made an explicit policy decision that the international comity concerns and the possibility of interruption of commerce may be appropriately sacrificed to what Congress perceived to be a more important goal. See *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting) (Congress "clearly has constitutional authority" to regulate extraterritorially and to regulate in violation of customary international law).

A recent example, of course, is the amendments to Title VII of the Civil Rights Act, enacted in 1991 in response to this Court's holding in *ARAMCO*. See p. 16, *supra*. Another circumstance, which the Fifth Circuit recognized below, is *Cunard*. With a specific exemption for the transportation of liquor through the Panama Canal, the National Prohibition Act applied to all ships within the territorial waters of the United States. Pet. App. 10a.

Cunard was an easy case. By explicitly exempting the Panama Canal from its geographic reach, the National Prohibition Act clearly applied to the limits of the U.S. territorial waters. *Cunard*, 262 U.S. at 127-128. Regulations interpreting the statute also expressly stated: "'All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port * * *.'" *Id.* at 119 (quoting the regulations).

Moreover, in that case the Court specifically interpreted the Act *not to regulate* the transport of liquor on the high seas, although it recognized Congress's power to do so as regards domestic ships (*Cunard*, 262 U.S. at 129 (noting that a nation has regulatory authority over its own ships when they are outside its territorial waters))—reaffirming the customary balance of regulatory authority since noted in the Restatement (see p. 17, *supra*). No basis exists for reading *Cunard* as petitioners and their *amici* urge, as support for interpreting statutes to require *permanent* changes to ships—which will remain after the ships have left U.S. waters—based on those ships' temporary presence in U.S. waters.

These cases demonstrate only that the Court sometimes has sufficient reason to interpret Congress's words as clearly overcoming the presumptions favoring domestic application of a statute. They do not, as petitioners and their *amici* seem to think, weaken the presumption against extraterritoriality or render it inapplicable to cases involving ships that travel to and from the United States. Rather, they show that the presumption can be rebutted if the evidence is strong enough—which it is not here. Nothing about the ADA in general, Title III specifically, or the statute's legislative history provides *any* reason to apply it extraterritorially to foreign cruise ships.

II. Business Decisions to Fly Foreign "Flags of Convenience" Are Appropriate Decisions that Responsible Companies Make All the Time

1. Respondent has made a business decision to register its ships in the Bahamas, based on an analysis qualitatively no different from that undertaken by businesses, including all members of *amicus*, for myriad business decisions made each year. It is clear that a large number of companies engaged in shipping in the United States have reached the same conclusion, as recent information from the U.S. Coast Guard indicates that 95% of passenger ships and 75% of freighters entering U.S. ports are foreign flagged. See http://www.uscg.mil/hq/g-m/pscweb/psc_speech.pdf (speech regarding the Coast Guard's Port State Control Initiative).[11]

This Court has recognized that comparable business decisions are not subject to challenge simply because they may offer legal or other advantages to the businesses that make them. In *Cannon Mfg. Co.*, 267 U.S. at 336, a business decision to maintain the corporate separateness of a subsidiary corporation in one State, so as to enjoy the privilege of doing business in

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[11] Petitioners draw from this fact a conclusion that is entirely unwarranted—that because only one U.S. cruise ship bears the U.S. flag, for Title III to have any application at all, it must apply to foreign-flagged cruise ships. Pet. Br. 32. Initially, petitioners' argument assumes that they are correct that Title III applies to cruise ships at all. *Amicus* Chamber does not address this issue, but concurs in respondent's arguments that Title III's application to cruise ships is far from clear. Moreover, although only one large oceangoing cruise ship is U.S. flagged, that statistic is misleading. There are more than a thousand passenger vessels bearing the U.S. flag—including harbor tour boats, dinner cruise boats, gambling boats, passenger ferries, river cruise boats, and smaller cruise boats operating in U.S. waters (such as to Alaska). See U.S. Maritime Admin., Office of Statistical and Economic Analysis, *U.S.-Flag Fleet of Passenger Vessels, Tugs/Towboats, and Other Work Boats as of June 30, 2002*, available at http://www.marad.dot.gov/marad_statistics/inven-part-ii-a.htm (counting 1331 U.S.-flagged passenger vessels).

that State without subjecting itself to personal jurisdiction there, was effective. The Court pointedly did not inquire into the parent corporation's reasons for the decision, which were assumed "satisfactory to itself." *Ibid.* And, in another context, this Court more recently has observed that longstanding "respect for corporate distinctions" should not be disturbed without a statement by Congress that it intended to do so. Congress is unlikely to be "reticen[t]" if it is contemplating "an important and controversial change in existing law." *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998).

Good economic incentives exist for a company—especially one like respondent owning ships that regularly dock at ports in the Bahamas—to choose to fly the Bahamian flag. "Foreign-owned ships registered in The Bahamas are exempt from customs duties and documentary stamp taxes if they exceed 150 [gross registered tons]." OFFICIAL GUIDE TO SHIP REGISTRIES 23 (Michael E. Hanson & Vernon C. Miller, Jr. eds., 2000). The Bahamas has entered into a double-taxation agreement with the United States, such that a Bahamian-flagged ship is exempt from U.S. taxes (and U.S.-flagged ships are reciprocally exempt in the Bahamas). *Ibid.*; see also *id.* at 409. Another advantage of flagging in the Bahamas is "no restrictions on the nationality of officers or seamen" (*id.* at 25), while the United States requires "[a]t least 75% of the officers and crew aboard US flag vessels [to] be US citizens" (*id.* at 411). In light of those regulatory advantages, respondent's choice to fly the Bahamian flag was a rational, legitimate business decision.[12]

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[12] Although respondent's business decisions may allow it to "escape" U.S. regulation, including laws like the ADA that do not have parallels in the Bahamas, market-based incentives operate to encourage companies, particularly cruise lines, to adopt business postures friendly to potential customers who are disabled. Petitioner's *amici* Paralyzed Veterans of America (PVA) et al. pointed out that "many cruise lines actively target persons with disabilities in their marketing materials and promotional activities * * *. Several cruise lines have already voluntarily implemented many of [DOT's] recommendations" for "accessibility

Moreover, any argument that the Bahamas has no legitimate claim to regulating respondent's cruise ships is nonsensical. Nassau, Bahamas is a major port of call for Carribean cruises; between the 15th and the 28th of January, 2005, some 20 cruises were scheduled to call at Nassau. See http://www.cruiseline.co.uk/destinations.php?portId=106. "Nassau * * * is one of the busiest cruise-ship ports in the world." See The Cruise Company, *Bahamas Ports of Call* 10 (2001), available at http://www.thecruisecompany.com/wreports/bahamas.pdf. And, although petitioners are U.S. citizens, given the ease of foreign travel in the modern day, myriad overseas destinations cater largely to tourists from the United States, and millions of U.S. citizens find themselves subjected to regulation by foreign sovereigns every year. That fact provides no basis to subject those foreign destinations to U.S. regulation.

2. Decisions made by respondent and by other businesses to fly the flag of a foreign sovereign and to list their ships on foreign registries also are the kinds of business decisions that long have been recognized by the U.S. Government as valid. In the Merchant Marine Act of 1936, as amended, Congress gave the Secretary of Transportation the power to "provide insurance and reinsurance against loss or damage by war risks." 46 U.S.C. app. § 1282(a). Insurable vessels include certain "foreign-flag vessels owned by citizens of the United States or engaged in transportation in the water-borne commerce of the United States." *Id.* § 1283(a).

Regulations promulgated by DOT pursuant to authority of the Act (see 46 U.S.C. app. § 1114(b)) recognize that only ships registered on the Bahamian registry, along with four other

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standards." PVA Br. 6. If, as *amici* would have the Court believe, respondent is somehow the only cruise line not accessible to passengers with disabilities, it is certain to suffer from its inability to market its product to a large customer base. (In fact, respondent vehemently denies that its ships are less accessible than those of other lines; we understand that this point will be addressed in respondent's brief.)

registries, are eligible for war-risk insurance. 46 C.F.R. § 308.2(a). The Act, and regulations it authorized, reflect an express recognition by Congress and the DOT of the value of foreign registries such as that of the Bahamas.

Further evidence exists of the federal government's recognition of the validity of and respect for the Bahamian registry. The U.S. Coast Guard has implemented a "Port State Control Initiative" whereby it establishes indices to determine what "risk"—categorized by "safety" and "security"—is presented by a ship seeking entry to U.S. ports. The program uses a point system, with points serving as "black marks," assigned to the "three entities [that] directly influence a vessel's operational condition and compliance with international safety and environmental protection standards. These entities are: 1) Ship Management List, 2) Classification societies, and 3) Flag States." http://www.uscg.mil/hq/g-m/pscweb/Boarding%20Matrix.htm. The more "points" assigned to a vessel under any of the appropriate indicia, the more likely that vessel is to be boarded by the Coast Guard because of concerns about safety issues. A similar analysis is undertaken with regard to possible security concerns.

Notably, the Bahamian registry is not listed in either matrix—meaning no points due to safety or security concerns are assessed to Bahamian-flagged vessels. See http://www.uscg.mil/hq/g-m/pscweb/FlagSafety.htm (list of Flag States "identified as having a detention ratio higher than the overall average"); http://www.uscg.mil/hq/g-m/pscweb/FlagSecurity.htm (list of Flag States presenting security concerns). The careful attention that the Coast Guard pays to safety and security issues under the Port State Control Initiative and the conclusions that Bahamian-flagged vessels present no special concerns demonstrate that—contrary to arguments advanced by petitioners and their *amici* (Pet. Br. 31-33; Gutoff Br. 3-16)—the Bahamian registry is not considered by the federal government to be in any manner a toothless watchdog.

3. The Coast Guard's and DOT's perceptions that registration in the Bahamas reliably ensures compliance with safety and security standards are accurate. Like the United States, the Bahamas is a member of the International Maritime Organization (IMO), and has been for nearly 30 years. See http://www.imo.org/home.asp (link to list of IMO member states). Recognizing that "[s]hipping is perhaps the most international of all the world's great industries and one of the most dangerous," the IMO exists to "'encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.'" *Ibid.* ("Introduction to IMO") (quoting IMO Conv. Art. 1(a)).

> The IMO is an established United Nations governing body that sets standards and adopts regulations that apply to all vessels that operate international voyages. The IMO is based in London and includes representatives from 152 major maritime nations including the United States. Since its inception in 1948, the IMO's most important objectives have been to improve vessel safety and to prevent marine pollution.

White Paper, *supra*, at 9.

Member states of IMO are required to agree to rigorous requirements set forth in conventions, including SOLAS, the International Convention for the Prevention of Pollution from Ships, and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers. In its "Status of Conventions" worksheet, the IMO lists the Bahamas as participating in those three, as well as in numerous others. In fact, the Bahamas is signatory to 30 conventions, protocols, or subparts of conventions or protocols, as compared to the United States' participation in 28. See http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10793/status.xls.

No basis exists to treat respondent's, or any other business's, decision to register its ships in a foreign sovereign

as in any way less worthy of respect than a decision such as where to incorporate or where to locate a principal place of business, which also are made based on the various costs and benefits of different choices. The result of the court of appeals' decision in this case is that respondent's vessels are subjected to the regulation of the Bahamas, unless, with regard to a particular piece of legislation, Congress has made a clear expression of intent to regulate the internal management and affairs of those ships. Because Congress did not do so in the ADA, Title III does not regulate respondent's Bahamian-flagged ships, and no reason exists to disturb the Fifth Circuit's holding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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