IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS SPECTOR, ANA SPECTOR,	§	
JULIA HOLLENBECK, DAVID T. KILLOUGH	§	
and RODGER PETERS Individually and	§	
Behalf of All Similarly Situated Persons	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**C.A. NO. H-00-2649**
	§	
NORWEGIAN CRUISE LINE LIMITED	§	
d/b/a NORWEGIAN CRUISE LINE	§	
	§	
	§	
Defendant.	§	
	§	

UNITED STATES' SUR-REPLY AS AMICUS CURIAE TO DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Defendant Norwegian Cruise Line (NCL) relies on two claims in its reply that demand clarification and response.[1] First, NCL asserts categorically that the flag of a ship dictates whether an application of United States law to a foreign-flagged ship is considered "extraterritorial" even when the ship is in United States territory. See NCL's Reply at 10-12. This position directly contradicts Supreme Court authority and the plain meaning of the term "extraterritorial." Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123-124 (1923) (activity that occurs on a foreign-flag ship within United States internal waters or ports is not extraterritorial); Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1242 (11th Cir. 2000) ("[b]y definition, an extraterritorial application of a statute involves that regulation of conduct beyond U.S. borders."); see also United States v. Gonzales, 520 U.S. 1, 117 S.Ct. 1032, 1936 (1997) ("The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words ... in search of an intention which the words themselves did not suggest") (quoting United States v. Wiltberger, 5 Wheat. 76, 95- 96, 5 L.Ed. 37 (1820) (Marshall, C.J.)).

Second, NCL asserts that the barrier removal requirements of the ADA are limited to only those public accommodations for which specific New Construction and Alteration standards are in place. This position misstates the law. Barrier removal requirements are applicable to all

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[1]See Defendant Norwegian Cruise Line's Reply to Plaintiffs' Response to the Motion to Dismiss and to the United States' Memorandum of Law as *Amicus Curiae* in Support of Plaintiffs' Response" ("NCL's Reply") at 9, 12. The United States respectfully submits that NCL's Reply contains numerous misapplications of the law and mischaracterizations of the United States' position. However, the United States limits its sur reply as amicus curiae to the two issues referenced above and asks this Court to refer to United States' Memorandum of Law as Amicus Curiae In Support of Plaintiff's Opposition to Defendant Norwegian Cruise Line's Motion to Dismiss ("U.S. First Brief") for all other issues.

public accommodations covered by the ADA, and where specific New Construction and Alteration standards have not been promulgated, the remedies for a violation of the barrier removal provisions are dictated by what is readily achievable as determined based on the facts on a case by case basis.

ARGUMENT

I. Unless Specifically Exempted by the Statute in Question, Foreign-Flag Cruise Ships Doing Business Within the Internal Waters and Ports of the United States Must Comply with All Generally Applicable Laws

It is axiomatic that activities taking place on United States waters are generally governed by United States law. Pennoyer v. Neff, 95 U.S.714, 720 (1877) (the first principle of the public law that regulates the relationships among independent nations is "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.") It is also well settled that a given statute need not expressly contemplate or predict the specific circumstances of all potential violations of that statute. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; it demonstrates its breadth). Thus, Plaintiffs ask this Court to apply the ADA to alleged discriminatory activity occurring on a foreign-flag cruise ship operating in United States waters and ports.[2] Since the ADA does not expressly exempt from coverage foreign-flag ships operating on United States territory, the ADA clearly applies to NCL in the instant case.

[2] Ports are part of a nation's internal waters. See United States v. Louisiana, 394 U.S. 11, 40 (1969).

A. Applying the ADA to Foreign-Flag Cruise Ships That Embark and Disembark From United States Ports Is Not Extraterritorial Application of United States Law

NCL argues that the flag of a ship dictates whether an application of United States law to a foreign-flagged ship is considered "extraterritorial" even when the ship is in United States territory. See Reply at 3-12. The Supreme Court rejected this argument in Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923):

> [T]he statement [is] sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. . . It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.

Id., 262 U.S. at 123-124 (citations omitted); accord Cruz v. Chesapeake Shipping Co., 932 F.2d 218, 227-228 (3d Cir. 1991).

Nevertheless, NCL asks this Court to adopt its own, unique, definition of the term "extraterritorial." According to NCL, it is the flag of the ship, not the geographic location of where the ship sails, that dictates extraterritoriality. See NCL's Reply at 9, 12. Thus, according to NCL, the application of the ADA to foreign ships sailing on United States waters is an extraterritorial application, regardless of the fact that the ships were operating within the territory of the United States. Id.

The only two courts to consider this issue have rejected NCL's proposition and found that the ADA does apply to foreign-flag cruise ships. Stevens, 215 F.3d at 1242 (11th Cir. 2000) (cruise ships sailing under a foreign flag are not exempt from the ADA when operating in United States waters); Walker v. Carnival Cruise Lines, Case No. C 98-2926 (N.D. Cal. Nov. 22, 2000) (Judge Thelton Henderson) (denying cruise ship's motion for summary judgement and ruling that

foreign flag ships are covered by Title III of the ADA). In Stevens, the Eleventh Circuit endorsed a plain reading of the term "extraterritorial" where it held that "[b]y definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders." 215 F.3d at1242 (quoting Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C.Cir.1993)); see also Black's Law Dictionary 528 (5th ed. 1979) (defining "extraterritorial" as "[b]eyond the physical and juridical boundaries of a particular state or country."); Webster's Ninth New Collegiate Dictionary 441 (1989) (defining "extraterritorial" as "existing or taking place outside the territorial limits of a jurisdiction."). Despite NCL's claim that the Eleventh Circuit "got it wrong," see NCL's Reply at 8, NCL provides no genuine and contrary authority to support its alternative reading of the word "extraterritorial."

Instead, NCL selectively quotes dicta from Lauritzen v. Larsen, 345 U.S. 571, 584-585 (1953), concerning the law of the flag. See NCL's Brief at 6. The point of the passage relied on by NCL, however, was that the flag state could sometimes retain "concurrent jurisdiction" over a crime that occurred on the ship while it was in the territorial waters of another country.[3] Lauritzen, 345 U.S. at 585. A flag state may exercise jurisdiction over conduct that occurs on the high seas. See, e.g., United States v. Hayes, 653 F.2d 8, 15 (1st Cir. 1981). It may also exercise concurrent jurisdiction over certain actions that occur on the ship while it is in foreign waters. See, e.g., United States v. Flores, 289 U.S. 137, 157-158 (1933). No court, however, has held

[3] Indeed, the Lauritzen Court refused to endorse the very language relied on by NCL. Lauritzen, 345 U.S. at 585, n. 18. Instead the Court laid out competing positions on whether a ship is a "floating part of the flagstate" and then conspicuously declined to resolve it. Id. ("[w]e leave the controversy where we find it, for either basis leads to the same result in this case"); see also U.S. First Brief at 17 (distinguishing Lauritzen because its holding was based on the cause of action arising out of matters internal to the ship which did not affect the dignity of the United States).

that a foreign-flag ship sailing in United States waters is always an extraterritorial legal entity. In fact, Cunard expressly rejects the proposition, 262 U.S. at 123-124, and Lauritzen refuses to rule on it. 345 U.S. at 585, n. 18.

Moreover, NCL's reliance on NLRB v. Dredge Operators, Inc. 19 F.3d 206, 208 (5th Cir. 1984) in an attempt to distinguish the Eleventh Circuit's holding in Stevens is misplaced. See NCL's Reply at 6-9. Dredge Operators dealt specifically with the application of a United States law to activities occurring in Hong Kong waters. 19 F.3d at 208. The court did not address the question at issue here, whether a law is applied extraterritorially, even if it is applied to events occurring within the territorial limits of the United States.[4]

Finally, NCL relies on comity and international law considerations by raising claims about "possibly" conflicting legal obligations stemming from barrier removal obligations and laws of other countries and the "potentially deleterious" impact of the United States' position. See NCL's Reply at 4-5. However, NCL has not shown that any eventual remedy would result in conflicting legal obligations. NCL's speculative concerns are not relevant to the disposition of

[4] Therefore, despite NCL's efforts to cast this issue in terms of a difference of opinions between between the Eleventh and Fifth Circuits, no such difference exists. See NCL's Reply at 9. NCL further relies on Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957). See NCL's Reply at 7-8, 11. The Benz case does not expand the definition of extraterritorial to include foreign-flag ships sailing in United States waters. More accurately, the Benz Court, at the very outset of the decision, defines the issue as whether United States laws should be applied in matters arising out of internal disputes between a "foreign employer and a foreign crew" where the "only American connection was that the ship was transiently in a United States port." Id. at 142. The instant case is distinguishable from Benz because it has far greater "American connections" – the ships embark and disembark from American ports, the ships spend a considerable amount of time on American waters, the Plaintiffs' are American citizens seeking protection of their civil rights, and the owner and operator of the ship has its principle place of business in the United States.

a motion to dismiss. Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir.1986) (The complaint must be liberally construed in favor of the plaintiff.)

B. Because the Activity Regulated Here is Not "Extraterritorial," this Court Does Not Need to Address the Presumption Against Extraterritoriality

Under the "presumption against extraterritoriality," a statute is only applicable outside the territory of the United States if the statute contains congressional intent for such an extraterritorial application. See EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (ARAMCO). Thus, if the presumption were applied in the instant case, the ADA would be applicable to foreign-flag ships operating in United States territory only if specific congressional intent existed for such an application. However, the "presumption against extraterritoriality" is not applicable where no extraterritorial application of a statute exists.[5]

A plain reading of ARAMCO – where the Supreme Court most recently defined the "presumption against extraterritoriality" – conclusively reveals that the presumption applies only where a law is being applied extraterritorially, i.e., outside of United States territory. 499 U.S. at 248. The definition of the presumption as provided in ARAMCO is tied directly to the location

[5] NCL also argues that this Court should find that Plaintiffs seek an extraterritorial application of the ADA because the cruise ships at issue leave the United States waters during certain cruises and thus "the relief that Plaintiffs seek would alter the character of the ships' 'facilities, services and programs' at a time when the ships are outside of United States territory." See NCL's Reply at 13. Ironically, in this instance NCL is willing to rely on the location of the ship, i.e., "outside United States territory," as a factor for establishing "extraterritoriality." Significantly, however, NCL provides no authority for its position that ADA violations occurring in United States territory must be overlooked because they also occur outside United States territory. That the discrimination also happens to occur when the ship is in international waters – where United States law cannot reach – does not in any way negate the fact that it also occurred in United States waters, where it is against the law.

of events and is not based, in whole or in part, on the nationality of the actors involved. Id. ("legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (emphasis added). Thus the ARAMCO decision further confirms that "extraterritoriality" is triggered by where the conduct takes place, not by the nationality of the actor. Id.; see also Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (in addressing the presumption, indicating that the key question is whether Congress intended to make the law applicable to work performed in foreign countries); Stevens, 215 F.3d at 1242 (specifically declining to adopt ARAMCO's "presumption against extraterritoriality" because foreign-flag ships in United States waters are not extraterritorial).

Neither the ARAMCO decision, nor any decision in the body of law addressing the presumption,[6] expand the meaning of "extraterritorial" to include matters occurring within the territory of the United States. Moreover, there is no authority, and NCL provides none, to support the use of the "presumption against extraterritoriality" where there is no extraterritorial application of a statute at issue. Therefore, because the application of the ADA to foreign flag cruise ships operating in United States waters is not extraterritorial, the "presumption against extraterritoriality" is not applicable in the instant case.

II. The Barrier Removal Requirements Are Applicable to All Public Accommodations Covered by the ADA

According to NCL, the barrier removal requirements of the ADA are not applicable

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[6] See e.g., Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 156 (1993) (applying the "presumption of extraterritoriality" as it relates to the location of the conduct); Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989) (same); Foley Bros., Inc,, 336 U.S. 281, 284-285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949) (same); Boureslan v. Aramco, Arabian American Oil Co., 892 F.2d 1271, 1274 (5th Cir. 1990) (same).

unless there are corresponding "New Construction and Alteration" standards in place for the type of public accommodation at issue. See NCL's Reply at 20-22. The United States respectfully submits that this position misstates the law.

The barrier removal requirement, which is one of several specific non-discrimination prohibitions in Section 302 of Title III (42 U.S.C. §12182(b)(2)(A)(iv)), is separate from the new construction and alteration requirements found in Section 303 of title III of the ADA (42 U.S.C. §12183). Section 303's design and construction standards are meant to be comprehensive and incorporate the ADA Standards for Accessible Design to regulate a variety of construction features that will affect accessibility of new construction. The concept of barrier removal in Section 302 means, simply, that when a place of public accommodation has physical barriers to access, it must remove them if it is "easily accomplishable. . . without much difficulty or expense." 42 U.S.C. §12181(9). For example, if the facility has boxes blocking the hallway, it is undeniable that it would be "readily achievable" to move the boxes in order to permit persons who use wheelchairs to pass through the hallways. See 28 C.F.R. § 36.304(b)(4).

The regulations implementing the barrier removal provisions do reference the New Construction and Alteration requirements. See 28 C.F.R. § 36.304(d)(1) ("Except as provided in paragraph (d)(2) of this section [setting out the "readily achievable" standard], measures taken to comply with the barrier removal requirements of this section shall comply with the applicable [New Construction and Alteration requirements] for the element being altered."); see also id. at §36.304(g). The purpose of this reference is to set a limit on what entities may be required to do. See id. ("the [barrier removal] requirements for § 36.304 shall not be interpreted to exceed the standards for [new construction and alterations] in subpart D of this part."); 28 C.F.R. Pt. 36,

App. B at 649 (explaining that the references to the new construction and alteration requirements were incorporated into the regulation in order to set a limit on what is required under the barrier removal provisions). The purpose of these references are not to exclude from any barrier removal requirements, all public accommodations for which no specific standards are in place.

A public accommodation for which there are no new construction and alteration standard in place, such as a cruise ship, follows a three step approach in complying with the barrier removal requirements of the ADA. First, cruise ships are under a general requirement to remove barriers where it is readily achievable to do so. 28 C.F.R. § 36.304(a). In some situations, appropriate barrier removal measures have no applicable new construction or alteration "standards" in place. See id. at § 36.304(b) (providing examples of barrier removal where no applicable new construction or alteration standard applies, such as rearranging tables and chairs). Second, cruise ships removing barriers are required to comply with any applicable new construction and alteration standards where it is readily achievable to do so. Id. at § 36.304(d). Thus, if a cruise ships must lower a countertop to provide appropriate wheelchair access, and such a remedy is readily achievable, cruise ships must comply with the relevant regulations governing alterations of public facilities and countertop heights. Moreover, a cruise ship would not be required, under 28 C.F.R. § 36.304(a), to do any more than what is required under the applicable standards for countertop heights, see id. at § 36.304(g), and could be required to do less, depending on what is readily achievable.[7] Third, where barrier removal is not readily

[7] Under the readily achievable standard, the appropriate remedy is a factual determination made on a case by case basis. Because there are existing factual disputes over whether NCL's alleged barrier removal violations are readily achievable, NCL's Motion to Dismiss is inappropriate. Campbell, 781 F.2d at 442.

achievable, cruise ships must implement alternatives to barrier removal, e.g., providing assistance. 28 CFR § 36.305.

Under NCL's reading of the law, because there are no specific standards governing new construction and alterations for cruise ships, cruise ships are free of any barrier removal obligations. This reading of the law is incorrect. The United States respectfully urges that this Court reject NCL's argument and rule that the barrier removal requirements are applicable to all public accommodations covered by the ADA, and that where specific New Construction and Alteration standards are not in place, entities must remove barriers wherever it is readily achievable to do so, as determined based on the facts on a case by case basis. Should this Court find the regulatory language in question to be ambiguous, the United States' interpretation of that regulation is entitled to deference. Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655, 1663 (2000) (holding that an agency's interpretation of its own regulation is entitled to deference when the language of a regulation is ambiguous); see also Olmstead v. Zimring, 527 U.S. 581, 582 (1999) (the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance). Cf. NCL's Reply at 19 (incorrectly concluding that Christensen effectively eliminates deference to agency interpretations.).

CONCLUSION

Based upon Plaintiffs' arguments and the arguments presented by the United States in its Memorandum of Law as Amicus Curiae In Support of Plaintiff's Opposition to Defendant Norwegian Cruise Line's Motion to Dismiss, and arguments stated above, the Court should deny defendant's motion to dismiss and allow this case to go forward, as scheduled.

Respectfully submitted,

WILLIAM R. YEOMANS
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH
Chief
L. Irene Bowen
Deputy Chief
PHILIP L. BREEN
Special Legal Counsel

DANIEL I. WERFEL
DANIEL W. SUTHERLAND
Trial Attorneys
Disability Rights Section
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 305-7475

Gordon Young
Assistant United States Attorney
Keith E. Wyatt
Chief, Civil Division
Office of the United States Attorney
P.O. Box 61129
Houston, Texas 77208
Phone: 713-567-9000
Fax: 713-718-3303

Attorneys for United States as Amicus Curiae