WIN(D) WIN(D): *AMERICAN CRUISE LINES'* BALANCING OF JONES ACT PROTECTIONS AND ITS IMPLICATIONS FOR OFFSHORE WIND FARMS

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I. Introduction

With the passage of the Jones Act in 1920,[1] the United States signaled its commitment to protect its maritime industry.[2] When first proposed, the Jones Act was designed to curb our reliance on foreign vessels in times of war[3] and keep U.S. shipyards active, fostering a strong mariner community.[4] To achieve these goals, the Jones Act places three restrictions on vessels engaged in "coastwise trade," which refers to the transportation of passengers or merchandise between points within the United States.[5] The vessel must be (1) built in the United States,[6] (2) owned and operated by a citizen of the United States,[7] and (3) crewed by citizens of the United States.[8]

However, because the Jones Act places severe restrictions on the industry, companies have opted for foreign manufacturing unless absolutely necessary to engage in coastwise trade.[9] The Act's requirement that coastwise trade be conducted exclusively by U.S.-built vessels operated by U.S.-owned companies has driven the cost of market participation sky high.[10] Although Congress passed the Jones Act to reinforce our shipping industry, the Act has become an overprotective barrier that is stifling the same growth it was meant to foster.[11]

The high cost of Jones Act restrictions have forced ship manufacturing and other merchant marine industries, like crewing, to migrate overseas.[12] The biggest factor, however, is manufacturing costs.[13] For example, the only Wind Turbine Installation Vessel (WTIV) manufactured in the United States costs double the amount of a WTIV manufactured in South Korea.[14] WTIV's are crucial to the growth and development of the offshore wind industry in the United States. In recent years, maritime companies have been looking for loopholes to the Jones

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[1] The Jones Act is referred to in different areas of maritime law. For purposes of this comment, the Jones Act will denote section 27 of the Merchant Marine Act of 1920, which deals with cabotage laws, rather than section 33 of the Act which governs claims for personal injury of a seaman. *See* Constantine G. Papavizas & Gerald A. Morrissey, *Does the Jones Act Apply to Offshore Alternative Energy Projects?*, 34 Tul. Mar. L.J. 377, 379–80 (2010).

[2] *See* John F. Frittelli, *The Jones Act: An Overview*, CRS REPORT FOR CONGRESS, 3 (2003).

[3] *See* Frittelli, *supra* note 2, at 2.

[4] *Id.* at 3, 6.

[5] *See* 46 U.S.C. §§ 12102 (2010), 12103, 12112, 50501 (2006).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See* Grabow et al., *The Jones Act: A Burden America Can No Longer Bear*, CATO INST.: POL'Y ANALYSIS NO. 845, 6.

[10] *Id.* at 2.

[11] *Id.*

[12] *See* Tyler Bisconti, *Low-Cost Country Sourcing (cheap labor)*, EBSCO, https://www.ebsco.com/research-starters/social-sciences-and-humanities/low-cost-country-sourcing-cheap-labor#full-article.

[13] *See* Eric Huan, *Cost of U.S.-Built WTIV CHARBDIS Balloons to $715 Million*, OFFSHORE ENGINEER, https://www.oedigital.com/news/516103-cost-of-us-built-wtiv-charybdis-balloons-to-715-million.

[14] *Id.*

Act's restrictions and have found inventive workarounds to keep their costs as low as possible.[15] But no solution has proven to be as efficient or risk-free as these companies would have hoped—that is, until the Second Circuit decided *American Cruise Lines v. United States*.[16]

The Second Circuit's decision created a valid course of action to dodge the Jones Act's crippling complications. *American Cruise Lines* involved a "unique arrangement" between a U.S. company, River 1, and a Swiss company, Viking River Cruises.[17] The U.S. Maritime Administration ruled the agreement was a time charter that was permissible under coastwise trade laws.[18] Applying the principles from *American Cruise Lines* that achieve the correct balance between protecting domestic interests and allowing foreign investors to alleviate shipping costs could catalyze the offshore wind market. In striking this balance, Article III courts sitting in admiralty should regulate charters to ensure that the heart of the Jones Act—fostering the U.S. maritime industry—is not sacrificed in favor of a corporation's bottom line.

Moving forward through this Comment, Part II will provide the background for a comprehensive understanding of coastwise trade laws and the Jones Act; an overview of the offshore wind industry and its current state, including how it is affected by coastwise trade laws; and a summary of the *American Cruise Lines* decision. Part III of this Comment will advocate for the *American Cruise Lines* decision, illustrate how it strikes the correct balance between Jones Act protections and corporate interests, and evaluate the potential for the offshore wind market to grow from this decision. Part IV will conclude that the Second Circuit's *American Cruise Lines* decision provides a viable framework for cost-sharing agreements with foreign charterers that adheres to the Jones Act's objectives, reduces vessel construction risks, and strengthens the U.S. offshore wind supply chain.

II. Cabotage Laws: the Architect of Modern Trade

The Jones Act is neither the first nor only legislation of its kind; it is merely another variation of cabotage laws.[19] Cabotage laws are restrictive laws that "reserv[e] a nation's maritime and shipping trades, services, and activities for its own citizens."[20] Cabotage laws are employed

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[15] *See generally* Kloosterboer Int'l Forwarding LLC v. United States, 604 F.Supp. 3d 853 (D. Alaska 2022); *see also* The Maritime Executive, *ASC Affiliates Pay $9.5M to Settle "Canadian Rail" Jones Act Case*, https://maritime-executive.com/article/asc-affiliates-pay-9-5m-to-settle-canadian-rail-jones-act-case (Shipping affiliates of a U.S. Seafood Company exploited a loophole in the Jones Act coastwise trade provisions. The shipping companies engaged in transporting frozen seafood from Alaska to the eastern coast of the United States using foreign flagged vessels. They chartered vessels lacking coastwise endorsements to transport the seafood from Alaska to New Brunswick, Canada. The cargo was then loaded into a trailer truck that was, in turn, driven onto a flatbed rail car. Next, the rail car, located on the Bayside Canadian Rail, traveled the entirety of the 100-foot track, and the truck was unloaded. The truck carrying the seafood would then proceed to cross the border into the United States, having technically satisfied the Canadian rail line Jones Act exception. *See* 46 U.S.C. § 55116.); *See also infra* Part II(E) (discussing a Jones Act work around called "feedering").

[16] Am. Cruise Lines v. United States, 96 F.4th 283 (2nd Cir. 2024).

[17] *Id.* at 285.

[18] *See id.* at 291.

[19] *See* SEAFARERS' RIGHTS INTERNATIONAL, CABOTAGE LAWS OF THE WORLD, 23 (2018).

[20] *Id.*

by many nations around the world that engage in shipping trades and services.[21] These restrictive laws originated in England in 1381 during the reign of King Richard II.[22] King Richard ordered all exports and imports to use English ships exclusively in order to reassemble a greatly diminished British Navy.[23] The British Parliament eventually expanded this order in the 15th and 16th centuries, which led to the creation of the first set of cabotage laws.[24] The rest of the world followed suit, with a great number of seafaring countries enacting cabotage laws throughout the following centuries.[25] In fact, the United States enacted similar forms of protection during the first session of Congress in 1789.[26] The United States has since clarified and expanded its cabotage laws to place restrictions on coastwise trade in the Merchant Marine Act of 1920, more commonly known as the Jones Act.[27]

A. Coastwise Trade and Jones Act Requirements

The Jones Act prohibits "the transportation of merchandise [or passengers] . . . between points in the United States to which the coastwise laws apply," unless the vessel receives a coastwise trade endorsement.[28] 46 U.S.C. § 55101 provides that coastwise trade laws apply to the entire United States, including all its territories and possessions.[29] Some simple examples of coastwise trade include a vessel traveling from New Orleans to St. Louis or from New York to Miami. While these examples are easy to conceptualize, applying coastwise trade laws to offshore platforms, for instance, complicates the analysis.[30] The Jones Act also codifies eligibility requirements for a vessel to receive its coastwise endorsement.[31]

It is important to note there are two separate federal agencies governing maritime citizenship matters: the United States Coast Guard (USCG) and the United States Maritime Administration (MARAD) (collectively, "the agencies").[32] The agencies interpret these statutes and issue rulings that shape the Jones Act's influence on domestic maritime industries.[33] These Jones Act provisions, in tandem with the agencies' regulations, require that a vessel be built in the United States and be owned and operated by a U.S. entity.[34]

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[21] *See id.*
[22] *Id.*
[23] *Id.*
[24] Seafarers' Rights International, *supra* note 19, at 23.
[25] *Id.* at 24–28 (discussing slight differences in cabotage laws between countries such as Brazil, Portugal, Korea, Germany, Japan, France, the United States, and more).
[26] *Id.* at 24.
[27] *Id.*
[28] 46 U.S.C. § 55102–03 (2006) (Other codifications of coastwise laws apply to dredging and towing but are not discussed in this comment.); 46 U.S.C. §§ 12102, 12112 (2006).
[29] 46 U.S.C. § 55101 (noting that coastwise trade laws generally do not apply in American Samoa, Northern Mariana Islands, and U.S. Virgin Islands).
[30] *See* discussion *infra*, Part II(B)(i).
[31] *See* 46 U.S.C. §§ 12102 (2010), 12103, 12112 (2006), 8103 (2021).
[32] *See* 46 U.S.C. § 56101 (providing that a transfer of a vessel must be approved by the Secretary of Transportation, which is the department MARAD falls under); *see also* 46 U.S.C. § 2101(44) (defining "Secretary" as the Secretary of the department USCG falls under).
[33] *Id.*
[34] *See id.* § 12103.

The requirements for the coastwise endorsement are found within 46 U.S.C. Subtitle II – Chapter 121, titled "Documentation of Vessels."[35] Section 12112 provides the requirements for engaging in coastwise trade; namely, that the vessel must be "built in the United States."[36] Section 12103 outlines the eligibility of vessel owners, including that an owner must be a U.S. citizen, as well as the requirements for business entities to be considered citizens under the subtitle.[37]

1. U.S.-Built

In addition to § 12112, the agencies have codified regulations mandating that vessels must be manufactured in the United States.[38] These regulations require that "[a]ll *major components* of [the vessel's] hull and superstructure are fabricated in the United States; and [t]he vessel is assembled entirely in the United States."[39] The terms "hull" and "superstructure" are defined therein as the following:

> Hull means the shell, or outer casing, and internal structure below the main deck which provide both the flotation envelope and structural integrity of the vessel in its normal operations. In the case of a submersible vessel, the term includes all structural members of the pressure envelope. . . . Superstructure means the main deck and any other structural part above the main deck.[40]

Additionally, the USCG has provided detailed criteria on what should be considered part of the "hull" and "superstructure."[41] These regulations were further articulated in the recent Fifth Circuit decision *Diamond Services Corp. v. Curtin Maritime Corp*.[42]

2. U.S.-Owned and Operated

The next box that a U.S.-built vessel must check to qualify for a coastwise trade endorsement is that it must be owned and operated by a U.S. citizen.[43] However, not all U.S. citizens are individuals. Indeed, business entities frequently own and operate vessels, which raises the question: how does a business entity qualify as a U.S. citizen? 46 U.S.C. § 12103 outlines citizenship eligibility for trusts, partnerships, and corporations that own a vessel.[44] For a trust, each member must be a citizen of the United States, and the trust must be capable of holding a vessel's

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[35] *See generally* 46 U.S.C. Subtitle II, Chapter 121– "Documentation of Vessels."
[36] *Id.* §12112. Additionally, Section 8103 provides the requirements for manning a vessel—at least 75% of the crew must be U.S. citizens. *See* 46 U.S.C. § 8103.
[37] 46 U.S.C. § 12103; *see also* 46 U.S.C § 50501.
[38] *See* 46 C.F.R. §§ 67.3 (2017), 67.97 (2025), 67.177 (2009).
[39] 46 C.F.R. § 67.97 (2025) (emphasis added).
[40] 46 C.F.R. § 67.3 (2017).
[41] *Review Criteria for Steel Weight Components WRT U.S. Build and Foreign Rebuild Determinations,* UNITED STATES COAST GUARD (2021) (describing the components that may be present on the ship, such as cargo handling & stowage arrangements, independent tanks, appendages, hull castings, LNG shelters).
[42] Diamond Servs. Corp. v. Curtin Mar. Corp., 99 F.4th 722, 728 (5th Cir. 2024) (holding that a crane and spuds would not be considered part of the hull or superstructure because "the crane and spuds could be removed without affecting the operation as a vessel, the structural integrity of the hull, or the integrity of the superstructure").
[43] *See* 46 U.S.C. §§ 12102 (2010), 12103, 12112, 50501 (2006).
[44] 46 U.S.C. § 12103 (2006).

title.[45] For a partnership, each general partner must be a citizen of the United States, and the controlling interest must be owned by a citizen of the United States.[46] Finally, a corporation must be incorporated under the laws of the United States, the CEO and chairman of the board must be U.S. citizens, and the number of directors that are noncitizens must be less than "a minority of the number necessary to constitute a quorum."[47] Section 50501 further requires that 75% of the interest in the corporation be owned by citizens of the United States.[48] The intricacies of corporate ownership have prompted the agencies to issue regulations further clarifying corporate citizenship status.[49]

These clarifications are commonly referred to as "tracing rules."[50] Tracing rules were enacted to combat foreign companies that stack business entities to circumvent the Jones Act, codifying the Supreme Court's decision in *Central Vermont Transport Co. v. Durning* to that effect.[51] The agencies have issued their own tracing rule in the Code of Federal Regulations, but the general idea is the same:[52] each entity in a multi-tiered organization that has an interest in a vessel, or in another entity that owns a vessel, must comply with the Jones Act in its own right.[53] As such, the tracing rule requires the examination of each shareholder within each level of a multi-tiered entity.[54]

For example, imagine that a Jones Act-compliant U.S. wind energy company has just acquired all the stock in a smaller foreign wind energy company.[55] As a result of the acquisition, 25.1% of the parent company is now owned by non-U.S. citizens.[56] The parent company must self-report to MARAD that it is not Jones Act-compliant because it can no longer satisfy the 75% interest rule. Now that the parent company is noncompliant, it must stop engaging in coastwise trade.[57] As this illustrates, the tracing rule is a stringent requirement that cannot be satisfied even when exceeded by minute margins.[58] However, when a vessel and its owner and operator do

[45] *Id.* § 12103(b).
[46] *Id.*
[47] *Id.*
[48] 46 U.S.C. § 50501.
[49] *See* 46 C.F.R. §§ 67.39, 68.80, 68.105.
[50] *See* Constantine Papavizas, *Public Company Jones Act Citizenship*, 39 TUL. MAR. L.J. 383, 391 (2015).
[51] *See generally* 294 U.S. 33 (1935) (holding that a vessel owned by a Maine corporation that, in turn, was held by a Canadian corporation did not satisfy the Jones Act ownership requirements).
[52] 46 C.F.R. §§ 67.31 (2004), 221.3 (2013).
[53] *See* 46 C.F.R. § 67.31 ("[E]ach entity contributing to the stock or equity interest qualifications of the entity holding the title must be a citizen eligible to document vessels in its own right with the trade endorsement sought.").
[54] *See* Papavizas, *supra* note 50, at 391–92.
[55] This hypothetical stems from a case where the Third Circuit affirmed MARAD's "tracing rule." *See* Conoco, Inc. v. Skinner, 970 F.2d 1206, 1210–11 (3d Cir. 1992).
[56] *Id.*
[57] *Id.*
[58] *See id.* (This does not mean that MARAD's "tracing rule" should be used in place of the USCG rule. This type of transaction invokes MARAD's jurisdiction rather than the USCG. Although the court only affirmed the MARAD ruling, it pointed out that the USCG "tracing rule" is "entirely consistent with [the rule] adopted by the Coast Guard.").

comply with the Jones Act, the agencies will issue a coastwise endorsement, allowing the vessel's participation in coastwise trade.[59]

B. Wind Farms

1. Coastwise Trade Reaches Beyond the Coast

Once a vessel receives its coastwise trade endorsement, it is finally ready to operate in U.S. waters. But is all that truly necessary for constructing offshore wind farms, an activity that scarcely resembles port-to-port trade? Indeed, constructing offshore wind farms within 200 nautical miles[60] of the U.S. coastline is considered coastwise trade for Jones Act purposes.[61]

There are two main pieces of legislation that control the jurisdiction of offshore wind farm platforms: the Submerged Lands Act (SLA) and the Outer Continental Shelf Lands Act (OCSLA).[62] The SLA grants states ownership of the seabed and the natural resources that extend three geographic miles from the coastline of the state.[63] This zone comprises the state's territorial waters.[64] Additionally, the OCSLA governs the submerged lands within the Exclusive Economic Zone (EEZ),[65] excluding state territorial waters.[66] Through the OCSLA, Congress ordered that the outer continental shelf surrounding the United States is subject to federal jurisdiction and control.[67] Below, the shaded areas in Figure 1 show the EEZ of the United States, which serve as the locations for potential offshore wind farms.

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[59] *See* 46 U.S.C. § 12112.

[60] There are three separate varieties of miles in maritime law: a geographic mile, a nautical mile, and a statute mile. All three are based on different calculations and, as a result, are not the same length. A geographic mile is 6,087.27 feet, a nautical mile is 6,076.1, and a statute mile is 5,280 feet. *See* Papavizas & Morrissey, *supra* note 1, at 383 n.29.

[61] *See* 43 U.S.C. § 1333(1)(A)(iii) (2021) (extending federal jurisdiction to installations producing non-mineral energy resources permanently attached to the seafloor).

[62] Papavizas & Morrissey, *supra* note 1, at 383.

[63] *See* 43 U.S.C. §§ 1301(a)(2) (2025), 1311(a) (2022).

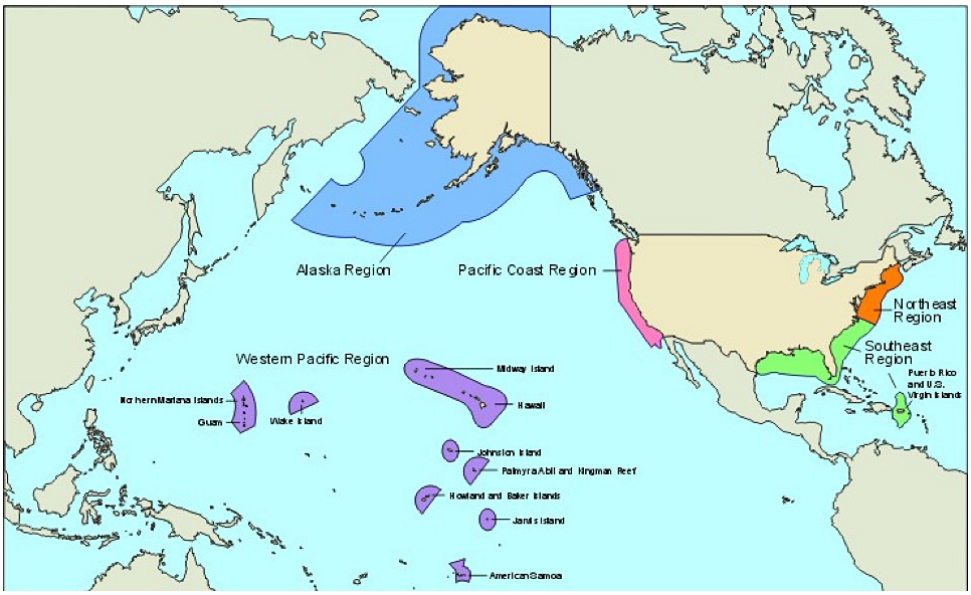
[64] *See* 43 U.S.C. § 1301(a). In the SLA, the ownership of the seabed is given to the states within their boundaries at the time that state became a member of the Union. This creates an exception to the ordinary three-mile zone for Texas and Florida as they claimed jurisdiction of three leagues of navigable waters when each became a state. *See* Papavizas & Morrissey, *supra* note 1, at 383–384.

[65] "The U.S. [EEZ] extends no more than 200 nautical miles from the territorial sea baseline and is adjacent to the 12 nautical mile territorial sea of the U.S., including the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty." Nat'l Ocean Serv., Nat'l Oceanic & Atmospheric Admin*., What is the EEZ?,* NOAA, https://oceanservice.noaa.gov/facts/eez.html (last visited Mar. 6, 2025); *see also* Figure 1, *infra*.

[66] 43 U.S.C § 1331(a)(1) (1986).

[67] *See* 43 U.S.C. § 1332 (1986).

Figure 1[68]



Relevant sections of the OCSLA provide federal jurisdiction over "installations . . . permanently or temporarily attached to the seabed . . . for the purpose of exploring for, developing, or producing resources, *including non-mineral energy resources*."[69] The Garamendi Amendment added the words "non-mineral energy resources" to the OCSLA.[70] The Amendment added only four words to the OCSLA's language, but the impact was monumental.[71] Previously, observers were left to speculate whether the Jones Act would apply to offshore renewable energy resources like wind farms.[72] Now, the Garamendi Amendment mandates that offshore wind turbines are considered a coastwise point under the Jones Act.[73]

In addition to the Garamendi Amendment's designation of offshore wind installations as coastwise points, transferring wind turbines from a U.S. port to the offshore installation is also considered coastwise trade because of the way "merchandise" is defined. Merchandise for the purposes of coastwise trade is defined in two separate statutes.[74] Section 1401(c) defines the term as "goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments as defined in section 5312 of Title 31,"[75] while § 55102(a) defines the same as "merchandise owned by the United States Government, a State, or a

[68] *See* Nat'l Oceanic and Atmospheric Admin, *supra* note 64.
[69] 43 U.S.C. § 1333(1)(A)(iii) (2021) (emphasis added).
[70] Press Release, Congressman John Garamendi, *Congress Passes Garamendi Amendment Requiring Jones Act Enforcement in Offshore Wind* (Dec. 11, 2020), https://garamendi.house.gov/media/press-releases/congress-passes-garamendi-amendment-requiring-jones-act-enforcement-offshore.
[71] *Id.*
[72] *See generally* Papavizas & Morrissey, *supra* note 1.
[73] *Id.*
[74] 19 U.S.C § 1401(c) (2016); 46 U.S.C. § 55102(a) (2006).
[75] 19 U.S.C § 1401(c) (2016).

subdivision of a State; and . . . valueless material."[76] The United States Customs and Border Patrol (CBP) restricted the statutory definitions of merchandise in clarifying that not everything on the vessel that fits those definitions will be considered merchandise.[77]

More specifically, the CBP articulates that "vessel equipment" is not included in the definition of merchandise.[78] Vessel equipment, in turn, is defined as "portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board."[79] In light of this definition, the CBP has clarified that all equipment that aids in the construction, maintenance, and operation of subsea infrastructure and surface production facilities is considered vessel equipment.[80]

In the context of offshore wind turbines, vessel equipment includes implements used by the vessel in carrying out the transportation and installation of the wind turbine.[81] Items that comprise part of a permanent offshore structure, such as wind turbine components intended to be installed and left in place, are generally considered merchandise.[82] Therefore, a WTIV transporting wind turbine components from a port in the United States to an offshore installation site would be engaging in coastwise trade. With the above understanding of how wind farms are regulated, it is important to assess the industry's current landscape before applying *American Cruise Lines* to its prospects.

2. The Current Landscape of the United States' Offshore Wind Market

The U.S. offshore wind market's growth has been stifled as a result of the country's political volatility and high cost of market entry.[83] Under the Biden Administration, the United States set an ambitious goal of installing thirty gigawatts of offshore wind energy by 2030.[84] This

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[76] 46 U.S.C. § 55102(a) (2006).

[77] *See What Every Member of the Trade Community Should Know About: The Jones Act,* U.S. Customs and Border Patrol, December 2024, 18–21 (detailing statutory and regulatory exceptions). The CBP is responsible for issuing rulings and enforcing Jones Act coastwise trade laws, including the transportation of merchandise. *See* 19 C.F.R. § 4.80(b) (2025).

[78] *Id.*

[79] U.S. Customs & Border Prot., *Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points*, Customs Bulletin and Decisions, Vol. 53, No. 45, at 87 (Dec. 2019) (illustrating several articles that constitute equipment).

[80] *Id.* at 88–89; *see also* discussion *supra* note 42 (discussing a recent case where crane and spuds of a vessel were not required to be U.S.-built).

[81] U.S. Customs & Border Prot., *supra* note 79, at 88–89.

[82] *Id.*

[83] *See generally* Austin Gae, Why Trump Blew Away Biden's Wind Energy Fantasy on Day 1, CENTER FOR ENERGY, CLIMATE, AND ENVIRONMENT AT THE HERITAGE FOUNDATION (Jan. 30, 2025), https://www.heritage.org/energy/commentary/why-trump-blew-away-bidens-wind-energy-fantasy-day-1; Ivan Penn et al., *What Ails Offshore Wind: Supply Chains, Ships and Interest Rates*, N.Y. TIMES (Dec. 11, 2023), https://www.nytimes.com/2023/12/11/business/energy-environment/offshore-wind-energy-east-coast.html# [hereinafter Penn, What Ails Offshore Wind].

[84] MATT SHIELDS ET AL., THE DEMAND FOR A DOMESTIC OFFSHORE WIND ENERGY SUPPLY CHAIN, 1 (2022).

led to an increased interest in the market and the introduction of several significant investments in the supply chain, including project development, turbine component manufacturing, and installation vessel manufacturing.[85] However, installing wind turbines has slowed due to rising interest rates, among other complications.[86] Now, development in the wind energy sector has come to a grinding halt due to a memorandum issued by President Donald Trump.[87] In his memorandum, President Trump cited several consequences of wind projects, "including negative impacts on navigational safety interests, transportation interests, national security interests, commercial interests, and marine mammals."[88]

Because the U.S. market for offshore wind farms has many complications, the supply chain is significantly underdeveloped, especially when it comes to vessels necessary for constructing wind turbines.[89] There is currently only one Jones Act-compliant WTIV under construction,[90] and the United States lacks an adequate number of associated vessels.[91] The consequences of using noncompliant vessels are varied.[92] Vessel owners may either face increased building costs and timelines[93] or, if the owner attempts to engage in coastwise trade without an endorsement, risk the seizure of the wind turbine components under 46 U.S.C § 55102.[94] Indeed, among the principal reasons for the fleet being underdeveloped are the excessive costs and lengthy timelines associated with building Jones Act-compliant vessels. Another significant challenge for vessel owners involves keeping up with the rapid technological advancement of wind turbines and their installation methods.[95]

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[85] *See id.* at 1–2, Table 1.

[86] *See* Penn, What Ails Offshore Wind, *supra* note 83 (noting that the COVID-19 Pandemic disrupted supply chains and lead to increased costs in transportation and construction of offshore wind farms).

[87] *See* Gae, *supra* note 83.

[88] Memorandum on Temporary Withdrawal of All Areas on the Outer Continental Shelf From Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects, 90 Fed. Reg. 8363, 8363 (January 20, 2025) [hereinafter Withdrawal Memorandum]. Notwithstanding the current halt on leasing for offshore wind projects, this Comment will analyze the possibilities of building Jones Act-compliant vessels needed to construct offshore wind farms.

[89] *See* Shields et al., *supra* note 84, at 36.

[90] *See First U.S.-Built Wind Turbine Installation Vessel Starts Sea Trials*, MARINE LINK (Feb. 20, 2025), https://www.marinelink.com/news/first-usbuilt-wind-turbine-installation-522592 [hereinafter First U.S.-Built WTIV].

[91] *See* Shields et al., *supra* note 84, at 36 (detailing the shortage of Jones Act-compliant cable laying vessels, service operation vessels, crew transfer vessels, and heavy lift vessels).

[92] *See infra*, text accompanying notes 106–110 (describing the Jones Act-workarounds of "feedering" and operating from a foreign port); *see also* 46 U.S.C. § 55102(c).

[93] *See infra*, text accompanying notes 106–110 describing the Jones Act-workarounds of "feedering" and operating from a foreign port).

[94] 46 U.S.C. § 55102(c).

[95] Shields et al., *supra* note 84, at 36; *see also* Ken Goh, *Current Developments of Wind Turbine Installation Vessels*, KNUD E. HANSEN (2022), https://www.knudehansen.com/wp-content/uploads/2022/05/CURRENT-DEVELOPMENTS-OF-WIND-TURBINE-

The United States' sole WTIV costs around $715 million and has taken five years for the project to near completion.[96] Consider these costs with the fact that, in the last thirty years, standard blades on offshore wind turbines have increased in size by more than 200 yards;[97] this rapid growth is a result of companies seeking to maximize the energy output of each turbine. In fact, the improvement of turbine components is expected to continue for at least a decade before leveling out.[98] As turbine components continue to grow, so too must WTIVs.[99] This means that WTIV owners must plan ahead when building their vessel to accommodate the next generation of wind turbines.[100]

However, "the growth of [offshore wind turbines] has been so rapid that within 10 years many WTIVs have been unable to tender for construction contracts due to . . . crane load and height limitations."[101] This phenomenon has led to many WTIVs being limited to performing maintenance on existing wind turbines.[102] Even if companies invest in building a WTIV, the vessel could be obsolete soon after it is launched.[103] Because of these conflicts, the U.S. fleet has fallen behind the curve, while the U.S. maritime community faces a dilemma—either practice "feedering" or operate from a foreign port.[104] Each method presents its own variety of challenges.[105]

"Feedering" has become a predominant method used to construct offshore wind farms in the United States because it allows wind farm companies to evade the costly conditions of the Jones Act.[106] Using this method, turbine components are loaded onto several barges that are ferried out to the installation's location by coastwise-endorsed tugboats, instead of one large, specialized

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INSTALLATION-VESSELS-by-KNUD-E.-HANSEN.pdf (detailing the rate of development between WTIVs and wind turbines).

[96] First U.S.-Built WTIV, *supra* note 90.

[97] *See* Goh, *supra* note 95.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See* Goh, *supra* note 95.

[103] *Id.*

[104] *See* Rhonda Moniz, *Offshore: Feedering for the Win(d)*, MARINE LINK https://www.marinelink.com/news/offshore-feedering-wind-518204; *See* Ivan Penn, *Offshore Wind Farms Show What Biden's Climate Plan Is Up Against*, N.Y. TIMES, https://www.nytimes.com/2021/06/07/business/energy-environment/offshore-wind-biden-climate-change.html (Oct. 13, 2021) [hereinafter Penn, Biden's Climate Plan]; Peter Ziobrowski, *Bigroll Beuafort*, Halifax Shipping News, https://halifaxshippingnews.ca/2020/04/due-tomorrow-bigroll-beaufort.html (A cargo ship was loaded with turbine components for the Coastal Virginia Offshore Wind pilot project in Germany. The vessel then made a transatlantic journey to Halifax, Canada where the components were loaded onto a foreign WTIV. Finally, the foreign WTIV brought the components to their final destination off the coast of Virginia and installed them.).

[105] *See* Colin Grabow, *Recent Articles Highlight Jones Act Contributions to Offshore Wind Difficulties*, CATO INSTITUTE, https://www.cato.org/blog/jones-act-contributes-offshore-wind-growing-pains [hereinafter Grabow, Offshore Wind Difficulties]; *Feedering Solution*, CROWLEY, https://www.crowley.com/lp/feedering-solution/; Penn, Biden's Climate Plan, *supra* note 106.

[106] *See* Moniz, *supra* note 104.

vessel leaving from port with all the components.[107] On location, there is a foreign WTIV waiting to install the components.[108] The CBP has issued multiple ruling letters detailing that a foreign WTIV anchored to the outer continental shelf is considered a coastwise point.[109] Further, ruling letters have held that constructing wind turbines does not constitute coastwise transportation "provided any movement of merchandise is effected exclusively by the crane and not by any movement of the vessel."[110] Thus, there is no unendorsed coastwise trade issue.

However, the disadvantages are substantial.[111] When using feeder vessels, there will always be an "at sea heavy lift" to transfer the components from the feeder vessel to the WTIV.[112] This method "increases the risk of property damage, potential vessel casualty and associated marine pollution, and personal injury."[113] While operating from a foreign port decreases these safety risks, it is an inefficient way of building wind turbines.[114]

Figure 2[115]

Operating out of a foreign port may seem like an effective alternative to Jones Act restrictions, but the WTIVs have to travel back to the distant port after every turbine they install.[116] The foreign port method was used during the construction of the Coastal Virginia pilot project, the

[107] *Id.*
[108] *Id.*
[109] *See HQ 115217*, CUSTOMS AND BORDER PATROL (Dec. 7, 2000). Recall that the CBP is responsible for ruling and enforcing Jones Act cabotage laws.
[110] *HQ H338702*, CUSTOMS AND BORDER PATROL (Aug. 13, 2024).
[111] *See* Gerald Morrissey & Vincent Foley, *U.S. Offshore Wind Growth Brings Risk and Opportunity*, 6 MARINE INSURER 26, 28 (2021).
[112] *See id.* (detailing an "at sea heavy lift" is when the components are lifted from the feeder barge by the WTIV).
[113] *Id.*
[114] Penn, Biden's Climate Plan, *supra* note 104.
[115] From left to right, a feeder barge loaded with turbine components being brought to their installation point by a coastwise endorsed barge, and a foreign WTIV assembling a turbine at an installation. Moinz, *supra* note 104.
[116] *See* Penn, Biden's Climate Plan, *supra* note 104.

largest offshore wind project in the United States.[117] Using this method, the WTIV had to travel 800 miles from a Canadian port to the installation location off the coast of Virginia.[118] As a result, the installation took one year to construct rather than merely a few weeks, as it would have if a coastwise-endorsed WTIV operated out of a Virginia port.[119] These inefficiencies "lengthen[] project timelines and add[] costs."[120]

Therefore, a U.S.-based company that wishes to enter the offshore wind market tomorrow faces three underwhelming options for construction: (1) feedering, (2) the foreign port method, or (3) paying upwards of $700 million to build a Jones Act-complaint WTIV. The *American Cruise Lines* decision, however, may serve as a way to cut through these ignominious inefficiencies and massive monetary undertakings presented by the Jones Act restrictions.

C. *American Cruise Lines v. United States*

The restrictions of the Jones Act have long been thought to preclude foreign intervention in coastwise trade. Yet, *American Cruise Lines* refuted this belief, when the Second Circuit affirmed a MARAD ruling allowing Viking River Cruises ("Viking"), a Swiss company, to expand into the Mississippi River cruise market.[121]

Viking entered into a "unique arrangement" with a U.S. company, River 1, LLC, in which "River 1 would construct a cruise ship which [sic] Viking would then charter for cruises on the Mississippi River."[122] To comply with U.S. cabotage laws, Viking and River 1 sought to structure the charter as a time charter and submitted the agreement to MARAD for approval.[123] MARAD ultimately issued a ruling letter that the agreement was properly structured as a time charter and permissible under the Jones Act.[124] A brief background on charter agreements is essential to understanding the crux of *American Cruise Lines*.

A "charter party," or charter agreement, is a "contract by which the owner of a ship [leases] it to others for use in transporting a cargo."[125] There are several types of charters that can be

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[117] *See id.*; *Biden-Harris Administration Approves Largest Offshore Wind Project in the Nation*, U.S. DEPT. OF THE INTERIOR, https://www.doi.gov/pressreleases/biden-harris-administration-approves-largest-offshore-wind-project-nation (last visited Feb. 2, 2026).
[118] *See* Penn, Biden's Climate Plan, *supra* note 104.
[119] *See id.*
[120] Grabow, Offshore Wind Difficulties, *supra* note 105.
[121] *See* Am. Cruise Lines v. United States, 96 F.4th 283, 285–86 (2d Cir. 2024).
[122] *Id.* at 284 (detailing River 1 is "an American company and a subsidiary of Edison Chouest Offshore" (ECO)).
[123] *Id.* at 285.
[124] *Id.* at 285; *see also* 19 C.F.R. 177.1 (stating that a ruling letter is issued by the appropriate office of the CBP in response to a written request by interested parties "with respect to a specifically described transaction"); *see also* 19 C.F.R. 177.9 (Once a ruling letter is issued, it is binding on the CBP and party that submitted the request. It should not be assumed that the "ruling will be applied in connection with any transaction other than the one described in the letter.").
[125] The Editors of Encyclopedia Britannica, *Charter Party*, BRITANNICA, https://www.britannica.com/topic/charter-party (last visited March 27, 2025).

created, but the two most common are "time charters" and "bareboat charters."[126] A time charter is an agreement whereby the vessel owner provides a fully equipped vessel to the charterer for a defined period or purpose, such as transporting cargo.[127] Although the charterer does not operate the vessel, they do determine the destination to which the cargo will travel.[128] By contrast, a bareboat charter relinquishes full operation and liability from the owner of the vessel to the charterer.[129] It is as close to a transfer of ownership as you can get without an actual sale.[130]

> The [bareboat] charterer is responsible for providing the crew, managing the vessel, maintaining the vessel, providing fuel, supplies, and provisions for the vessel, and commanding and navigating the vessel. The [bareboat] charterer is responsible for the seaworthiness of the vessel. Services performed on board ship are primarily for charterer's benefit, and the charterer must supply essential operating expenses.[131]

An easy way to recognize the difference between the two types of charters is to think of them in terms of cars. A time charter is analogous to calling an Uber. A car will show up when called and take the client to their destination. The client is not responsible for insuring, maintaining, or fueling the car, nor are they liable for accidents that occur while in the car, despite exerting some form of control over the car. A bareboat charter, on the other hand, is analogous to leasing a car. Although the lessee does not own the car, they have complete control over it for the duration of the lease. They are responsible for car insurance, maintenance and repairs, fueling the car, and accident liability.

The type of charter created is dispositive because "MARAD regulations provide for a standing blanket approval for most forms of charter agreements," but not for bareboat charters.[132] American Cruise Lines (ACL), the petitioner, sued MARAD and Viking under the Administrative Procedure Act (APA), alleging that the agreement constituted an impermissible bareboat charter.[133] Because ACL brought the suit under the APA, the court's review of it was "narrow and deferential."[134] MARAD's ruling could only be reversed if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[135]

ACL asserted that the charter converted into a bareboat charter because "(1) the agreement requires Viking to absorb certain standard operating costs and business risks, (2) Viking may direct that the vessel master be removed, and (3) the financing for the ship's construction gave Viking

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[126] *See generally* Cecily Fuhr, et al., 80 C.J.S. Shipping § 92 (explaining that bareboat charters are also referred to as demise charters, and the two can be used interchangeably).
[127] *Id.* at § 93.
[128] *Id.*
[129] *Id.* at § 92.
[130] *See id.*
[131] *See* Fuhr et al., *supra* note 128, at § 92 (internal citations omitted).
[132] Am. Cruise Lines v. United States, 96 F.4th 283, 285 (2nd Cir. 2024); 46 C.F.R. § 221.13(a)(1)(iii).
[133] *See Am. Cruise Lines*, 96 F.4th at 285–86 (stating American Cruise Lines had standing to challenge MARAD's ruling because increased competition in the U.S. river cruise market from Viking was an injury, and a favorable decision may alleviate that injury).
[134] *Id.* at 286 (quoting Kakar v. U.S. Citizenship & Immigr. Servis., 29 F.4th 129, 132 (2d Cir. 2022)).
[135] *Id.*

impermissible equity in the ship itself."[136] The court found that the "operating costs and business risks" assumed by Viking mostly related to liability from passenger misconduct, while "the business risks associated with maritime activities remain[ed] with River 1."[137] Additionally, the court ruled that Viking's ability to have the vessel master removed did not rise to the level of control over the vessel required to constitute a bareboat charter.[138] The court reasoned, "Viking may only [remove the captain] in the context of unsatisfactory performance, and Viking has no power to direct who that replacement should be."[139]

Regarding ACL's final "impermissible equity" argument, the court simply deferred to MARAD's decision as a "reasonable interpretation of its own regulations."[140] In the agreement, Viking pre-paid the charter with River 1, which financed the ship's construction.[141] As ACL argued, this "gave Viking impermissible equity in the ship itself."[142] In essence, ACL's impermissible equity argument invoked the tracing rule as the reason the charter should be barred.[143] However, the Second Circuit affirmed MARAD's ruling, adding:

> We do not suggest today that, as a matter of law, charter arrangements such as this one are per se legal under the . . . Jones Act provisions. We merely conclude that, based on the record before it, MARAD did not act in an arbitrary and capricious manner in confirming that this particular arrangement constituted a valid time charter and was not an impermissible transfer of control of a vessel to a non-citizen.[144]

Given the Second Circuit's deliberate inclusion of the final paragraph of the opinion, one critical question remains: how should a court rule on these types of charters as a matter of law?

III. Implementing *American Cruise Lines*

The agencies and Article III courts exercising admiralty jurisdiction should rule that agreements structured like the one in *American Cruise Lines* do not violate the Jones Act, particularly in the offshore wind farm context. These agreements conform to Jones Act coastwise trade laws while lowering the cost of market entry. U.S. coastwise trade laws were designed to protect domestic maritime industries; however, these protections have inadvertently raised the price for U.S.-owned offshore wind energy production companies wishing to enter the market.[145] As offshore wind energy interests continue to struggle, there has been significant discourse

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[136] *Id.* at 288.
[137] *Id.* at 289.
[138] *See Am. Cruise Lines*, 96 F.4th at 287 (citing *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 676 (2d Cir. 1971)).
[139] *Id.* at 289.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 288.
[143] *See* 46 C.F.R. 67.31.
[144] *Am. Cruise Lines*, 96 F.4th at 290.
[145] Freight Right, *Understanding the Jones Act: The America-First Cabotage Policy*, https://www.freightright.com/news/understanding-the-jones-act-the-america-first-cabotage-policy, (June 17, 2020).

regarding the shortcomings of the Jones Act and possible reforms that would lessen its unintentional burdens.[146]

Some legal commentators have proposed changes to the Jones Act ranging from a complete repeal of U.S. cabotage laws to the relaxation of provisions that have the most adverse effects.[147] Additionally, nonlegislative solutions include issuing Jones Act waivers for offshore renewable energy development and granting government subsidies for the construction of associated vessels.[148] However, none of these solutions are perfect. Some are not wholly aligned with the goal of cabotage laws to protect the domestic maritime industry.[149] Others are subject to the policies of the president and may change drastically with each new administration.[150] In the face of constraints on producing coastwise-endorsed vessels, domestic and foreign companies have spent years attempting to circumvent cabotage restrictions.[151]

One of the most evident problems created by U.S. cabotage laws is the substantial financial burden imposed on domestic companies for the construction, ownership, and operation of vessels.[152] The estimated cost of a dedicated WTIV is $500–700 million, and these vessels take upwards of three years to construct.[153] Upon a deeper dive into this financial barrier plaguing offshore wind farm development and the solutions posed, a recurring theme emerges: the attempt to strike a balance between protecting domestic industry and promoting efficiency through the use of cheaper foreign actors. This problem does not stop at wind farm development; rather, it extends to the development and evolution of all coastwise trade.[154] The *American Cruise Lines* decision finally offers a reasonable framework for the construction of coastwise eligible vessels—an alternative solution that should be embraced to mitigate the economic constraints associated with the Jones Act's protectionist measures.

A. The Second Circuit's Alternative Solution

Because the court did not examine the substance of the agreement, an analysis of MARAD's ruling letter is the necessary starting point. It is important to recall that the procedural path of *American Cruise Lines* placed the Second Circuit in a peculiar position. ACL brought the suit under the APA as a challenge to a final ruling letter issued by MARAD,[155] which meant the

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[146] Gabriela Rodriguez, *The Ghosts of Navies Past: Rebooting the Jones Act for the 21st Century*, NISKANEN CTR., (Jan. 17, 2023).
[147] *See generally* Colin Grabow, *No Shortage of Options for Reforming the Jones Act*, CATO INST. (Feb. 2, 2023, 11:34 AM) https://www.cato.org/blog/no-shortage-options-reforming-jones-act [hereinafter Grabow, Reforming the Jones Act].
[148] *See generally* Chad Thornton, *Wave Goodbye to the Jones Act: Why a Waiver of the Jones Act Should and Can Be Granted for Offshore Wind Farm Installation*, 11 LSU J. OF ENERGY L. & RES. 247, 252 (2022).
[149] *See* Freight Right, *supra* note 145.
[150] *See* Gae, *supra* note 83; *see also* discussion *supra* Part II(B)(i).
[151] *See* discussion *supra* note 7.
[152] *See* Grabow, Reforming the Jones Act, *supra* note 147.
[153] Shields et al., *supra* note 84, at 36; *see also* Huan, *supra* note 13.
[154] Grabow, Reforming the Jones Act, *supra* note 147.
[155] *See* discussion *supra* Part II(C).

Second Circuit had to show great deference to the agency's decision.[156] Explaining the level of deference due, the court stated that an agency's decision will only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[157]

In issuing its final action, MARAD rebutted all public comments arguing that the agreement should be a bareboat charter.[158] Some legal commentators argued that indemnity provisions within the agreement indicated improper control.[159] MARAD responded that Viking would not have improper control because it was not "absorbing the normal risk of vessel ownership and operation."[160] Following its review of the proposed charter, MARAD also listed numerous responsibilities that would remain with River 1.[161] These responsibilities included indemnification agreements between River 1 and Viking, wherein River 1 agreed to indemnify Viking.[162] The court reasoned that these agreements were in line with responsibilities typical of time charters.[163] Paramount among the responsibilities listed was that the vessel master retained control over the vessel, coupled with the fact that River 1 was solely responsible for procuring and employing the vessel master.[164] MARAD concluded by determining that the advance charter payments were not a form of impermissible control.[165] MARAD explained that Viking would not exceed the 25% ownership limit on the vessel even if the advance payments were considered an equity payment.[166] In addition to MARAD's ruling, the Second Circuit's decision further clarified the issues in the charter agreement.[167]

On appeal, ACL focused on the same two arguments addressed in the ruling letter to support their position:[168] that Viking was allowed too much operational and business control of

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[156] *See* Am. Cruise Lines v. United States, 96 F.4th 283, 286 (2d Cir. 2024) (citing Kakar v. U.S. Citizenship & Immigr. Servs., 29 F.4th 129, 132 (2d Cir. 2022)).

[157] *Id.* at 286 (quoting Kakar v. U.S. Citizenship & Immigr. Sers., 29 F.4th 129, 132 (2d Cir. 2022)); 5 U.S.C. § 706(2)(A) (1966).

[158] *See MARAD's Response to Comments and Final Action Under Section 3502(B) of the National Defense Authorization Act for Fiscal Year 2021 Regarding the ECO Time Charter*, U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION, https://www.maritime.dot.gov/sites/marad.dot.gov/files/2022-03/River%201%2C%20LLC%203502%28b%29%20Final%20Action.pdf. [hereinafter ECO Time Charter Final Action].

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.*

[163] *Compare* ECO Time Charter Final Action, *supra*, note 158 (stating that River 1 would be responsible for the crewing, insuring, maintenance and repair of the vessel, and procuring bunkers) *with* discussion *supra* Part II(C) (detailing the differences of liability in time charters and bareboat charters).

[164] *See* ECO Time Charter Final Action, *supra* note 158.

[165] *See id.*

[166] *See id.*

[167] *See* Am. Cruise Lines v. United States, 96 F.4th 283, 287–88 (2d Cir. 2024).

[168] *Id.* at 288. (There were additional procedural arguments concerning MARAD's decision making process made by American Cruise Lines, but the arguments were quickly refuted by the court).

the vessel and that the advance payments constituted impermissible equity in the vessel itself.[169] The court dispelled the argument that the charter agreement granted Viking too much control, relying on MARAD's explanation of the distribution of liability and operating costs.[170] The court emphasized the fact that River 1 was responsible for crewing the ship, stating, "'the presence of [the ship owner's] crew on board is very strong presumptive evidence' that an agreement is a time charter."[171] Nevertheless, the bulk of ACL's argument was directed at the advance charter payment.[172]

ACL contended that the preliminary payment from Viking to River 1 was not an "Advance Charter Hire Payment" constituting a capital contribution, as MARAD determined, but rather an impermissible equity contribution that granted Viking ownership rights exceeding the 25% statutory threshold for coastwise trade.[173] ACL claimed that the payments "went straight to the banks[] and never touched River 1's hands."[174] ACL further asserted that, in a true advance payment, a good or service is provided in return for payment, whereas in this case "the payments are instead 'earned' just by the passage of time," regardless of the performance of River 1.[175] ACL made this argument because Viking could not terminate the charter except for the total loss of the vessel.[176]

This argument is paradoxical. The "good or service" that River 1 provided Viking is the use of a coastwise-endorsed vessel for the length of the charter. The legal outcome would be the same if the advance payment had been for a vessel that was already constructed. The application of a deferential standard of review coupled with a well-crafted charter agreement resulted in the court properly upholding MARAD's legal interpretation.

Notwithstanding the above, to say that the court was correct in ruling for MARAD does not necessarily mean that the court struck the correct balance between domestic protection and foreign assistance. The parties to the charter agreement at issue in *American Cruise Lines* essentially found a way around Jones Act protections. On its face, the agreement provided a U.S. vessel to a U.S. company built by a U.S. shipyard. Once the charter with Viking expires, River 1 could use the vessel however it pleases. Is this not the essential goal of cabotage laws—"to promote and enable American ship-making"?[177] The question remaining is whether the evasion of cabotage protections *should* be encouraged because it benefits U.S. maritime industries, despite its potential threats to U.S. national security.

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[169] *Id.*; *see also* Brief for Petitioner, 32–33, Am. Cruise Lines, 96 F.4th 283 (2d Cir. 2024) (No. 22-1029) [hereinafter Brief for Petitioner] (arguing that River 1 passed all "operating, maintaining, and repairing" costs to Viking through the charter agreement).
[170] *See Am. Cruise Lines*, 96 F.4th at 289.
[171] *Id.* at 287 (quoting Hansen v. E.I. Du Pont de Nemours & Co., 33 F.2d 94, 96 (2d Cir. 1929)).
[172] *See generally* Brief for Petitioner, Am. Cruise Lines, *supra* note 169.
[173] *See id.* at 39–45.
[174] *Id.* at 40.
[175] *Id.* at 44–45.
[176] *Id.* at 44.
[177] *See* Freight Right, *supra* note 145.

B. Balancing Domestic Protection with Foreign Intervention

Whether *American Cruise Lines* provides a solution or creates a problem is subject to one's view of U.S. cabotage law as a whole. On one hand, some legal commentators believe that the decision creates an avenue for foreign companies to enter into a previously untapped market by "expand[ing] their operations to the United States using [similar] charter arrangements."[178] On the other hand, the decision may create an opportunity for domestic shipping companies to bolster their fleet of coastwise eligible vessels through foreign investment.

Without intending to do so, MARAD and the Second Circuit have created a mutually beneficial solution to the Jones Act's overprotection problem.[179] Through charter agreements similar to the one in *American Cruise Lines*, foreign investment will lower the cost of building a coastwise-endorsed vessel.[180] Although the decision will benefit U.S. companies, there is a risk that foreign companies may try to overstep the bounds of the agreement. Policing this problem can be done either proactively or retroactively.

A proactive approach would require the agencies to issue regulations providing definitive guidance for prefinancing charters, specifically addressing charters for vessels not yet constructed. The agencies have already issued some regulations on prefinancing vessels, but they are limited to commercial fishing vessels.[181] ACL even relied on these regulations to argue against MARAD's final decision.[182] If the agencies issue broader prefinancing regulations, they will be able to control foreign investment in domestic maritime industries. As such, this method would prepare the agencies for companies looking to take advantage of *American Cruise Lines*.

However, any regulations issued by the agencies would likely restrict the scope of prefinancing because the current framework permits the agreement found in *American Cruise Lines*. By approving that charter agreement, MARAD has endorsed a significant amount of foreign control over a U.S. vessel. The only logical reason for further rulings on this subject is to establish limits on what MARAD has already allowed. This comports with the protectionist nature of the Jones Act,[183] which is stifling the development of critical maritime industries like offshore wind farms.[184] A better approach is to act retroactively, allowing for a case-by-case determination of whether a charter aligns with the Congressional intent of the Jones Act.

Acting retroactively would shift control from the agencies and empower the judiciary to shape the future of cabotage laws. The effect of this shift in oversight would temper MARAD's blanket approval of a foreign company time chartering coastwise-endorsed vessels.[185] Using the *American Cruise Lines* decision as it stands now, companies can enter into similar time charters

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[178] John Imhof Jr., *Maritime Cases to Watch: Second Circuit Decision in American Cruise Lines v. United States No. 22-1029, 2024 U.S. App. LEXIS 6233*, GLOB. TRANSP. FIN. NEWSL. 3, 5 (2024).
[179] *See* Freight Right, *supra* note 145.
[180] *See* ECO Time Charter Final Action, *supra* note 158.
[181] *See* 46 C.F.R. § 356.45 (2025).
[182] *See* Am. Cruise Lines v. United States, 96 F.4th 283, 289 (2024) (refuting this argument due to the deference the APA affords to agencies for reasonable interpretations of their own regulations).
[183] *See* Freight Right, *supra* note 145.
[184] *See* Penn, What Ails Offshore Wind, *supra* note 83.
[185] 46 C.F.R. § 221.13(a)(1)(iii).

in good faith without first seeking approval from MARAD.[186] If challenged under a retroactive regulatory scheme, however, such agreements would proceed directly to a court, bypassing agency review and eliminating any standard of deference. Therefore, a court could evaluate the charter in light of the congressional intent behind the Jones Act. This would serve as a potent exercise of admiralty jurisdiction where an Article III court operates at its most powerful, allowing for flexible and individualized examinations as opposed to blanket regulations enacted before agreements are formed.[187]

Judicial oversight over time charters would empower courts to weigh multiple considerations while ensuring that agreements exceeding the scope of the Jones Act are quashed. Typically, when Article III courts exercise admiralty jurisdiction, they are allowed to shape general maritime law.[188] However, courts are not allowed to do so when Congress has legislated on point.[189] This doctrine is commonly referred to as "displacement."[190] In this case, the Jones Act would not displace federal courts from shaping general maritime law because Congress has not specifically enacted restrictions governing charter agreements.[191] The Jones Act has thus created "windows that allow for the judiciary to fill in these gaps with its own general maritime law.[192] Through this method, the underlying intent of the Jones Act would be preserved, and courts would have discretion to decide how fierce or relaxed the protections would be. Charters like the *American Cruise Lines* agreement will help fuel the growth of U.S. maritime industries, consistent with the intent of the Jones Act. Therefore, allowing the courts to regulate these agreements is the most suitable approach.

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[186] *See generally Am. Cruise Lines*, 96 F.4th at 289–90 (emphasizing that companies can still use the final action as persuasive authority to make similar agreements).

[187] *See* Noe S. Hamra & Zachary R. Cain, *Maritime Law: The Gateway to Federal Court: Admiralty Jurisdiction and Limitation of Liability*, 22 PRATT'S ENERGY L. REP. 181, 182 (explaining what types of contracts fall under Admiralty Jurisdiction and stating that "charter parties are considered 'quintessential maritime contracts'").

[188] *See* U.S. CONST. art. III, § 2, cl. 1 (granting "Judicial Power … to all Cases of admiralty and maritime Jurisdiction").

[189] *See* Dutra Group v. Batterton, 588 U.S. 358, 374 (2019) (holding that the Court's "overriding objective is to pursue the policy expressed in congressional enactments").

[190] Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 630 (1978) (holding that the Death on The High Seas Act's limitation of pecuniary damages prohibits recovery for "loss of society" under general maritime law).

[191] *See* 46 U.S.C. §§ 12103, 12112 (2006) (restricting ownership and construction of vessels).

[192] Here, "window" is a metaphor for the gaps left in federal statutes that judicially made general maritime law can "fit through" to clarify and support the statutes.

> In determining whether statutes leave room for judge-made law, courts sometimes confront a narrow "window." Judge-made law may be fashioned when Congress has provided "enough federal law" so that a legislative purpose is clear, but not when Congress has provided so much federal law that its detail or comprehensiveness would be undermined by common law supplements.

John J. Costonis, *The BP B1 Bundle Ruling: Federal Statutory Displacement of General Maritime Law*, 38 TUL. MAR. L.J. 1, 37 (2013) (quoting Matter of Oswego Barge Corp., 664 F.2d 327, 339 n. 15 (2d Cir. 1981) (internal citations omitted) (quoting United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960)).

C. Converting to Offshore Wind Farms

The *American Cruise Lines* decision concerned the construction and operation of a river cruise vessel, not a WTIV.[193] Viking's investment in a river cruise makes financial sense because the agreement assigned Viking responsibility for setting itineraries and managing passengers and ticketing.[194] Thus, Viking will have a return on its investment as long as passengers keep booking cruises. The difference in investing in a river cruise and a WTIV poses a question that may signal foreign companies' willingness to do so: will they invest in an untapped market or does the risk outweigh the reward?

Foreign companies can take one of two routes to enter the U.S. market. Foreign companies can either (1) build the wind turbines, continue to operate them, and collect a stream of revenue from energy sales; or (2) build WTIVs and collect a lump sum for each turbine or wind farm built. However, no venture is ever guaranteed success, and either route presents its own set of challenges.[195] The most obvious risk for foreign companies is the cost associated with entering the market where failure to turn a profit could result in the loss of hundreds of millions of dollars.[196] Other factors that may deter companies from venturing into the U.S. market include the political volatility of renewable energy development and the complex and lengthy regulatory process.[197]

1. Investing in Wind Energy

Companies must first navigate a complex bureaucratic landscape and invest millions of dollars before they can even break ground.[198] The Bureau of Ocean Energy Management (BOEM), which regulates energy projects on the outer continental shelf, prescribes four distinct phases for authorizing wind energy leases: planning and analysis, lease issuance, site assessment, and

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[193] *See* Am. Cruise Lines v. United States, 96 F.4th 283, 285 (2nd Cir. 2024).

[194] Brief for Respondents at 23, Am. Cruise Lines v. United States, 96 F.4th 283 (2d Cir. 2022) (No. 22-1029) [hereinafter Brief for Respondents].

[195] *See* First U.S.-Built WTIV, *supra* note 90 (reporting the final cost of the first Jones Act-compliant WTIV to be $715 million); *see also* Business Norway, *Cost of Wind Turbines* (June 13, 2025), https://businessnorway.com/articles/cost-of-wind-turbines (detailing that constructing and operating offshore wind farms can cost in the billions) [hereinafter Cost of Wind Turbines].

[196] *See* Shields et al., *supra* note 84, at 36 (estimating the cost of a WTIV to be between $250 and $500 million); *see also* First U.S.-Built WTIV, *supra* note 90 (reporting the final cost of the first Jones Act compliant WTIV to be $715 million); *see also*, Bureau of Ocean Energy Mgmt., FY 2025 Bureau Highlights (last visited September 7, 2025) https://www.doi.gov/sites/default/files/documents/2024-03/fy2025-508-bib-boem.pdf (stating that 2023 offshore wind lease sales in California "generated more than $757 million in revenue for the U.S. Treasury").

[197] *See* discussion *supra* Part II(B)(ii) (detailing the drastic changes in developing wind energy between the Biden and Trump administrations); *see also* Tade Oyewunmi, *The Regulatory State and the Emerging Offshore Wind Energy Market in the U.S.*, 13 ARIZ. J. OF ENV'T L. & POL'Y, 1, 14–15 (2022) (describing that the regulatory process has four separate phases and can take up to 11 years) [hereinafter Oyewunmi, Emerging Offshore Wind Energy]; *see also* Penn, What Ails Offshore Wind, *supra* note 83 (listing several projects that have been canceled or delayed in recent years).

[198] Oyewunmi, Emerging Offshore Wind Energy, *supra* note 197; *see also* Cost of Wind Turbines, *supra* note 195.

construction and operations.[199] The four project phases can take around eleven years to complete[200]—a timeline that could easily be extended by administrative changes to renewable energy commitments.[201] Only after the leasing process is complete may the wind farm owner finally begin construction.

The construction of wind farms entails more than merely building wind turbines.[202] This step also includes providing the infrastructure necessary to transfer the energy produced by turbines to the shore and costs around $880 million.[203] Once installed, the annual operating expenses for a wind farm ranges from $100 million to $300 million.[204] Once the wind farm concludes its operational lifespan, the decommissioning phase can cost roughly $404 million.[205] Despite the considerable risks and costs, foreign companies remain willing to invest in the U.S. market.[206] This willingness warrants a deeper examination of its underlying justifications.

Foreign companies possess a distinct competitive advantage in the U.S. market, largely attributable to their extensive experience constructing and operating offshore wind farms.[207] The substantial costs and protracted permitting requirements common in the United States are not novel challenges for these established international entities.[208] This experience and preparedness allows foreign companies to swiftly penetrate the U.S. market and exploit a sector that remains relatively untapped compared to oil markets. Indeed, foreign wind energy companies have already demonstrated their commitment through existing investments in and continual pledges to U.S. offshore wind energy.[209] While foreign companies remain eager to invest in U.S. wind farms, they have endured setbacks that undermine confidence in their investments, largely due to inefficiencies within the offshore wind supply chain.[210] However, *American Cruise Lines* suggests a solution:

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[199] Bureau of Ocean Energy Mgmt., *FY 2025 Fact Sheet: Wind Energy Commercial Leasing Process*, (last visited September 7, 2025) https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2019-2024/DPP/NP-Wind-Energy-Comm-Leasing-Process.pdf.

[200] *See Regulatory Framework and Guidelines: Regulatory Roadmap*, BUREAU OF OCEAN ENERGY MANAGEMENT, (last visited Mar. 31, 2025) https://www.boem.gov/renewable-energy/regulatory-framework-and-guidelines.

[201] *See* Withdrawal Memorandum, *supra* note 88.

[202] *See* Cost of Wind Turbines, *supra* note 195.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *See* Adnan Memija, *US Gets Its First Commercial Scale Offshore Wind Farm*, OffshoreWind, (last visited Sept. 3, 2025) https://www.offshorewind.biz/2024/03/15/us-gets-its-first-commercial-scale-offshore-wind-farm/.

[207] *See* Oceans of Opportunity, WIND EUROPE (last visited Sept. 3, 2025) https://windeurope.org/policy/topics/offshore-wind-energy/.

[208] *See* Cost of Wind Turbines, *supra* note 195.

[209] *See* Partners, VINEYARD VINE, (last visited Mar. 31, 2025) https://www.vineyardwind.com/partners; *see also Offshore Wind Power*, ORSTED, (last visited Mar. 31, 2025) https://us.orsted.com/renewable-energy-solutions/offshore-wind.

[210] *See* Penn, What Ails Offshore Wind, *supra* note 83.

the supply chain can meet the demand for offshore wind farms if foreign companies are willing to invest in the construction of vessels.

2. Investing in Wind Vessels

While operating a wind farm has more red tape to go around, building a coastwise vessel carries its own complications.[211] The most prominent complications are the unforeseeable costs and possible delays.[212] For example, the first Jones Act-compliant WTIV sharply exceeded its budget and encountered significant delays.[213] When Dominion Energy commissioned the CHARYBDIS in 2020, they anticipated that the vessel would cost $500 million and that it would be delivered by 2023.[214] However, due to changes in specifications, the final cost ballooned to approximately $715 million[215] and delivery was postponed to late 2025.[216]

By contrast, a WTIV built in a South Korean shipyard would cost 50% less.[217] Based on procurement cost alone, the South Korean shipyard appears to be the most beneficial choice. Nevertheless, opting for these shipyards would also result in financial consequences if the WTIV were employed in U.S. waters, primarily due to the Jones Act. Compliance with the Jones Act would necessitate either additional time for international travel or increased costs for feedering.[218] Consequently, with foreign companies eager to expand into the U.S. market, paying the premium for a coastwise endorsement may ultimately prove the more economically sound decision.

The *American Cruise Lines* decision provided the framework for building coastwise vessels with foreign assistance through charter agreements, and a charter agreement for a WTIV could function similarly. The adaptability of *American Cruise Lines*' holding to WTIVs stems from the delegation of responsibility. The crew on a WTIV is typically split into two categories: vessel crew and project crew.[219] The vessel crew is responsible for maritime matters like the operation and navigation of the vessel, while the project crew is responsible for constructing the wind turbines once the vessel has reached its destination.[220] This split in crew responsibilities is similar to *American Cruise Lines*, where the crew was split between the maritime and non-maritime activities.[221] The split in responsibilities in *American Cruise Lines* was an essential element of the court's decision that the agreement was a time charter.[222] The construction of wind turbines, however, would likely be deemed a maritime activity under OCSLA because it directly pertains to the development of wind energy, which qualifies as maritime activity under the

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[211] First U.S.-Built WTIV, *supra* note 90.
[212] *Id.*
[213] Huan, *supra* note 13.
[214] *Id.*
[215] *Id.*
[216] *See* First U.S.-Built WTIV, *supra* note 90.
[217] Huan, *supra* note 13.
[218] *See* discussion *supra* Part II(B)(ii).
[219] JOHN FRITTELLI & LAURA B. COMAY, OFFSHORE ENERGY: VESSEL AND CREW NATIONALITY REQUIREMENTS, CRS REPORT FOR CONGRESS (May 25, 2023).
[220] *See id.*
[221] *See* Am. Cruise Lines v. United States, 96 F.4th 283, 287–89 (2d Cir. 2024).
[222] *See id.*; *See* ECO Time Charter Final Action, *supra* note 158.

Garamendi Amendment.[223] This classification would require adjusting certain provisions of the vessel's charter to ensure continued compliance with relevant provisions of the Jones Act.

The precedent set in the ACL charter allowed Viking to control the personnel responsible for the vessel's hospitality services and included a provision for Viking to indemnify River 1 for liability stemming from passenger misconduct.[224] By contrast, these provisions are not applicable to a WTIV charter because the entire crew is involved in maritime activity and must, therefore, be employed by a U.S. company.[225] The necessity of removing such provisions will not deter foreign investment, as vessel owners retain commercial flexibility to incorporate their operating, construction, and crew costs into their chartering rates.[226] Crucially, as long as the owner of the vessel maintains control over operational duties, these necessary operational costs are permitted to pass through directly to the charterer.[227] This framework permits a U.S. company to shift a considerable amount of costs to a foreign charterer, provided that the charterer does not "absorb all of the costs and normal business risks associated with [the] ownership and operation of" the vessel.[228] Therefore, adapting the *American Cruise Lines* framework offers a catalyst for growth in the U.S. offshore wind industry.

IV. Conclusion

The substantial cost of constructing vessels in the United States has ultimately led to a limited number of vessels capable of engaging in coastwise trade under the Jones Act.[229] This, in turn, has resulted in a stunted offshore wind supply chain.[230] But a solution already exists. The Second Circuit's decision in *American Cruise Lines* effectively allows U.S. vessel owners to shift significant costs onto foreign charterers through customized agreements.[231] In doing so, *American Cruise Lines* upheld the original intentions of the Jones Act—bolstering the U.S. maritime industry—while mitigating the substantial financial risks that would typically deter foreign investment from reaching domestic vessel construction. These agreements should be regulated through Article III courts sitting in admiralty to ensure that the agreements align with the policy goals of the Jones Act. This legal oversight will create a mutually beneficial relationship between foreign and domestic actors across U.S. maritime industries. The U.S. offshore wind energy market stands to benefit most, as agreements modeled on *American Cruise Lines* allow foreign companies to contribute their vast resources and experience to building offshore wind farms, all while using U.S.-built, owned, and operated vessels. In the end, this result is harmonious with the intention and fundamental purpose of the Jones Act.

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[223] *See* 43 U.S.C. § 1333; *see also supra* Part II(B)(i) (discussing the effects of the Garamendi Amendment).
[224] *Am. Cruise Lines*, 96 F.4th at 285, 289.
[225] *Id.*
[226] *See* Brief for Respondents, *supra* note 194 at 29–32 (citing Grand Famous Shipping Ltd. v. China Navigation Co. Pte., 45 F.4th 799, 804 (5th Cir. 2022); Bergan v. International Freighting Corp., 254 F.2d 231, 233 (2d Cir. 1958)).
[227] *See* Grand Famous Shipping Ltd. v. China Navigation Co. Pte., 45 F.4th 799, 804 (5th Cir. 2022) (discussing that the charterer paid fuel costs which did not show operational control).
[228] *Am. Cruise Lines*, 96 F.4th at 289 (quoting 46 C.F.R. § 356.11(a)(8)–(9)).
[229] *See* Grabow et al., *supra* note 9 at 3.
[230] Shields et al., *supra* note 84, at 36.
[231] *Id.*