No. 98-5913

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TAMMY STEVENS,

Plaintiff-Appellant

v.

PREMIER CRUISES, INC.,

Defendants-Appellees

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CASE NO. 98-5913 (Stevens v. Premier)

CERTIFICATE OF INTERESTED PARTIES & CORPORATE DISCLOSURE STATEMENT

The following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company that owns 10 percent or more of the party's stock, and other identifiable legal entities related to a party.

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CASE NO. 98-5913 (Stevens v. Premier)

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Pursuant to this Court's Order, dated June 14, 2001, the United States submits this brief, as amicus curiae, concerning (1) whether customary international law establishes that the flag state of a vessel has the responsibility for regulating and implementing any changes to the physical aspects of a vessel and (2) whether application of the Americans with Disabilities Act (ADA) to foreign-flag cruise ships would conflict with that law.

STATEMENT OF THE CASE

Plaintiff Tammy Stevens, who uses a wheelchair for mobility, brought suit under Title III of the ADA, 42 U.S.C. 12181-12189, against Premier Cruises, Inc., the owner and operator of a cruise ship in connection with a cruise she took on

Premier's vessel in May 1998 (R. 1).[1] Stevens alleged that Premier violated the ADA by charging her a higher fare for an accessible cabin and by failing to remove architectural barriers to accessibility.[2] Stevens' complaint seeks injunctive relief enjoining Premier from further violations of the ADA and ordering Premier to modify the vessel to remove barriers to accessibility.[3] The district court dismissed Stevens' complaint on two grounds: (1) Stevens failed to establish standing to seek injunctive relief because she had not specifically alleged that she intended to take another cruise with Premier in the future; and (2) the ADA did not apply to Premier's cruise ship because the ADA does not apply extraterritorially. The court applied the presumption against extraterritoriality set forth in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991), because the cruise ship is owned by a foreign company and sails under a foreign-flag (R. 11 at 3-4).

Stevens filed a motion for reconsideration in which she tendered a proposed amended complaint. The amended complaint alleged Stevens would like to go on

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[1] "R.__" refers to the district court docket number of the record on appeal.

[2] The barrier removal provisions of the ADA require covered entities to "remove architectural barriers * * * that are structural in nature, in existing facilities * * * where such removal is readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv). Barrier removal does not require complete remodeling of existing structures. It requires only accessibility that is "readily achievable." 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).

[3] Only injunctive relief is available in a private action alleging a violation of Title III of the ADA. See 42 U.S.C. 12188; 42 U.S.C. 2000a-3(a).

another cruise with Premier but for Premier's failure to comply with the ADA. The court denied the motion, finding that even if Stevens could establish standing, the ADA "does not reach the extraterritorial application sought in this case" (R. 15 at 1-2). Stevens filed a timely notice of appeal.

On June 22, 2000, this Court reversed the district court's dismissal of Stevens' complaint. The panel held that the district court improperly denied Stevens' request to amend her complaint to properly allege Article III standing and held that Title III of the ADA was "not inapplicable," *a priori*, to foreign-flag cruise ships in United States waters. *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1243 (11th Cir. 2000). The panel did not address "whether the treaty obligations of the United States might, in some cases, preclude or limit application of Title III." *Id*. at 1243 n.8. Premier filed a petition for rehearing and petition for rehearing en banc, raising, *inter alia*, that rehearing is needed to address whether applying the ADA to foreign-flag vessels conflicts with customary international law (Premier Petition for Reh'g at 5-10).

On June 14, 2001, this Court requested supplemental briefing by the parties regarding (1) whether customary international law establishes that the flag state of a vessel has the responsibility for regulating and implementing any changes to the physical aspects of a vessel and (2) whether application of the Americans with Disabilities Act to foreign-flag cruise ships would conflict with that law.

SUMMARY OF ARGUMENT

As an initial matter, the relevance of customary international law and treaties to this case is necessarily limited to Stevens' allegations that Premier violated the

ADA by failing to remove architectural barriers to accessibility. Stevens' claim that Premier violated the ADA when it charged her a higher fare for an accessible cabin, which implicates neither the physical structure of the vessel nor the internal affairs of the ship, is an independent cause of action worthy of being adjudicated. See also Larry W. Kaye & Jeffrey B. Maltzman, *'Twas the Night Before Regulations: Foreign-Flag Cruise Ships and the ADA*, 75 Tul. L. Rev. 1571, 1580 (2001) (acknowledging that "[s]ituations involving alleged discriminatory policies by foreign-registered cruise lines operating in the United States may be appropriate for judicial resolution at this juncture"). Because Stevens' claim of being charged a discriminatory fare is not affected by any analysis of the effect of international law on the application of the ADA to foreign-flag cruise ships, there is no basis for this Court to reverse its earlier decision to vacate the district court's dismissal of Stevens' complaint. See *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) ("a complaint should not be dismissed 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'") (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)).

Customary international law generally recognizes the authority of a flag state to regulate the physical structure of ships under its flag. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). However, customary international law also recognizes the authority of a port state to regulate ships entering its ports for commercial purposes. See *Benz* v.

Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957). Requiring foreign-flag cruise ships to remove barriers to accessibility in order to provide services to people at U.S. ports is not inconsistent with these principles of customary international law. Furthermore, Title III's requirement for "readily achievable barrier removal" excludes any action which would violate existing treaty obligations (such as watertight integrity, fire protection, or emergency egress) or jeopardize the safety of the vessel.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW DOES NOT PROHIBIT THE UNITED STATES FROM REGULATING THE DESIGN AND CONSTRUCTION OF SHIPS ENTERING U.S. PORTS

Customary international law is one of the two primary sources of international law which, along with treaties, makes up the bulk of international law rules. See Restatement (Third) of the Foreign Relations Law of the United States §§ 101-102 (1987). Unlike treaties, which are contractual in nature and generally written instruments, customary international law is composed of two elements: State practice and *opinio juris*, or the sense of legal obligation under which a State acts. See generally *id.* § 102 (2), cmts. (b) & (c). Through analysis of these two elements, as well as their duration and character, rules of customary international law eventually develop and gain acceptance by the international community as binding law. See *ibid.* Customary international law is often later codified by treaty. See *id.* § 102 cmt. (i).

A. Customary International Law Recognizes That Flag States And Port States Both Have Authority To Regulate Vessels

Customary international law recognizes that "the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That said, customary international law also gives States broad authority to regulate ships that enter their ports. See Craig Allen, *Federalism in the Era of International Standards (Part II)*, 29 J. Mar. L. & Com. 565, 572 (1998). For example, the United Nations Convention on the Law of the Sea (UNCLOS), draws a distinction between the regulation of vessels in "innocent passage" through a State's territorial sea and vessels entering a State's internal waters.[4] In the former category, UNCLOS provides that "coastal State[s] may [not] adopt laws and regulations * * * relating to innocent passage" that apply "to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards." UNCLOS Art. 21(1)(2), 21 I.L.M. 1261, 1274 (1985).[5] By

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[4] UNCLOS defines innocent passage as either "traversing [the territorial] sea without entering internal waters * * * or proceeding to or from internal waters * * *." UNCLOS Art. 18(1), 21 I.L.M. 1261, 1273. Ports are considered part of a State's internal waters. See *United States* v. *Louisiana*, 394 U.S. 11, 40 (1969); Commentary – The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI, Feb. 1995; 34 I.L.M. 1400, 1400-1407 (1995).

[5] The United States has not ratified UNCLOS, but has accepted it as customary international law in most respects. See e.g., President Reagan's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983); Letter of Transmittal from President Clinton to the Senate, 140 Cong. Rec. 28,361 (1994).

contrast, UNCLOS respects the authority of States to regulate ships within its ports, as it defines innocent passage to exclude entering of ports or internal waters for commercial purposes. UNCLOS Art. 18, 21 I.L.M. 1261, 1273 (1985). Were it true, as Premier asserts, that customary international law prohibited States from regulating matters affecting the design and construction of foreign flag ships as a condition of port entry, then UNCLOS would not limit its prohibition on regulation of design and construction to ships in "innocent passage" but would extend it more broadly.

Further, the fact that a ship sails under a foreign-flag or is registered in a foreign country does not, in the absence of a clear source of law to the contrary, exempt it from generally applicable laws of the countries in which it does business. "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country." *Benz*, 353 U.S. at 142; 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); *Armement Deppe, S.A.* v. *United States*, 399 F.2d 794 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969).

The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them.

Cunard, 262 U.S. at 124.

B. International Treaties Do Not, A Priori, Preclude Port States From Regulating Accessibility To Foreign-Flag Ships Entering Their Ports

Several international treaties direct flag States to ensure that the physical structure of ships flying their flag comports with international standards. For example, Article 10 of 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 standards for the construction, equipment, and operation of ships and provides that Contracting Governments have agreed to "undertake to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended." SOLAS, 1974, Art. 1(b). However, nothing in the Convention on the High Seas or SOLAS prevent States, *a priori*, from imposing on foreign-flag ships accessibility requirements in order to receive passengers at their ports.

C. Congress Has The Authority To Regulate Foreign-Flag Ships Engaged In Commerce At U.S. Ports

Premier erroneously cites *Brown* v. *Duchesne*, 60 U.S. 183 (1856), for the proposition that Congress lacks authority to enact legislation that would regulate the physical structure of a foreign-flag ship (Premier's Supp. Br. at 21). *Brown* involved a claim by the holder of a U.S. patent against the master of a foreign ship

that installed the patented improvement prior to the ship's arrival in U.S. waters. *Brown*, 60 U.S. at 193. The Court recognized, as an initial matter, that "undoubtedly every person who is found within the limits of a Government, whether for temporary purposes or as a resident, is bound by its laws. * * * A difficulty may sometimes arise, in determining whether a particular law applies to the citizen of a foreign country, and intended to subject him to its provisions." *Id.* at 194.

In determining whether the patent laws should apply to the ship's master, the Court noted that the authority under which Congress enacted the patent laws provides that Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. *Ibid.*; see also U.S. Const. Art. 1, § 8, Cl. 8. This authority is "domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce, which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits." *Brown*, 60 U.S. at 195. The Court further observed that the patent laws themselves are intended to "secure to the inventor a just remuneration from those who derive a profit or advantage, within the United States, from his genius and mental labors." *Ibid.* As such, the Court concluded

> the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or

> equipment of such vessel, while she is coming in or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

Id. at 198-199.

Revealing the limited application of its holding, the Court specifically noted that "Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter." *Id.* at 198. Unlike the patent laws involved in *Brown*, Congress enacted the ADA pursuant to its authority under the Commerce Clause.[6] Contrary to Premier's assertion, *Brown* supports application of the ADA to foreign-flag cruise ships entering U.S. ports for commercial purposes.

II. APPLICATION OF THE ADA TO FOREIGN-FLAG CRUISE SHIPS WOULD NOT CONFLICT WITH CUSTOMARY INTERNATIONAL LAW OR TREATY OBLIGATIONS

A. The ADA Overrides Principles Of Customary International Law

Enforcement of a U.S. law generally cannot be challenged in federal court on the grounds that it violates customary international law. The Supreme Court, in *The Paquete Habana*, 175 U.S. 677 (1900), recognized the importance of customary

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[6] Title III covers, *inter alia*, "public accommodations," which are defined by a list of type of facilities whose operations "affect commerce." 42 U.S.C. 12181(7). In addition, the ADA's statement of purpose states that it intends "to invoke the sweep of congressional authority, including the power * * * to regulate commerce." 42 U.S.C. 12101(b)(4).

international law in a case brought by the owner of fishing vessels captured and condemned as prize during the Spanish-American War. The owner sought compensation from the United States, asserting that customary international law prohibits the seizure of boats engaged in coastal fishing. The Court concluded that condemnation was improper because "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *Id*. at 700. The Court's assessment of the domestic effect of international law, however, was qualified by the statement: "[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages * * * of nations." *Ibid*.

Following this guidance, courts have recognized that subsequently enacted statutes or legislative action preempt existing principles of customary international law. See *Committee of United States Citizens Living In Nicar.* v. *Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) (rejecting argument that continued funding by Congress of "Contras" in Nicaragua in violation of an International Court of Justice judgment violated customary international law principle that nations must obey the rulings of an international court); *Tag* v. *Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959) (upholding seizure of property by the Attorney General during World War II, pursuant to the Trading With the Enemy Act, despite customary international law forbidding the seizure or confiscation of the property of enemy nations during time of war), cert. denied, 362 U.S. 904 (1960); *Federal Trade Comm'n* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (courts

"obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law"). As such, even if this Court were to hold that application of the ADA to a foreign-flag cruise ship accepting passengers at U.S. ports presents a *per se* conflict with customary international law, the ADA preempts any conflicting customary international law principles.

That the ADA does not explicitly mention its application to foreign-flag cruise ships is of no consequence. 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 Corrections* v. *Yeskey*, 524 U.S. 206, 210-213 (1998) (ADA covers state prisons even though they are not specifically mentioned in statute). The Department of Justice has concluded that cruise ships are covered entities under the ADA as public accommodations. See 28 C.F.R. Pt. 36, App. B at 660; Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (U.S. Br. as Amicus, Addendum).[7] 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).

B. Application Of The ADA Does Not, A Priori, Conflict With U.S. Treaty Obligations

Although the panel's request for supplemental briefing did not specifically

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[7] The Department of Transportation has similarly determined that cruise ships are covered under 42 U.S.C. 12184 as "specified transportation services." See 56 Fed. Reg. 45,584, 45,600 (1991).

include a request for briefing on whether application of the ADA would conflict with specific international treaties, Premier contends that such a conflict will occur.[8] Specifically, Premier contends that applying the ADA to Premier would conflict with the International Convention for the Safety of Life at Sea (SOLAS) (Premier's Supp. Br. at 12-15). This contention is without merit.

First, 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 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.) (U.S. Br. as Amicus, Addendum). 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 (Sept. 6, 1991). Should Stevens prevail, the district court should not order any remedy that would directly conflict with any existing treaty provisions.

Second, Premier's argument that the ADA regulations governing new

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[8] Premier raised the argument that applying Title III to foreign-flag cruise ships would violate SOLAS and the 1958 Convention on the High Seas for the first time on appeal. As noted in the United States' Reply Brief to this Court, application of these treaties was not properly before the panel and that this issue should be initially assessed by the district court (U.S. Reply Br. as Amicus at 10).

construction and alteration of land-based facilities and standards for new construction and alteration of passenger vessels recommended to the Access Board by the Passenger Vessel Access Advisory Committee (PVAAC) conflict with SOLAS-mandated safety requirements and accessibility recommendations issued by the International Maritime Organization (IMO) is misleading. Stevens alleges that Premier violated the ADA by failing to remove architectural barriers to accessibility. She has not claimed that Premier violated the ADA by failing to comply with ADA regulations governing land-based facilities or by failing to implement PVAAC's proposed standards. The district court may look to the ADA regulations for land-based facilities or the PVAAC recommendations – both of which establish standards for new construction and alteration – for guidance in fashioning appropriate relief should Stevens prevail. However, as mentioned above, ADA regulations specifically advise courts that no relief should be ordered that would violate any international treaties.

Further, any differences between guidelines for new construction and alteration of passenger vessels that may be adopted in the future and the IMO accessibility guidelines for passenger vessels do not constitute a conflict between application of the ADA and SOLAS. The IMO, an organization established by the United Nations which sponsors the SOLAS conferences, has adopted accessibility guidelines related to the design and operation of new passenger ships. See IMO Maritime Safety Committee Cir. 735, "Guidelines for the Design and Operation of New Passenger Ships to Respond to Elderly and Disabled Persons' Needs"

(Premier Supp. Br., App. D). Such recommendations "provide guidance in framing national regulations and requirements," but "are not usually binding on Governments." See "International Maritime Organization: What it is, What it does, How it works" at 22 (Premier Supp. Br., App. C). The accessibility recommendations by the IMO to guide Contracting States do not have the force of treaty provisions. The only significance these recommendations have to this case is to reinforce the role of individual nations, not international treaties, to regulate accessibility.

Premier also asserts that the ADA should not apply to foreign-flag ships because of the possibility that flag States might develop accessibility standards for ships under their flag (Premier's Supp. Br. at 17-19). There is similarly no legal basis for concluding that the existence of such standards, much less the possibility that such standards could be developed in the future, warrants the conclusion that the barrier removal provisions of the ADA should not apply to foreign-flag cruise ships doing business in U.S. ports.

C. Application Of The ADA Does Not Violate The Primary Jurisdiction Doctrine

Premier also contends that application of Title III's "barrier removal" requirement to cruise ships, in the absence of regulations governing new construction and renovation of cruise ships, violates the primary jurisdiction doctrine (Premier's Supp. Br. at 14, n.14). Their argument reflects a mistaken understanding of primary jurisdiction, which is a doctrine specifically applicable to

claims properly cognizable in court that contain some issue within the special competence of an administrative agency. The doctrine requires the court to enable a "referral" to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. See *United States* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 63-64; *Ricci* v. *Chicago Mercantile Exch.*, 409 U.S. 289, 291, 302 (1973); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 65, 68 (1970). Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-223 (1966); *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R. Co.*, 230 U.S. 247, 266-267 (1913); Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037, 1055 (1964).

Contrary to Premier's assertion, under the primary jurisdiction doctrine, the absence of regulations establishing new construction or renovations standards for passenger vessels does not render the separate "barrier removal" provisions of Title III unenforceable with regard to such vessels nor does it warrant dismissal of Stevens' case until such regulations are adopted.

D. Application Of The ADA Does Not, A Priori, Conflict With The Principle Of Reciprocity

Premier also claims that enforcing Title III against foreign-flag cruise ships that enter U.S. ports would be at odds with the principle of reciprocity (Premier's

Supp. Br. at 16). The "principle of reciprocity" provides that "certification of a vessel by the government of its own flag nation warrants that the ship has complied with international standards, and vessels with those certificates may enter ports of signatory nations." *United States* v. *Locke*, 529 U.S. 89, 102 (2000); see also 46 U.S.C. 3303 (providing that the United States will accept a certificate of inspection by a foreign country that is a party to SOLAS and which accords reciprocity to U.S. vessels visiting its country).

Premier misapplies the recent Supreme Court decision in *Locke*. *Locke* involved regulations adopted by the State of Washington applied to oil tankers, both foreign and domestic, entering state waters. 529 U.S. at 97. The Court held that the state regulations regarding tanker design, equipment, reporting, and operating requirements were preempted by federal statute and regulations. *Id.* at 104. The Court did not address whether the "principle of reciprocity" had any legal significance in the proceeding. *Id.* at 103.

Nevertheless, application of the ADA to foreign-flag cruise ships does not conflict with the principle of reciprocity. Provided the conditions set forth in 46 U.S.C. 3303 are satisfied, the Coast Guard will continue to accept a valid certificate of inspection from the ship's flag State. Requiring cruise ships providing services to U.S. passengers at U.S. ports to ensure barriers to accessibility have been removed is an entirely different matter.

E. The ADA's "Barrier Removal" Provision Is Not Vague

Amicus International Council of Cruise Line's suggestion that the "barrier

removal" provision of the ADA is unconstitutionally vague is without merit. Because the ADA is a statute that regulates commercial conduct, it is reviewed under a less stringent standard of specificity. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The Supreme Court has explained that economic regulation is subject to a less strict test "because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* at 498.

The fundamental rationale underlying the vagueness doctrine is that due process requires a statute to give adequate notice of its scope. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). A statute is vague not when it prohibits conduct according "to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). Under this standard, the "barrier removal" provision of the ADA would be vague only if it is so indefinite in its terms that it fails to articulate comprehensible standards to which a person's conduct must conform. The ADA's regulations give 21 examples of steps facilities can take to remove barriers. See 28 C.F.R. 36.304(b). Such guidance as to examples of what may constitute appropriate steps to remove barriers can hardly be considered vague. See *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 836-837 (9th Cir. 2000) (rejecting vagueness challenge to Title III's "barrier removal" provision); *Pinnock* v. *International House of Pancakes Franchisee*, 844 F. Supp.

574, 582 (S.D. Cal. 1993) (same).

CONCLUSION

Customary international law generally defers to a State to regulate the physical structure of ships under its flag. However, customary international law also supports regulation by the United States of foreign-flag ships entering its ports for commercial purposes. The application of Title III's "barrier removal" provisions to foreign-flag cruise ships seeking to provide services to people at U.S. ports is consistent with this principle and does not, *a priori*, conflict with any U.S. treaty obligations. There is no basis, therefore, to reverse this Court's prior decision to vacate the district court's order dismissing Stevens' claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d) and Eleventh Circuit Rule 29-2, the attached amicus brief was prepared using WordPerfect 9 and contains 4,820 words of proportionally spaced type.

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