

***Spector v. Norwegian Cruise Line Ltd.* — Background, Legal Issues,  
and Implications for Persons with Disabilities\***

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**Abstract**

On February 28, 2005, the U.S. Supreme Court will hear argument in *Spector v. Norwegian Cruise Line Ltd.*, No. 03-1388, a case that will determine whether foreign-flagged cruise ships serving U.S. ports must comply with the public accommodations provisions contained in Title III of the Americans with Disabilities Act (ADA). This paper examines the *Spector* case in detail and concludes that the plain and expansive language of Title III evidences a congressional intent to require cruise ships to comply with Title III. Cruise ship owners and operators claim that they and their ships are exempt from the ADA because all of their ships are, with few exceptions, foreign-flagged, and historically under international law, a seagoing vessel need only comply with the laws of the flagging nation when it comes to the regulation of a ship's internal operations. This paper explains that compliance with Title III would not impinge on the internal management prerogatives of cruise lines or conflict with the United States' obligations under international law. Moreover, the contemporary practice of flying what is known as a "flag of convenience" is simply a business decision that only marginally implicates the sovereign interests of the flagging nation. In stark contrast, however, the United States has a significant interest in ending invidious discrimination against persons with disabilities by cruise lines — particularly when cruise lines are headquartered in the United States, base their

ships in U.S. ports, draw their clientele almost exclusively from the United States, and advertise and solicit most of their passengers in the United States. In passing the ADA, Congress sought to guarantee “full participation” by persons with disabilities in all aspects of American life. The Supreme Court has an opportunity in *Spector* to give force and effect to Congress’ unequivocal intent by refusing to exempt foreign-flagged cruise ships from Title III of the ADA. To do otherwise would place the Court’s imprimatur upon the discriminatory practices of inaccessible cruise lines, and write segregation on the basis of disability into American law.

## TABLE OF CONTENTS

Abstract.....	<i>i</i>
<b>I. Introduction: When a Dream Vacation Turns into a Nightmare.....</b>	<b>1</b>
<b>II. An Overview of the Cruise Line Industry.....</b>	<b>5</b>
<b>A. The Quintessentially American Nature of the Industry.....</b>	<b>5</b>
<b>B. Advertising and Marketing in the United States.....</b>	<b>6</b>
<b>C. The Marketing of Cruises to Persons with Disabilities.....</b>	<b>8</b>
<b>III. Open Registries and “Flags of Convenience”.....</b>	<b>9</b>
<b>IV. The Application of Title III of the ADA to Cruise Ships.....</b>	<b>12</b>
<b>A. The Unequivocal Language of the Statute.....</b>	<b>12</b>
<b>B. The Development of Accessibility Standards for Cruise Ships.....</b>	<b>14</b>
<b>V. Setting the Stage for Supreme Court Review.....</b>	<b>17</b>
<b>VI. The Question of Extraterritoriality.....</b>	<b>19</b>
<b>A. American Jurisdiction over U.S. Territorial Waters.....</b>	<b>19</b>
<b>B. Choice of Law with Respect to a Ship’s Internal Affairs.....</b>	<b>21</b>
<b>C. Choice of Law with Respect to the Protection of American Interests.....</b>	<b>22</b>
<b>D. Looking Behind the Façade of a Flag of Convenience.....</b>	<b>24</b>
<b>VII. The Feasibility of Accessibility.....</b>	<b>27</b>
<b>A. Finding Conflict with International Law Where There Is None.....</b>	<b>27</b>
<b>B. Efforts by Cruise Lines to Comply with Title III of the ADA.....</b>	<b>29</b>
<b>VIII. The Ultimate Goal: Full Participation.....</b>	<b>31</b>
<b>IX. Conclusion: Separate and Unequal.....</b>	<b>33</b>

## **I. Introduction: When a Dream Vacation Turns into a Nightmare**

Whether it's *The Love Boat* or *Titanic*, Americans have a love affair with cruise ships. For millions of Americans, the prospect of a few days on a cruise ship conjures up a wealth of favorable images: A cruise ship sailing under a clear blue sky; high-energy music playing in the background; tourists frolicking in the sun; happy families exploring exotic ports of call; couples dancing in formal wear in front of an orchestra; a red-carpeted casino buzzing with activity; a Broadway-style musical performed before an eager audience; tables draped in fine linen with sumptuous dinners awaiting; and a contented traveler reclining on a sun deck, umbrella-festooned beverage in hand. Images such as these appear in countless advertisements, on television and in print, all of them encouraging the viewer to escape to what the cruise line industry likes to call "everyone's dream vacation."<sup>1</sup> For many persons with disabilities, however, the reality of a cruise vacation is quite different.

Douglas Spector's experience on a ship operated by Norwegian Cruise Line (NCL) was more like a bad dream than a dream vacation. First, NCL has a practice of charging passengers with disabilities (and their *required* traveling companions) higher fares than passengers without disabilities, so Mr. Spector, who has a physical disability and uses a wheelchair, had to pay considerably more for his cruise vacation than did other passengers. Despite the premium he paid, Mr. Spector found that most of the ship was inaccessible to him. Onboard swimming pools, restaurants, elevators, and public restrooms were all inaccessible. In fact, the only accessible restrooms on the ship were in the four (out of eight hundred) cabins set aside by NCL for persons with disabilities — all of them less desirable, windowless interior cabins. The ship's crew would not let Mr. Spector participate in emergency evacuation drills, and the cruise line provided him with no evacuation plan in the event of an emergency. And when the ship docked

at various ports of call, Mr. Spector was stranded onboard because shore excursions were not accessible to persons with mobility impairments.

Mr. Spector was not alone in having had a bad experience with NCL. Other individuals with disabilities had reported similar accessibility problems with NCL cruises. Mr. Spector contacted these individuals and, through various informal channels, together they tried to persuade NCL to end its discriminatory practices and make its ships accessible. NCL refused. As a result, Mr. Spector and two other persons with disabilities, together with their traveling companions, filed a class action lawsuit against NCL in August 2000.<sup>2</sup> The plaintiffs sought declaratory and injunctive relief under Title III — the public accommodations provisions — of the Americans with Disabilities Act (ADA), which provides that “[n]o individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”<sup>3</sup> Title III of the ADA also prohibits discrimination on the basis of disability in the “full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.”<sup>4</sup> Relying on these provisions, the plaintiffs asked the court to order NCL to end its discriminatory practices and policies, to remove physical barriers on existing ships where feasible, and to insure that any newly built ships are fully ADA accessible.

NCL did not dispute that its cruise ships were places of public accommodations, nor did NCL dispute that it provided public transportation services as defined by Title III. Rather than respond to the plaintiffs’ allegations of discrimination, however, NCL defended the lawsuit by claiming that it did not have to comply with the mandates of the ADA because its cruise ships do not fly the American flag. Like every other major cruise line, NCL has opted to fly a “flag of

convenience” on its ships, i.e., a flag from a country such as Liberia, Panama, or the Bahamas — countries that only nominally regulate or supervise the ships whose flag they fly. According to NCL, under established principles of international maritime law, its ships need only comply with the laws of the flagging country. NCL claimed that requiring its foreign-flagged ships to comply with the ADA would violate international law and amount to an extraterritorial application of the ADA not explicitly authorized by the Act. According to NCL, the facts that NCL’s passenger base consists mainly of American citizens, that it advertises and solicits passengers in the United States, that its ships are based in U.S. ports, and that its company headquarters is in Miami, Florida, were irrelevant in determining whether it must comply with Title III of the ADA.

The federal district court in Houston, Texas, in which Mr. Spector sued, rejected NCL’s extraterritoriality argument. On appeal, however, the U.S. Court of Appeals for the Fifth Circuit reversed and ordered the case dismissed.<sup>5</sup> Mr. Spector sought review of the Fifth Circuit’s decision in the United States Supreme Court, and the Supreme Court has agreed to hear his case, *Spector v. Norwegian Cruise Line Ltd.*, No. 03-1388, which is scheduled for oral argument on February 28, 2005. The issue presented, as framed by the petition for a writ of certiorari, is whether and to what extent Title III of the ADA applies to companies that operate foreign-flagged cruise ships within United States waters. While the case technically involves only one cruise line, it will have wide implications for the entire cruise ship industry. Some cruise lines have voluntarily made their ships accessible; many others, however, have made their ships accessible only in response to litigation or the threat of litigation. Lower federal courts have been divided on the issue of whether Title III applies of the ADA to foreign-flagged cruise ships.<sup>6</sup> While some plaintiffs have successfully forced a few cruise lines to make their ships more accessible, other plaintiffs have had their cases dismissed at an early stage. A definitive

ruling from the Supreme Court will therefore determine the extent to which cruise ships accommodate persons with disabilities for years to come.

This paper examines the *Spector* case in detail. It begins by looking at the cruise line industry, the ways in which the industry is a quintessentially American one, and the appeal that a cruise vacation has for persons with disabilities. Next, it explains the practice of flying a flag of convenience and why the cruise ship industry has opted to follow that practice. The paper then turns to a discussion of the public accommodations provisions of the ADA and how the federal government has drafted guidelines detailing how cruise ships must be made accessible to persons with disabilities. Next, it addresses the cruise industry's argument that requiring foreign-flagged cruise ships to comply with the ADA would be an impermissible extraterritorial application of U.S. law. The paper then explains how requiring compliance with the ADA would not, in fact, be an extraterritorial application of U.S. law, and how it would not conflict with U.S. treaty obligations. The paper describes how several major cruise lines have already made their ships fully accessible, thereby undermining the cruise line's argument that compliance with the ADA is somehow not technologically or economically feasible in the cruise ship context. Finally, the paper concludes that requiring cruise ships' compliance with the ADA is the only way to achieve Congress' goal of "full participation" in society by persons with disabilities. To deny persons with disabilities the ability to enjoy a sea cruise would seriously undermine Congress' primary goal in enacting the ADA: the full participation of persons with disabilities in all aspects of American life.

## **II. An Overview of the Cruise Line Industry**

### **A. The Quintessentially American Nature of the Industry**

Travel and tourism in the United States are big business. In 2003, the American travel industry generated over \$550 billion dollars in revenue,<sup>7</sup> more than 5% of the country's gross domestic product.<sup>8</sup> The cruise line industry's contribution to that output was sizable: According to a study commissioned by the International Council of Cruise Lines (ICCL), North American cruise lines had \$14.7 billion in gross receipts and contributed over \$25 billion to the U.S. economy in 2003.<sup>9</sup> The cruise line industry's growth in the past two decades has been impressive; despite a relatively weak economy and a post-9/11 slump in much of the travel and tourism sector, the cruise line industry has maintained an 8% passenger growth rate over the past two decades.<sup>10</sup>

The United States is, far and away, the driving force behind the global cruising industry. Passenger embarkations at U.S. ports accounted for 72% of global embarkations in 2003,<sup>11</sup> and U.S. residents constituted 76% of all cruise ship passengers worldwide.<sup>12</sup> The industry is rapidly expanding its American presence by offering cruises originating from more and more U.S. cities, and the industry actively seeks public funding of port expansion projects to accommodate newer and bigger cruise ships. For example, early in 2004 the city council of Norfolk, Virginia, committed to spending over \$40 million dollars to build a new cruise ship terminal and upgrade associated infrastructure in order to make its port more appealing and accessible to the cruise lines.<sup>13</sup> Last year New York City likewise committed \$50 million of public monies to make improvements to its passenger ship terminals and "keep NYC's cruise industry strong."<sup>14</sup> A few years ago, the Port of Seattle committed \$12.9 million to build a new cruise line terminal after NCL agreed to use the terminal as a homeport for at least four years.<sup>15</sup> As part of an agreement

with the Royal Caribbean cruise line, the State of New Jersey invested \$42 million (and expects to invest \$60 to \$80 million more) to deepen its Port Jersey Channel and make the City of Bayonne's port more accessible to larger cruise ships.<sup>16</sup>

Given their lucrative ties to the United States market, it is hardly surprising that the major cruise lines all maintain their principal offices in the United States. For example, NCL has its corporate headquarters in Miami<sup>17</sup> and employs approximately 1200 personnel throughout the United States.<sup>18</sup> Carnival Corporation, the largest cruise line company in the world, has several offices in the U.S., as well as personnel and properties scattered throughout the country.<sup>19</sup> Carnival owns twelve cruise brands, including Carnival Cruise Lines, Holland America Line, Princess Cruises, and Windstar Cruises, all of which operate in North America, and which together employ approximately 8500 full-time and 2500 part-time/seasonal employees in shore side operations.<sup>20</sup> Holland America, Princess Tours (a division of Princess Cruises), and Windstar lease 179,000 square feet of office space in Seattle for their headquarters operations. Princess Cruises leases an additional 282,000 square feet of office space in Santa Clarita, California. Carnival also has a reservation center in Colorado Springs, and an additional sales office in Pompano, Florida. Royal Caribbean has its principal executive office in Miami, where it leases 359,000 square feet of office space from Miami-Dade County under long-term leases.<sup>21</sup> It also has a reservation center in Wichita, Kansas, as well as an office building in Miramar, Florida.

## **B. Advertising and Marketing in the United States**

Beyond a physical presence, the most publicly visible way in which cruise lines have ties to the U.S. is through the industry's advertising and marketing activities. Royal Caribbean incurred over one-half billion dollars in selling and administrative expenses in 2003, up nearly

20% from the previous year.<sup>22</sup> Carnival Corporation spent even more.<sup>23</sup> Cruise lines expend considerable sums to advertise in print and television media. For example, Royal Caribbean spent approximately \$75 million on television advertising alone in 2004,<sup>24</sup> and plans to spend another \$10 million during the first quarter of 2005.<sup>25</sup> Carnival Cruise Lines recently announced a multi-million dollar television blitz of its own; as part of its newest campaign — entitled “There Are A Million Ways to Have Fun” — more than 6400 spots will air in 2005 on several top-rated network shows, including *West Wing*, *Gilmore Girls*, *Law & Order*, *The O.C.*, *24*, and *Amazing Race*.<sup>26</sup>

Beyond traditional commercial advertising, cruise lines have found other creative ways in which to market their vacation packages. Cruise lines regularly do product placements and tie-ins on network television programming: Royal Caribbean has offered free cruises to participants on the CBS reality-show, *Amazing Race*,<sup>27</sup> and in November 2004, NCL’s CEO Colin Veitch appeared on ABC’s *Good Morning America* to award complimentary ten-day cruises to 125 couples who had just renewed their wedding vows live on national television.<sup>28</sup> In September 2004, Royal Caribbean signed a deal with TiVo to run a series of advertisements on the TiVo platform to promote the company and its destinations.<sup>29</sup> Carnival Cruise Lines has arranged to print advertisements on the back of employee paychecks of United Airlines and the Kroger Co.<sup>30</sup>

These advertising and marketing efforts of the cruise lines have been remarkably successful. As indicated above, the industry has experienced steady growth. A recent study sponsored by Cruise Lines International Association found that, while 12.3% of the U.S. population has actually taken a cruise, almost twice as many (69 million) Americans have expressed a desire to take one.<sup>31</sup> As another industry group puts it, “[a] cruise offers all the things most people want in a vacation -- romance, excitement, relaxation, adventure, escape,

discovery, luxury, value and more -- without the hassles nobody wants,” and advertisements touting these qualities saturate the market.<sup>32</sup> The fact that roughly 40% of cruise-vacationers are first-timers attests to the success of the industry’s advertising efforts.<sup>33</sup>

### **C. The Marketing of Cruises to Persons with Disabilities**

Many cruise lines target persons with disabilities as part of their advertising strategy. Carnival Cruise Lines has produced a brochure for people with disabilities entitled “Easy Access to Fun” aimed at the traveler with a disability. Cruise lines regularly work with travel agents who cater to persons with disabilities, and the cruise line industry has experienced remarkable growth in that segment of the market.<sup>34</sup> When the Royal Caribbean cruise line launched its newest ship *Mariner of the Seas* in 2003, the company chose Jean Driscoll, an Olympic wheelchair champion and advocate for people with disabilities, to be the ship’s “godmother” in order to highlight the ship’s accessibility. At the *Mariner*’s official launch, Driscoll christened the ship, pushing a remote-control button to release a bottle of champagne against the hull.<sup>35</sup>

Cruise lines have targeted persons with disabilities because the industry has recognized the considerable appeal that an accessible cruise has for someone with a physical disability. For many people with disabilities, an accessible cruise would be an ideal vacation because cruise ships offer, in a relatively small space, an incredible array of leisure activities.<sup>36</sup> Cruise ships frequently contain restaurants, bars, movie theatres, shopping outlets, casinos, sunbathing decks, swimming pools, live music and theatre, educational programs, health spas, and gymnasiums. Thus, a traveler with a disability, who may have limited mobility, need not leave the confines of the ship in order to enjoy a host of entertainment options. The cruise passenger with a disability also has access to reliable, onboard medical services, a fact particularly comforting when traveling to foreign locales.<sup>37</sup> The traveler need only unpack once over the course of her

vacation, and if she requires rest in the middle of the day, she can simply retire to her cabin.<sup>38</sup> Furthermore, the consistent availability of ship staff ready to provide assistance when necessary affords someone with a disability a high level of comfort and security while traveling.<sup>39</sup>

Statistics attest to the popularity of cruises for persons with disabilities. In 2003, the Travel Industry Association of America, the Open Door Organization, and the Society for Accessible Travel and Hospitality released the results of a Harris Interactive Survey that examined the vacation habits of persons with disabilities. The Survey found that 12% of the population with disabilities had taken a vacation cruise in the preceding five years, compared to 8% of the population at large.<sup>40</sup> The Harris Survey also found that people with disabilities spend over \$13 billion each year on travel, and that this market will only expand in the future.<sup>41</sup> According to the Travel Industry Association, because of aging baby-boomers, persons with disabilities will make up to 24% of the U.S. population by the year 2030.<sup>42</sup> One can only expect the cruise line industry to redouble its efforts to develop the market for persons with disabilities.

### **III. Open Registries and “Flags of Convenience”**

Despite the appeal that cruise vacations have for persons with disabilities, some cruise lines (such as NCL) refuse to make their ships ADA-compliant. These cruise lines claim that they do not have to comply with the public accommodations provisions of the ADA because, instead of the American flag, they fly a “flag of convenience” — in the case of NCL, the flag of the Bahamas. Before addressing NCL’s claim that its choice of flag determines whether its ships need comply with the ADA, it would be useful to examine the practice of listing ships under foreign registries.

Until the early twentieth century, owners and operators of ships traveling in international waters normally registered their vessels with the authorities in their own country, or with the

nation that served as the vessel's home port. The ship's national registration would then be indicated by flying the flag of the registering authority. The flag served as public notice that the ship, its crew, and its cargo were under the protection of the registering nation.<sup>43</sup> In return for this protection, the owner and operator of the ship agreed to follow the registering nation's law, which typically included the nation's right to take advantage of the vessel's shipping capacity in time of war.<sup>44</sup>

At times, however, governments have encouraged their citizens to register their ships elsewhere for strategic reasons. For example, in the years preceding the United States' entry into World War II, the U.S. government encouraged carriers transporting war materiel to the United Kingdom to register their vessels in Panama to avoid U.S. neutrality laws.<sup>45</sup> Panama imposed almost no restrictions on registrants and let almost anyone register a vessel, regardless of one's ties to Panama. Ship owners realized, however, that by registering their vessels in Panama (and other countries with so-called "open" registrations), not only could they skirt U.S. neutrality laws, but they could also avoid a host of other costly U.S. taxes, laws, and regulations. As a result, the practice of flying a flag from an open registry country greatly expanded after World War II. By 1953, the Supreme Court was able to observe that "it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries."<sup>46</sup>

Indeed, the costs of operating a U.S.-flagged vessel can be prohibitively expensive. As one commentator has noted, "[t]he United States has the most stringent registration requirements of any maritime nation."<sup>47</sup> First, the registrant must be either (1) a U.S. citizen, (2) a group of U.S. citizens, (3) a partnership whose general partners are U.S. citizens, with a controlling interest owned by U.S. citizens, (4) a U.S. corporation whose chief officers are U.S. citizens and

whose board consists predominantly of U.S. citizens, (5) the U.S. government, or (6) a state government.<sup>48</sup> Once the would-be registrant has cleared this initial hurdle, the registrant must ensure that at least three-quarters of the registered vessel's crew are U.S. citizens,<sup>49</sup> and the master, chief engineer, radio operator, and all deck and engineering watch officers must be U.S. citizens.<sup>50</sup> Finally, the registrant must comply at all times with applicable U.S. labor, environmental, and safety laws.<sup>51</sup>

Flying a flag of convenience imposes considerably less of a burden on a ship's owner and operator. For example, registration with the Bahamas Maritime Authority (whose offices are in London), does not require any sort of beneficial local ownership or management of the ship, and there are no crewing nationality requirements.<sup>52</sup> Bahamian law imposes no minimum wage for crew members, and labor union recognition is up to the individual registrant. The Bahamas also has no corporate tax, and international business corporations are exempt from capital gains, real estate, inheritance, sales and customs taxes.<sup>53</sup> Similarly, the Panama Maritime Authority (whose offices are in New York City) imposes no citizenship requirements for the crewing or ownership of vessels, imposes no taxes on income derived from activity outside of Panama, and has few, if any, meaningful labor standards imposed as a condition of registration.<sup>54</sup> Indeed, Panama touts its lack of regulation as a selling point; it makes no secret of its eagerness to add new ships to its roster and has "promoted itself relentlessly," resulting in \$47.5 million dollars in registry fees in 1995 — five percent of the national budget.<sup>55</sup>

The cruise line industry, eager to take advantage of the benefits of open registries, has, with very rare exceptions, eschewed U.S. registration altogether.<sup>56</sup> As the U.S. Department of Transportation has observed, "[v]irtually all cruise ships serving U.S. ports are foreign-flag vessels."<sup>57</sup> By opting to fly flags of convenience, the cruise line industry has managed to keep

operating expenses considerably lower than they would be otherwise, and the industry has been able to take advantage of lower taxes, lenient labor and safety standards, and fewer inspections to insure compliance with international treaties and other international maritime law obligations.<sup>58</sup>

#### **IV. The Application of Title III of the ADA to Cruise Ships**

##### **A. The Unequivocal Language of the Statute**

Title III of the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>59</sup> It also prohibits discrimination in the provision of “specified public transportation services.”<sup>60</sup> Ever since the enactment of the ADA, federal agencies have interpreted these provisions to apply to cruise ships servicing U.S. ports, notwithstanding the fact that almost all cruise ships serving U.S. ports are foreign-flagged. This is so for several reasons.

First, cruise ships are clearly public accommodations. The ADA defines “place of public accommodation” as a facility, operated by a private entity, whose operations affect commerce and that falls within one of the twelve broad categories listed in the statute. For example, the categories include places of lodging, establishments serving food and drink, places of “exhibition or entertainment,” and places of “exercise or recreation.”<sup>61</sup> There is no denying that cruise ships are essentially floating public leisure and recreation centers. As one federal court of appeals has observed, “[c]ruise ships, in fact, often contain places of lodging, restaurants, bars, theaters, auditoriums, retail stores, gift shops, gymnasiums, and health spas.”<sup>62</sup> Thus the U.S. Department of Justice, after a public notice-and-comment period, and pursuant to its responsibility to interpret and promulgate regulations implementing the ADA, determined that cruise ships

function as one or more of the types of public accommodations enumerated in the statute and are therefore subject to requirements of Title III of the ADA.<sup>63</sup>

Likewise, the U.S. Department of Transportation has determined that cruise ships are one of Title III's "specified public transportation services," defined by the ADA as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter service) on a regular and continuing basis."<sup>64</sup> The Department of Transportation is charged with promulgating regulations enforcing the transportation provisions of the ADA, and like the Department of Justice, the Department of Transportation, after a public notice-and-comment period, determined that cruise ships fall within the ambit of the ADA since cruise ships "easily meet the definition of 'specified public transportation.' Cruise ships are used almost exclusively for transporting passengers and no one doubts that their operations affect commerce."<sup>65</sup>

Thus, as public accommodations *and* as providers of specified public transportation services, cruise ships are obligated to comply with applicable requirements of Title III of the ADA, including nondiscriminatory eligibility criteria, reasonable modifications in policies, practices, and procedures, the provision of auxiliary aids, and the removal of architectural barriers in existing cruise ships where readily achievable.<sup>66</sup> According to the Department of Justice and the Department of Transportation, this obligation extends to foreign-flagged cruise ships serving U.S. ports. As the Department of Transportation has explained:

Virtually all cruise ships serving U.S. ports are foreign-flag vessels. International law clearly allows the U.S. to exercise jurisdiction over foreign-flag vessels while they are in U.S. ports, subject to treaty obligations. A state has complete sovereignty over its internal waters, including ports. Therefore, once a commercial ship voluntarily enters a port, it becomes subject to the jurisdiction of the coastal state. In addition, a State may condition the entry of a foreign ship into its internal waters or ports on compliance with its laws and regulations. The

United States thus appears to have jurisdiction to apply ADA requirements to foreign-flag cruise ships that call in U.S. ports.<sup>67</sup>

The Department of Justice has come to the same conclusion: “Ships registered under foreign flags that operate in United States ports may be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement.”<sup>68</sup>

This conclusion is supported by Congress’ invocation of “the sweep of Congressional authority” in the ADA’s preamble, “including the power . . . to regulate commerce” defined to include “transportation . . . between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country.”<sup>69</sup>

Cruise ships, regardless of the country of registry, fall squarely within this invocation of Congressional authority. As a result, the Department of Justice has concluded that it can bring ADA enforcement actions against cruise lines notwithstanding a foreign flag of convenience, and, in fact, has brought one against NCL for the cruise line’s treatment of blind passengers on its foreign-flagged ships.<sup>70</sup>

## **B. The Development of Accessibility Standards for Cruise Ships**

While the Departments of Justice and Transportation are responsible for promulgating regulations implementing the ADA, the ADA requires that the Architectural and Transportation Barriers Compliance Board (commonly referred to as the “Access Board”) play an active role in the development of regulations ensuring that public accommodations are “accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.”<sup>71</sup>

In furtherance of this mandate, the Access Board is required to issue minimum guidelines and requirements for accessibility, which federal agencies are then obligated to incorporate into any final enforcement regulations. In developing standards for accessibility, the Departments of Justice and Transportation, as well as the Access Board, take into consideration Title III’s

distinction between existing facilities and new or newly altered facilities. New or newly altered facilities must be “readily accessible to and usable by persons with disabilities,”<sup>72</sup> whereas existing facilities are governed by a “readily achievable” standard, i.e., they must be made accessible whenever “easily accomplishable and able to be carried out without much difficulty or expense.”<sup>73</sup>

In their initial ADA rulemakings, the Departments of Justice and Transportation determined that the Access Board’s guidelines for newly constructed buildings on land may not be appropriate for vessels at sea, and concluded that further study by the Access Board was warranted before issuing rules governing the new construction or alteration of cruise ships and passenger vessels. In the meantime, however, the Department of Justice indicated that all cruise ships would be expected to adhere to the “readily achievable” standard required of existing facilities.<sup>74</sup>

In August 1998, the Access Board created the Passenger Vessel Access Advisory Committee (PVAAC), and charged it with providing recommendations for proposed accessibility guidelines for newly constructed and altered passenger vessels and cruise ships covered by the ADA. The PVAAC was composed of twenty-one members representing various groups, including owners and operators of passenger vessels and cruise lines, designers of passenger vessels, and organizations representing individuals with disabilities.<sup>75</sup> For example, the International Council of Cruise Lines (of which NCL is a member) served on the Committee, as did Princess Cruises and the Society of Naval Architects and Marine Engineers. Members of the PVAAC worked collaboratively and explored ways in which to achieve access in light of competing considerations such as passenger safety and seaworthiness, and in December 2000 the Committee made recommendations (in the form of a Final Report) for the Access Board to use in

developing guidelines.<sup>76</sup> In developing the Final Report, the PVAAC applied the existing ADA Accessibility Guidelines for Buildings and Facilities to passenger vessels and then modified certain “building” provisions which the Committee determined would be problematic if applied to seagoing vessels.<sup>77</sup> For example, to reduce the risk of water entering below deck, U.S. Coast Guard regulations, international treaties, and good design practice all mandate coamings (i.e., high thresholds) in doorways leading to outdoor decks.<sup>78</sup> This and other design elements presenting accessibility challenges were taken into consideration by the members of the PVAAC in developing the Final Report.

The PVAAC issued its Final Report to the Access Board in December, 2000. The Access Board released its draft guidelines based on the Report in November 2004.<sup>79</sup> The draft guidelines incorporate most of the recommendations contained in the PVAAC Final Report.<sup>80</sup> On the same day that the Access Board released its draft guidelines, the Department of Transportation issued an Advance Notice of Proposed Rulemaking (ANPRM) seeking comments on its consideration of issuing regulations based on the Access Board’s draft guidelines.<sup>81</sup> The ANPRM reiterated the Department’s conclusion that cruise ships “clearly fall into the categories of public transportation and public accommodation and, thus, are subject to the requirements of the ADA,” and that “the ADA applies to foreign-flag vessels operating within the internal waters of the United States.”<sup>82</sup> The comment period for the ANPRM closes on March 28, 2005, and final regulations will, presumably, be issued at a later date.<sup>83</sup> Until specific regulations are issued, newly constructed cruise ships apparently need only comply with the general accessibility requirements of Title III applicable to existing facilities, i.e., the “readily achievable” standard discussed above.

## V. Setting the Stage for Supreme Court Review

In the U.S. Court of Appeals for the Fifth Circuit, NCL did not contend that cruise ships were exempt, as a general proposition, from the ADA.<sup>84</sup> Rather, NCL argued (and the Fifth Circuit concluded) that the case turned on the fact that the cruise ships at issue were foreign-flagged. While the court recognized that a foreign-flagged cruise ship that voluntarily enters U.S. waters subjects itself to the laws and jurisdiction of the United States, the court held that the ADA did not apply to foreign-flagged cruise ships serving U.S. ports. Citing a “presumption against extraterritorial application” of U.S. law,<sup>85</sup> the court refused to extend the reach of the ADA to foreign-flagged cruise ships because “many of the structural changes required to comply with Title III would be permanent, investing the statute with extraterritorial application as soon as the cruise ships leave domestic waters.”<sup>86</sup> The court also concluded that requiring compliance with Title III would interfere with the “internal management and affairs” of the foreign-flagged ship, matters normally governed by the law of the flagging nation.<sup>87</sup> The court, however, did not address the fact that NCL’s headquarters is in the United States, that it advertises and solicits passengers almost exclusively in the United States, and that its ships are based in U.S. ports. The court relied solely on NCL’s choice of a foreign flag in holding that Title III of the ADA does not extend to NCL’s cruise ships.

The Fifth Circuit’s conclusion stands in stark contrast to the decision of the Eleventh Circuit in *Stevens v. Premier Cruises, Inc.*, in which that court held that Title III does, in fact, cover foreign-flagged cruise ships serving U.S. ports.<sup>88</sup> The Eleventh Circuit found that the case presented no extraterritorial application of the ADA because “a foreign-flag ship sailing in United States waters is not extraterritorial.”<sup>89</sup> Moreover, observed the Eleventh Circuit, “this case does not involve the ‘internal management and affairs’ of a foreign-flag ship; this case is

about whether Title III requires a foreign-flag cruise ship reasonably to accommodate a disabled, fare-paying, American passenger while the ship is sailing in American waters.”<sup>90</sup> Therefore, the court concluded, Title III of the ADA applied to all cruise ships, regardless of flag. While the Fifth Circuit in *Spector* acknowledged *Stevens* and its holding, the Fifth Circuit found it “unpersuasive” and declined to follow it.<sup>91</sup>

With conflicting circuit court rulings — in two circuits whose jurisdictions together account for the bulk of the cruise industry’s U.S. activities — the stage was set for Supreme Court review.<sup>92</sup> After Mr. Spector filed his petition for a writ of certiorari, NCL, rather than opposing the petition, responded by urging the Court to take the case for review. In addition, the International Council of Cruise Lines as well as a coalition of disability rights groups (led by the Paralyzed Veterans of America) urged the Court to take the case in order to resolve the conflicting lower court rulings. In September 2004, the Supreme Court granted Mr. Spector’s petition for a writ of certiorari, and the case has been fully briefed and set for argument. As is frequently the case with Supreme Court cases, interested persons and outside groups other than the actual litigants have a strong interest in the outcome of the case and file amicus (or “friend-of-the-court”) briefs to present their concerns and arguments to the Court. In *Spector*, amicus briefs in support of Mr. Spector have been filed by disability rights groups, a professor of maritime law, eight state attorneys-general, and the U.S. Department of Justice, all urging reversal.<sup>93</sup> On the other side, a cruise line industry group, a small family-owned cruise line based in Italy, the U.S. Chamber of Commerce, the Bahamas, and a group of thirteen mutual assurance associations have filed briefs in support of NCL, urging the Court to affirm the Fifth Circuit’s decision.<sup>94</sup>

## VI. The Question of Extraterritoriality

### A. American Jurisdiction over U.S. Territorial Waters

As explained above, the Fifth Circuit held that applying Title III of the ADA to foreign-flagged cruise ships would amount to an unauthorized extraterritorial application of U.S. law. This holding, however, does not conform with Supreme Court decisions concerning the application of U.S. law to foreign-flagged vessels sailing in U.S. territorial waters. Only the Fifth Circuit's initial observation was correct: "It is settled that 'a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country.'"<sup>95</sup> This principle is at least as old as the American legal system. In 1812, the Supreme Court explained in *The Schooner Exchange v. McFaddon*, "when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."<sup>96</sup> The Court reiterated this principle over 100 years later in *Cunard Steamship Co. v. Mellon*, when it observed that "a merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter," and this "jurisdiction attaches in virtue of her presence, just as with other objects within those limits."<sup>97</sup> Therefore, while a foreign-flagged ship cruising within U.S. waters is "entitled to the protection of [U.S.] laws," that ship is also "correlatively [] bound to yield obedience to them."<sup>98</sup>

Thus in *Cunard*, the Court held that the National Prohibition Act (which implemented the Eighteenth Amendment and banned the manufacture, transportation, importation, exportation and sale of intoxicating liquors) extended to foreign-flagged ships sailing in U.S. waters.<sup>99</sup>

Foreign corporations owning foreign-flagged cruise ships argued that the National Prohibition Act should not apply to alcoholic beverages that were taken on board at foreign ports and that would be consumed by passengers and crew members only when the ship was once again outside U.S. territorial waters. The Court, however, noted that the Act could easily “cover both domestic and foreign merchant ships when within the territorial waters of the United States,” that it did, in fact, “cover both when within those limits” since it contained no exception for foreign-flagged ships, and that carving out such an exception would “tend to embarrass its enforcement and to defeat the attainment of its obvious purpose” — the prohibition of alcohol within U.S. territory.<sup>100</sup>

*Cunard*'s reasoning would appear to have equal force with regard to the application of Title III of the ADA to foreign-flagged cruise ships serving U.S. ports and operating within U.S. waters. Like the National Prohibition Act, Title III of the ADA establishes a comprehensive, nationwide enforcement scheme, in addition to providing a “national mandate for the elimination of discrimination against individuals with disabilities.”<sup>101</sup> And as with the National Prohibition Act in *Cunard*, the failure to apply Title III to foreign-flagged cruise ships serving U.S. ports and operating in U.S. waters would “embarrass [the] enforcement” of the comprehensive scheme created by Congress and would “defeat the attainment of [the scheme's] obvious purpose” — the comprehensive, nationwide protection of Americans with disabilities from invidious discrimination.<sup>102</sup>

## **B. Choice of Law with Respect to a Ship's Internal Affairs**

The Fifth Circuit avoided the clear import of *Cunard* by relying on a line of more recent cases involving the regulation of the internal management and business affairs of foreign-flagged vessels. In *Benz v. Compania Naviera Hidalgo*,<sup>103</sup> and *McCulloch v. Sociedad Nacional de Marineros de Honduras*,<sup>104</sup> the Supreme Court held that, absent an affirmative expression of Congressional intent, it would not apply the National Labor Relations Act (NLRA) to disputes between a foreign-flagged vessel and its foreign crew regarding the ship's employment policies and practices. The Court recognized that Congress had the power to extend the NLRA to cover foreign-flagged vessels, at least while they were in U.S. waters. Nevertheless, the Court indicated that, in the interest of comity, it would not do so without some express indication that Congress intended the NLRA to cover foreign-flagged vessels. As the Supreme Court had explained in an earlier case, "by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace and dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."<sup>105</sup> The Court therefore declined to extend the protective reach of U.S. labor laws to foreign-flagged vessels where such an extension would implicate "the pervasive regulation of the internal order of a ship," something that historically has been left to the flagging nation.<sup>106</sup>

The Fifth Circuit, relying on *Benz* and *McCulloch*, concluded that requiring foreign-flagged cruise ships to comply with Title III of the ADA would likewise impinge on the management prerogatives of the ship's operators and thereby impinge on the sovereign interests

of the flagging nation. Compliance with the ADA, according to the Fifth Circuit, would require permanent modifications to a ship's structure that would (presumably) remain long after the ship leaves U.S. waters, and that compliance would therefore amount to an extraterritorial application of U.S. law. Quoting *EEOC v. Arabian American Oil Company (ARAMCO)*,<sup>107</sup> a case that considered whether Title VII of the Civil Rights Act of 1964 covered American employees in Saudi Arabia working for an American company, the Fifth Circuit stated that it would "assume that Congress legislates against the backdrop of the presumption against extraterritoriality."<sup>108</sup> Since the text of the ADA nowhere mentions Congress' desire to extend the reach of the ADA to foreign-flagged cruise ships, the Fifth Circuit concluded that Congress had not "clearly indicate[d] its intention" to overcome that presumption.<sup>109</sup> Absent "specific evidence of congressional intent," the court stated that it would not require foreign-flagged cruise ships to comply with Title III of the ADA.<sup>110</sup>

### **C. Choice of Law with Respect to the Protection of American Interests**

Under the Fifth Circuit's reasoning, however, it is hard to imagine what sort of regulation of a cruise ship would *not* interfere with a cruise ship's internal management and affairs. Foreign-flagged cruise ships are subject to a host of U.S. laws while in U.S. territorial waters, many of which have some sort of perceptible, lasting effect once the ship leaves U.S. waters. Nevertheless, those laws have not been held to have an impermissible extraterritorial effect. For example, in *Cunard*, the application of the National Prohibition Act to foreign-flagged cruise ships inevitably had an extraterritorial effect. Even though the cruise line in *Cunard* had offered to place any alcoholic beverages under lock and key once the ship entered U.S. territorial waters, the Supreme Court held that merely bringing alcoholic beverages into U.S. waters violated the Act.<sup>111</sup> Accordingly, the owners of the ship had to modify their conduct outside U.S. territorial

waters, either by ceasing to carry alcohol on board any ship entering U.S. territorial waters, or by throwing overboard all remaining liquor before entering those waters.<sup>112</sup> The Supreme Court, however, did not see *Cunard* as involving an extraterritorial application of U.S. law requiring “specific evidence of congressional intent.”

In a similar vein, the Supreme Court in *Uravic v. F. Jarka Co.* unanimously held that the Jones Act (which provides a remedy to seamen for the negligence of coworkers or employers) covered a U.S. citizen working as a stevedore who died as a result of a coworker’s negligence while unloading goods from a German vessel flying the German flag in New York harbor.<sup>113</sup> Even though exposing a ship owner to general tort liability for negligence would indisputably have a lasting effect on everything from a ship’s physical structure to the crew’s working conditions, the Supreme Court did not consider the application of the Jones Act in that case as having any sort of extraterritorial effect, or even any effect on the internal operations of the ship. Relying on *Cunard*, the Court observed that “[t]he jurisdiction and the authority of Congress to deal” with tortious conduct on a foreign-flagged vessel are “unquestionable and unquestioned”<sup>114</sup> and that there was “no reason for limiting the liability for torts committed [aboard a foreign-flagged vessel] when they go beyond the scope of discipline and private matters that do not interest the territorial power.”<sup>115</sup> In support of this conclusion, the Court noted that “[t]here is strong reason for giving the same protection to the person of those who work in our harbors when they are working on a German ship that they would receive when working upon an American ship in the next dock.”<sup>116</sup> The implications for U.S. citizens of a contrary ruling also deeply concerned the Court: “It would be extraordinary to apply German law to Americans momentarily on board of a private German ship in New York.”<sup>117</sup>

In light of *Cunard*, *Uravic* and other cases extending U.S. law to foreign-flagged vessels while in U.S. ports, particularly when the rights of U.S. citizens are at stake, it is hard to see how application of the *public* accommodations provisions of the ADA to cruise ships in any way implicates purely *private* matters to such an extent that the flagging nation's sovereignty is implicated.<sup>118</sup> At issue is not merely the internal management or affairs of foreign-flagged ships, but the ships' accessibility to American citizens — citizens whom the cruise lines have specifically sought out and targeted as customers. Thus the primary purpose of Title III is not to regulate the internal affairs of a foreign-flagged ship, but to regulate relations between cruise ships and U.S. citizens granted rights and protections under U.S. law. And, as explained above, since a cruise line's decision to fly a flag of convenience is purely a business decision untethered from any real consideration of issues of national sovereignty, that decision should have little bearing on the determination whether those rights and protections may ultimately be vindicated in court.

#### **D. Looking Behind the Façade of a Flag of Convenience**

In *Hellenic Lines Ltd. v. Rhoditis*, the Supreme Court described as a "façade" the contemporary practice of flying flags of convenience.<sup>119</sup> *Rhoditis* concerned the applicability of the Jones Act to a non-U.S. seaman injured on a foreign-flagged vessel. As explained above, the Supreme Court in *Uravic* concluded without hesitation that the Jones Act applied to injuries suffered by U.S. seamen on foreign-flagged vessels. In determining whether under the Jones Act a defendant employer was subject to suit by a non-U.S. seaman, the Court indicated that a ship's foreign registry "must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that [the] ship and its owner have with the United States."<sup>120</sup> The Court, relying on an earlier case, *Lauritzen v. Larsen*, explained

that courts should consider a variety of factors in determining whether U.S. law should apply: (1) the place of the wrongful act, (2) the law of the flagging nation, (3) allegiance or domicile of the injured, (4) allegiance of the defendant employer, (5) place of contract, (6) inaccessibility of a foreign forum, (7) the law of the forum, and (8) the ship owner's base of operation and the extent of his or her contacts with the forum state.<sup>121</sup> To afford dispositive weight to a ship owner's decision to fly a flag of convenience would permit a defendant to easily circumvent American law and give that defendant "an advantage over citizens engaged in the same business by allowing [the foreign-flagged ship's owner] to escape the obligations and responsibility" imposed by Congress.<sup>122</sup>

The Court has indicated that the factors identified in *Rhoditis* and *Lauritzen* are not limited to Jones Act cases; rather, they are "intended to guide courts in the application of maritime law generally."<sup>123</sup> In Mr. Spector's case almost every one of the *Rhoditis/Lauritzen* factors weigh in favor of the applicability of Title III of the ADA. First, the "wrongful acts" at issue occurred in U.S. territory. Before Mr. Spector had even boarded an NCL cruise ship, he and his traveling companion were subject to NCL's discriminatory policies and procedures. Once on board, acts of discrimination continued in the form of barriers to access while the ship operated in U.S. waters. Next, the "injured" parties, i.e., the victims of NCL's discriminatory acts, were all U.S. residents. The "contracts," i.e., the passengers' tickets, were all formed in the United States, and, indeed, by NCL's own design, explicitly provided that they were governed "in all respects" by U.S. law. As for the availability of a "foreign forum," the contract specifically provided that "any and all claims, disputes or controversies . . . arising from or in connection with" it must be brought in a U.S. forum, thereby precluding Mr. Spector from seeking relief in any foreign forum. Next, as for the actual "law of the forum," Mr. Spector

brought his claim in a federal court in Texas. Finally, NCL has its “base of operations” in Miami, Florida, where its public relations, employee retirement, hiring, benefits, and human resources departments are centered.

The only two factors weighing against the application of U.S. law — the ship’s foreign registry and NCL’s foreign incorporation — are insignificant in light of these other factors demonstrating a significant U.S. nexus. Indeed, in *Rhoditis*, the Supreme Court held that the Jones Act applied when the injured seaman was a Greek citizen, retained under a Greek contract with a Greek choice-of-law clause, on a Greek-flagged ship owned by a company incorporated in Greece, with an injury claim that could have been redressed in a Greek forum.<sup>124</sup> The Court found the Greek contacts to be “minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country.”<sup>125</sup> According to the Court, the significance of the *Rhoditis/Lauritzen* factors “must be considered in light of the national interest served by the assertion of Jones Act jurisdiction.”<sup>126</sup> In light of the fact that Mr. Rhoditis was injured in the United States, that the defendant had its principal place of business in the United States, that the defendant was engaged in significant U.S. commerce, and that the suit was brought in a U.S. forum, the Court concluded that, consonant with the “liberal purposes of the Jones Act,” the defendant was subject to suit under the Act.<sup>127</sup>

The application of Title III of the ADA to foreign-flagged cruise ships presents a much more convincing connection to the United States than the Jones Act application in *Rhoditis*. In Mr. Spector’s case, six of the eight factors clearly weigh in favor of the application of U.S. law. Moreover, the “liberal purposes” of the ADA — which include the elimination of invidious discrimination against persons with disabilities — mandate, if anything, that it be construed at least as liberally as the Jones Act. Congress specifically designed the public accommodations

provisions of the ADA to be exceedingly broad in scope; the sweep of ADA coverage reaches more entities and services than any of Congress' earlier civil rights statutes.<sup>128</sup> Unquestionably, then, the *Rhoditis/Lauritzen* factors compel the conclusion that Title III of the ADA applies to foreign-flagged cruise ships doing business in U.S. ports.

## **VII. The Feasibility of Accessibility**

### **A. Finding Conflict with International Law Where There Is None**

In support of its decision, the Fifth Circuit also claimed that application of Title III of the ADA would violate international law and treaties. Under what is known as the *Charming Betsy* doctrine, an act of Congress “ought never to be construed to violate the law of nations, if any other possible construction remains.”<sup>129</sup> The Fifth Circuit asserted that Title III's barrier removal provisions “may govern the finest details of maritime architecture in the quest to render ships fully accessible to disabled passengers.” Those provisions, according to the court, “pose a stark likelihood of conflicts with the standards set out in the International Convention for Safety of Life at Sea (SOLAS),” a treaty which the United States has ratified and which establishes minimum safety standards for the construction, equipment, and operation of ships weighing more than five hundred tons and engaged in international passage.<sup>130</sup> Given this perceived “likelihood” of conflicts, the Fifth Circuit concluded that “as a matter of statutory construction, Title III must be narrowly construed” to avoid any possible inconsistency.<sup>131</sup>

The Fifth Circuit's error with respect to its reliance on SOLAS is three-fold. First, the court assumed the existence (or at least the potentiality) of conflicts between the barrier removal requirements of Title III and SOLAS. As a matter of law, however, there should be no conflict. Under the ADA, barriers need only be removed when their removal is “readily achievable.”<sup>132</sup> To the extent that removal of an architectural barrier would conflict with an existing treaty

provision, such removal could not be considered “readily achievable” within the meaning of Title III.<sup>133</sup> Thus the Fifth Circuit’s wholesale rejection of Title III on the basis of a perceived conflict was unwarranted.

Second, as a matter of fact, there is no conflict between SOLAS and Title III. Indeed, the Fifth Circuit was hard-pressed to identify any. The best it could do was reference the Final Report of the PVAAC that identified two possible inconsistencies between SOLAS and Title III — inconsistencies that the Access Board addressed (and resolved) in the draft guidelines the Board recently issued.<sup>134</sup> The Department of Transportation likewise has made clear that when it issues its final regulations based on the Access Board’s guidelines, it “would structure any regulatory requirements to avoid [conflicts]” with SOLAS. Conflicts, however, are unlikely. SOLAS merely establishes “*minimum* standards for the construction, equipment and operation of ships, compatible with their safety.”<sup>135</sup> Nothing in the language, structure, or purposes of SOLAS prevents signatory nations from imposing accessibility requirements on ships that enter their territorial waters.

Finally, much of the conduct at issue in Mr. Spector’s case has nothing to do with removal of barriers that would implicate SOLAS. For example, NCL’s practice of imposing a surcharge for accessible cabins, its requirement that all passengers with disabilities be accompanied by a companion, its requirement that passengers with disabilities self-identify and present a doctor’s statement before traveling, its insistence that persons with disabilities waive NCL’s liability for personal injury occurring onboard, its failure to provide any accessible exterior cabins, and its exclusion of persons with disabilities from emergency evacuation programs are all unrelated to physical barriers on board.<sup>136</sup> The Fifth Circuit’s reliance on

SOLAS in reaching its holding is therefore misplaced. SOLAS does not present a bar to the enforcement of Title III of the ADA against cruise-ships.<sup>137</sup>

### **B. Efforts by Cruise Lines to Comply with Title III of the ADA**

The efforts of some cruise lines to become fully accessible to persons with disabilities further undermine the claim that SOLAS and Title III of the ADA are irreconcilable. For example, some cruise lines have voluntarily removed barriers and made their fleets accessible to persons with disabilities. Royal Caribbean states that every ship in its fleet has staterooms that are specially designed to be wheelchair accessible, and the company has undertaken a multimillion dollar renovation project to make its fleet even more accessible.<sup>138</sup>

Accommodations on Royal Caribbean ships include extra-wide corridors, hydraulic pool and Jacuzzi lifts, and ramps in terraced public areas; Braille on menus, stateroom doors, service directories and elevator buttons; portable kits for people who are deaf or hard of hearing, including TTY (Text Telephone)/TDD (Telecommunications Device for the Deaf), personal notification systems, and strobe alarms; closed-captioned televisions, amplified telephones in staterooms and public areas, and infrared audio receiver systems; and wheelchair accessible slot machines, and roulette, blackjack, and craps tables.<sup>139</sup>

Other cruise lines have implemented similar measures. For example, Princess Cruise Lines has made its cruise ships accessible to persons with mobility impairments: “Ramps are located around the ship which allow wheelchairs or scooters to easily maneuver within the vessel and to cross thresholds between the inside and outside of the ship. Additionally, areas in the major public rooms of the ship have been made accessible including the beauty salon, boutiques, casino, dining rooms and restaurants, self-serve laundromats, public restrooms, lounges, and

health spa and gymnasium.”<sup>140</sup> Indeed, Princess was involved in developing the Access Board’s guidelines, having served as an active member of the PVAAC.<sup>141</sup>

Despite these voluntary efforts by some cruise lines to become accessible, other cruise lines (such as NCL) have refused to comply with the mandate of the ADA to make their ships accessible to persons with disabilities. As a result of litigation against these cruise lines, several of them have been forced into compliance. For example, when Carnival Corporation decided in 2001 to settle a class-action lawsuit brought to make Carnival’s cruise ships ADA compliant, the parties incorporated into their settlement agreement accessibility standards from the PVAAC’s Final Report.<sup>142</sup> Carnival agreed to spend seven million dollars on installing fully and partially accessible cabins, accessible public restrooms, new signage, coamings, thresholds, stairs, corridors, doorways, restaurant facilities, lounges, spas, and elevators.<sup>143</sup> The agreement covered fifteen existing ships, seven under construction, and ships ordered in the future.

Compliance with the ADA is not only architecturally feasible, but evidence also indicates that it is not unduly burdensome. First, the fact that several cruise lines have voluntarily made their ships accessible to persons with disabilities would lend support to the conclusion that it makes good business sense for cruise ships to be accessible. Cruise lines have shareholders and owners to whom they are accountable; they are not going to invest large amounts of capital in becoming more accessible unless they believe that there is some sort of financial benefit to be gained from it. Moreover, as explained above, the number of persons with disabilities will only increase as our nation’s population lives longer and baby boomers enter their golden years. Many cruise lines specifically target their advertising to senior citizens and persons with disabilities to take advantage of these rapidly growing market segments. Finally, as the Supreme Court brief filed by NCL in response to the petition for a writ of certiorari seems to suggest,

NCL is equally (if not more) concerned with the certainty of knowing whether Title III of the ADA applies to its cruise ships. Of primary concern is uniformity of law among the American ports where NCL does business; burdensomeness is not.

### **VIII. The Ultimate Goal: Full Participation**

When Congress passed the ADA in 1990, it lamented “the continuing existence of unfair and unnecessary discrimination” against people with disabilities.<sup>144</sup> Congress sought to remedy this invidious discrimination through the public accommodations provisions of Title III of the ADA, which were designed to assure “full participation” by people with disabilities in all aspects of American life.<sup>145</sup> That sentiment is clearly embraced by the text of the Act itself: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any* place of public accommodation by *any* person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>146</sup> As the House Committee on Public Works and Transportation noted in its final report, “[t]he [ADA] will permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities *fully* into the mainstream of American society.”<sup>147</sup>

Notably, the Act does not limit its coverage to only those businesses and services that a person with a disability would need in order to meet the day-to-day requirements of contemporary life. Rather, the provisions cover almost all aspects of public life and human interaction. In addition to requiring accessibility for more basic needs (e.g., grocery stores and hospitals), Title III expressly includes concert halls, galleries, museums, health spas, amusement parks, or any “other place of recreation” in order to ensure that people with disabilities have access to cultural outlets that make life joyous, not just possible.<sup>148</sup> That Congress opted to

explicitly include these signifiers of a fully-lived life is unsurprising in light of its finding that “persons with disabilities . . . have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life.”<sup>149</sup> Thus, in passing the ADA, Congress sought to empower people with disabilities to live an unconstrained life that includes everything society has to offer.

Given the distinguished position occupied by cruise ships in American society, “full participation” must, necessarily, include equality of access on board. Cruise ships figure prominently in the American cultural landscape, and their rich history has been well documented and fictionalized in print, film, and television.<sup>150</sup> From the long-running television show *The Love Boat*, to the major motion picture *Titanic* (and the Broadway musical of the same name), cruise ships are a source of creative inspiration that satisfies Americans’ desire for romance, fun, adventure, drama, and luxury. As the recent media coverage of the maiden voyage of the *Queen Mary 2* attests, cruise ships continue to operate as a cultural signifier of the good life.<sup>151</sup>

It is not difficult to locate the source of America’s fascination with cruise ships. Besides occupying a unique place in our collective consciousness, “a cruise offers all the things most people want in a vacation — romance, excitement, relaxation, adventure, escape, discovery, luxury, value and more.”<sup>152</sup> It is practically stating the obvious to note that “full participation” in society includes the ability to enjoy these celebrated aspects of human existence. Philosophers have observed for centuries that “being able to laugh, to play, to enjoy recreational activities” is central to the attainment of a fully-lived life.<sup>153</sup> Congress recognized just how important these kinds of activities are when it included leisure-focused entities such as health spas, museums, and amusement parks in the list of public accommodations covered by Title III of the ADA.<sup>154</sup> If, however, the Supreme Court follows the Fifth Circuit’s lead and exempts cruise ships from

the requirements of Title III of the ADA simply because they fly foreign flags of convenience, it would not only be a deviation from settled precedent, but it would seriously undermine Congress' goal of full participation by people with disabilities in all aspects of American life.

In the debates leading up to the passage of the ADA, Congress heard testimony repeatedly emphasizing that the attainment of the "American dream" for people with disabilities was one of the Act's primary goals.<sup>155</sup> According to Senator Orrin Hatch, "[p]ersons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream. It is time for that dream to become a reality."<sup>156</sup> Senator John McCain echoed that sentiment: "Mr. President, this bill is an important step in making the American dream available to all . . . . The freedom to pursue the American dream is at the heart of what makes our Nation great."<sup>157</sup> For over twenty years, the ADA has permitted persons with disabilities to get closer than ever before to the American dream. The outcome of *Spector v. Norwegian Cruise Line Ltd.* will determine whether we take another step forward or a giant leap back.

## **IX. Conclusion: Separate and Unequal**

When Douglas Spector bought his ticket from NCL, he wanted what millions of other Americans have had: the opportunity to experience a fun-filled cruise vacation with all the enjoyable activities and amenities that typically go along with it. He had seen the advertisements on television, and he had seen the promotional materials prepared by the cruise line, so he thought he knew what to expect. Instead of a dream vacation, however, he got nothing but mistreatment, disillusionment, and exclusion. NCL and the cruise line industry insist that they have the right under U.S. and international law to exclude persons with disabilities from their ships, programs, and services. They maintain that they have no obligation to make their ships accessible to people like Mr. Spector.

For the better part of a century, people of color in the United States endured the indignity of state-sanctioned “separate but equal” access to the public sphere. Only in the latter part of the twentieth century did the Supreme Court come to recognize the inherent inequality in such an approach to human interaction. When a cruise ship remains inaccessible to persons with disabilities, however, one cannot even describe the state of affairs as “separate but equal.” Rather, it is one of wholesale exclusion and segregation on the basis of disability. When the Supreme Court takes up the case of Douglas Spector, it will either give its imprimatur to the discriminatory business practices of cruise lines, or it will honor Congress’ desire to end invidious discrimination against persons with disabilities. We can only hope that the Court takes the latter course.

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<sup>1</sup> See International Council of Cruise Lines (ICCL), Inside Cruising: A Guide for Travel Professionals, at <<http://www.iccl.org/faq/cruising.cfm>> (last visited Jan. 8, 2005).

<sup>2</sup> Mr. Spector's co-plaintiffs were Ana Spector, Julia Hollenbeck, David Killough, and Rodger Peters. For the convenience of the reader, however, this paper will refer to the case as Mr. Spector's. Except for Mr. Peters, who has since passed away, all of the co-plaintiffs are still parties in the appeal pending before the Supreme Court.

<sup>3</sup> 42 U.S.C. § 12182(a).

<sup>4</sup> *Id.* § 12184(a). "Specified public transportation" is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special services (including charter service) on a regular and continuing basis." *Id.* § 12181(10).

<sup>5</sup> *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641 (5<sup>th</sup> Cir. 2004).

<sup>6</sup> Compare *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11<sup>th</sup> Cir. 2000) (holding that Title III of the ADA applies to foreign-flagged cruise ships), with *Spector*, 356 F.3d at 649 (rejecting *Stevens*).

<sup>7</sup> Travel Industry Association of America (TIA), Economic Research: Economic Impact of Travel and Tourism, at <<http://www.tia.org/Travel/EconImpact.asp>> (last visited Jan. 9, 2005).

<sup>8</sup> Bureau of Economic Analysis, U.S. Department of Commerce, Gross Domestic Product (GDP), at <<http://www.bea.doc.gov/bea/dn/home/gdp.htm>> (last visited Jan. 9, 2005) (indicating that 2003 GDP was \$11,004 billion).

<sup>9</sup> Business Research and Economic Advisors, *The Contribution of the North American Cruise Industry to the U.S. Economy in 2003*, at 5, 15 (Aug. 2004), available at <[http://www.iccl.org/resources/2003\\_economic\\_study.pdf](http://www.iccl.org/resources/2003_economic_study.pdf)> (last visited Jan. 9, 2005). While the report speaks in terms of the "North American" cruise industry, the vast majority (94%) of North American embarkations are at U.S. ports (including San Juan, Puerto Rico). *Id.* at 13.

<sup>10</sup> ICCL, The Cruise Industry: 2003 Economic Summary, at <[http://www.iccl.org/resources/2003\\_econstudy-analysis.pdf](http://www.iccl.org/resources/2003_econstudy-analysis.pdf)> (last visited Jan. 9, 2005).

<sup>11</sup> Business Research and Economic Advisors, *supra* note 9 at 13. The figure increases to 76% if one includes Puerto Rico.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> Harry Minium, *Cruise Ship Terminal Plan Unveiled*, *Virginian-Pilot* (Apr. 21, 2004), available at <<http://www.cruisenorfolk.org/php-bin/news/showArticle.php?id=7>> (last visited Jan. 9, 2005).

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<sup>14</sup> NYC Economic Development Corp., Press Release, NYC Economic Development Corporation Announces Improvements for Passenger Ship Terminal (Jan. 15, 2004), *available at* <[http://www.nycedc.com/About\\_Us/getPressReleasePreview2004\\_detail.cfm?id=231](http://www.nycedc.com/About_Us/getPressReleasePreview2004_detail.cfm?id=231)> (last visited Jan. 9, 2005).

<sup>15</sup> NCL, Press Release, Countdown to Norwegian Cruise Line's First Homeport Season (May 7, 1999), *available at* <<http://www.ncl.com/news/pr/pr990507a.html>> (last visited Jan. 9, 2005).

<sup>16</sup> New Jersey Office of Travel & Tourism, Press Release, Royal Caribbean Cruises Ltd. Makes a New Home in New Jersey (May 18, 2004), *available at* <[http://www.state.nj.us/travel/news/2004\\_releases/p051804a.html](http://www.state.nj.us/travel/news/2004_releases/p051804a.html)> (last visited Jan. 9, 2005).

<sup>17</sup> *See* NCL, Press Release, NCL Purchases Hawai'i Tour Bus Company (Nov. 16, 2004), *available at* <<http://www.ncl.com/news/pr/pr111704.htm>> (last visited Jan. 9, 2005).

<sup>18</sup> Dun & Bradstreet Report on NCL (Nov. 29, 2004) (cited in Brief of *Amici Curiae*, Nine Associations Representing Persons with Disabilities, *see infra* note 93).

<sup>19</sup> Carnival Corporation, 2003 SEC Form 10-K, at 28, *available at* <<http://sec.freedgar.com/displayText.asp?ID=2789703>> (last visited Jan. 9, 2005).

<sup>20</sup> *Id.* at 22.

<sup>21</sup> Royal Caribbean Ltd., 2003 SEC Form 20-F, at 18, *available at* <<http://sec.freedgar.com/displayHTML.asp?ID=2832825>> (last visited Jan. 9, 2005).

<sup>22</sup> *Id.* at 26.

<sup>23</sup> Carnival Corporation, 2003 SEC Form 10-K, at 78, *supra* note 19.

<sup>24</sup> Arnold Urges Snowbound to Sail Away, AdWeek.com (Dec. 28, 2004).

<sup>25</sup> Jane L. Lefevre, *Cruise Ship Campaign Aims at Vacationers Tired of Snow*, New York Times, Dec. 28, 2004.

<sup>26</sup> Carnival Cruise Lines, Press Release, Carnival To Launch New Multimillion-Dollar Ad Campaign To Convey Product Enhancements (Dec. 6, 2004), *available at* <[http://www.carnival.com/CMS/Articles/new\\_adcampaign.aspx](http://www.carnival.com/CMS/Articles/new_adcampaign.aspx)> (last visited Jan. 9, 2005).

<sup>27</sup> Wayne Friedman, *Madison & Vine: Product Placements Rise at CBS*, Advertising Age, Sept. 23, 2002, at 8.

<sup>28</sup> NCL, Press Release, Norwegian Cruise Line Gives Away 125 Surprise "Second Honeymoons" at Reaffirmation Ceremony on Good Morning America (Nov. 18, 2004), *available at* <<http://www.ncl.com/news/pr/pr111804.htm>> (last visited Jan. 9, 2005).

<sup>29</sup> Royal Caribbean Sails with TiVo, AdWeek.com (Sept. 30, 2004).

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<sup>30</sup> Robert Gutsche Jr., *(Work)space Available — For a Price*, Chicago Tribune, Sept. 14, 2003, at C5.

<sup>31</sup> See ICCL, *Inside Cruising*, *supra* note 1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Tricia Holly, *Able Bodies, Open Minds: Learning to Serve the Disabled Travel Market is Daunting but Well Worth the Effort of Travel Agents*, *Travel Agent*, Vol. 311, No. 2, Jan. 13, 2003, at 20 (noting that “the number of disabled passengers shot up 36 percent between 2000 and 2001” and “predict[ing] an even larger increase in 2002”).

<sup>35</sup> Victoria Stevens, *Royal Treatment: Royal Caribbean Line Launches Its Newest Luxury Ship, the Mariner of the Seas*, *Toronto Star*, Nov. 27, 2003, at H01.

<sup>36</sup> See Alexandria Berger, *For the Disabled, Cruises Are Now an Easy Vacation*, *Virginian-Pilot* (Norfolk, VA), Jan. 7, 2002, at E3.

<sup>37</sup> While not required to do so by the U.S. law, most cruise lines provide quality medical services on board, and most cruise lines require each onboard physician to have an American medical license or its equivalent. See, e.g., Princess Cruise Lines, *Shipboard Medical Program*, available at <<http://www.princess.com/about/policy.jsp?policyId=na397>> (last visited Jan. 29, 2005); Crystal Cruises, *Shipboard Life: Medical Services*, available at <<http://www.crystalcruises.com/onboard.aspx?ID=9#id36>> (last visited Jan. 29, 2005); Carnival Cruise Lines, *Is There a Doctor on Board?*, available at <[http://www.carnival.com/CMS/FAQs/Medical\\_Services.aspx](http://www.carnival.com/CMS/FAQs/Medical_Services.aspx)> (last visited Jan. 29, 2005).

<sup>38</sup> See Karin Esterhammer, *Sailing on Four Wheels: A Short Voyage to Mexico Proves to Be Easy Going for a Wheelchair-Bound Vacationer*, *L.A. Times*, Feb. 6, 2000, at L5.

<sup>39</sup> See Dian McDougall, *Ships Meet Special Needs*, *Toronto Sun*, Dec. 1, 2002, at T3.

<sup>40</sup> See Deborah Alexander, *Vacationing with Disabilities: New Travel Market Is Opening Up on the Road*, *Omaha World-Herald*, May 23, 2003, at 1D; see also *A League of Their Own*, *Exceptional Parent*, Vol. 34, No. 5, May 1, 2004, at 42.

<sup>41</sup> See Alexander, *supra* note 40.

<sup>42</sup> See Holly, *supra* note 34.

<sup>43</sup> See N.P. Ready, *Ship Registration* 6, 8-9 (3d ed. 1998).

<sup>44</sup> See H. Edward Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 *Tul. Mar. L. J.* 139, 144 (1996); Robert Rienow, *Test of the Nationality of a Merchant Vessel* 155-57 (1937).

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<sup>45</sup> See William Langewiesche, *The Outlaw Sea* 5 (2004).

<sup>46</sup> *Lauritzen v. Larsen*, 345 U.S. 571, 587 (1953).

<sup>47</sup> Anderson, *supra* note 44, at 151.

<sup>48</sup> 46 U.S.C. § 12102.

<sup>49</sup> *Id.* § 8103(b)(1)(B).

<sup>50</sup> *Id.* § 8103(a).

<sup>51</sup> See Anderson, *supra* note 44, at 162-67; Jim Morris, “Flags of Convenience” Give Owners a Paper Refuge, *Houston Chronicle*, Aug. 22, 1996, available at <<http://www.chron.com/content/interactive/special/maritime/96/08/22/part5.html>> (last visited Jan. 15, 2005).

<sup>52</sup> See Ready, *supra* note 43, at 88; International Ship Registry Review, *The Official Guide to Ship Registries*, at 22-25 (2002) (cited in Brief of *Amicus Curiae* Jonathan M. Guttoff, *see infra* note 93).

<sup>53</sup> *Id.*; *see also* Ready, *supra* note 43, at 88.

<sup>54</sup> See Official Guide to Ship Registries, *supra* note 52, at 317-21; Morris, *supra* note 51; Ready, *supra* note 43, at 132-33.

<sup>55</sup> *Id.*

<sup>56</sup> Under the Passenger Services Act of 1886, 46 App. U.S.C. § 289, foreign-flagged vessels cannot transport passengers directly between U.S. ports. The handful of U.S.-flagged cruise ships in operation are registered in the U.S. to permit cruises between the Hawaiian Islands, or from the continental U.S. to Hawaii. The Passenger Services Act, however, does not prohibit foreign-flagged ships departing from and returning to the same U.S. port. Nor does it prohibit foreign-flagged ships departing from a U.S. port, visiting a foreign port, and then continuing to a second U.S. port. Nor does it prevent a ship from taking on passengers at a U.S. port and then returning them to another U.S. city by ground or air, or vice-versa.

<sup>57</sup> 45 Fed. Reg. 45,600 (1991). Congress has also indicated its awareness of the widespread practice of flying foreign flags of convenience. In deciding whether to amend the Johnson Act, 15 U.S.C. § 1175, to permit gambling on certain U.S.-flagged ships, the House Report on the proposed amendment explained that, of the seventy-seven cruise ships serving U.S. ports, only two of them were U.S.-flagged. See H.R. Rep. 102-357 (Nov. 22, 1991).

<sup>58</sup> Stephen Thomas, Jr., *State Regulation of the Cruise Ship Pollution: Alaska’s Commercial Passenger Vessel Compliance Program as a Model for Florida*, 13 *J. Transnat’l L. & Pol’y* 533, 540 (2003).

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<sup>59</sup> 42 U.S.C. § 12182(a).

<sup>60</sup> *Id.* § 12184(a).

<sup>61</sup> *Id.* § 12181(7).

<sup>62</sup> *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) (spelling error corrected).

<sup>63</sup> *See* 56 Fed. Reg. 35,551 (1991); 28 C.F.R. Pt. 36 App. B at 677; Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994), *available at* <<http://www.usdoj.gov/crt/ada/taman3.html>> (last visited Jan. 14, 2005).

<sup>64</sup> 42 U.S.C. § 12181(10).

<sup>65</sup> 56 Fed. Reg. 45,600 (1991).

<sup>66</sup> *See* 28 C.F.R. Pt. 36, App. B at 677; 49 C.F.R. 37.5(f); Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994). As for newly constructed cruise ships, until the government promulgates regulations setting specific accessibility standards for newly constructed or altered cruise ships, the vessels need only comply with the accessibility requirements for existing ships, e.g., the removal of barriers to access where readily achievable. *Id.*; *see* discussion of PVAAC, *infra*.

<sup>67</sup> 56 Fed. Reg. 45,600.

<sup>68</sup> Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994).

<sup>69</sup> 42 U.S.C. §§ 12101(b)(4), 12181(1)(B),(C).

<sup>70</sup> *See United States v. Norwegian Cruise Line Ltd.*, No. 01-0244-CIV (S.D. Fla. Aug. 22, 2001) (consent decree), *available at* <<http://www.usdoj.gov/crt/ada/ncruise.htm>> (last visited Jan. 9, 2005).

<sup>71</sup> 42 U.S.C. §§ 12204, 12186(c).

<sup>72</sup> *Id.* § 12183(a)(1).

<sup>73</sup> *Id.* §§ 12182(b)(2)(A)(iv), 12181(9)

<sup>74</sup> Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994).

<sup>75</sup> The Committee's membership included American Classic Voyages, American Council of the Blind, American Sail Training Association, American Society of Travel Agents, BB Riverboats, Boston Commission for Persons with Disabilities, Chesapeake Region Accessible Boating, International Council of Cruise Lines, National Tour Association, Paralyzed Veterans of America, Passenger Vessel Association, Port of San Francisco, Princess Cruises, Rhode Island Tourism Division, Self Help for Hard of Hearing People, Society for the Advancement of Travel

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for the Handicapped, Society of Naval Architects and Marine Engineers, Southeast Alaska Independent Living, Southwest Disability and Business Technical Assistance Center, Transportation Institute, and the Washington State Department of Transportation. *See* Passenger Vessel Access Advisory Committee Members, *available at* <<http://www.access-board.gov/pvaac/CommList.htm>> (last visited Jan. 9, 2005).

<sup>76</sup> The Final Report is *available at* <<http://www.access-board.gov/pvaac/commrept/index.htm>> (last visited Jan. 29, 2005). *See also* Summary of the Report from the Passenger Vessel Access Advisory Committee, *available at* <<http://www.access-board.gov/pvaac/commrept/report-summary.htm>> (last visited Jan. 29, 2005).

<sup>77</sup> The PVAAC relied primarily on the original ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) that the Access Board issued in 1991. *See* 56 Fed. Reg. 35408 (July 26, 1991). The PVAAC also considered the “Recommendations for a New ADAAG” published on September 30, 1996, by another Access Board advisory committee. *See* ADAAG Review Advisory Committee’s Recommendations, *available at* <<http://www.access-board.gov/ada-aba/commrept.htm>> (last visited Jan. 9, 2005). The Access Board eventually issued a revised version of its Accessibility Guidelines for Buildings and Facilities in July 2004. *See* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 69 Fed. Reg. 44084 (July 23, 2004).

<sup>78</sup> *See* Summary of the Report from the Passenger Vessel Access Advisory Committee, *supra* note 76; International Convention for Safety of Life at Sea, 32 U.S.T. 47 (1974).

<sup>79</sup> *See* Americans with Disabilities Act Accessibility Guidelines for Passenger Vessels; Large Vessels, 69 Fed. Reg. 69244 (Nov. 26, 2004); *see also* Board Releases Information for Guidelines for Passenger Vessels (Nov. 26, 2004), *available at* <<http://www.access-board.gov/news/pvag.htm>> (last visited Jan. 9, 2005).

<sup>80</sup> As explained above, the PVAAC relied on the 1991 version of the ADAAG in preparing its Final Report, and the Access Board has since issued a revised ADAAG. *See supra* note 77. As a result, the recently issued draft guidelines borrow several standards from the revised ADAAG, rather than from the PVAAC’s recommendations.

<sup>81</sup> 69 Fed. Reg. 69,246.

<sup>82</sup> *Id.*

<sup>83</sup> It is difficult to say when final regulations will be issued. As the Fifth Circuit observed in Mr. Spector’s case, “[a]mazingly, now more than a decade since the ADA’s passage, DOJ and DOT have yet to issue new construction and alteration regulations specific to cruise ships.” *Spector*, 356 F.3d at 650 n.10.

<sup>84</sup> *See Spector*, 356 F.3d at 644 (noting that NCL did not dispute district court’s finding that cruise ships are “public accommodations” and a “specified public transportation service” under Title III).

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<sup>85</sup> *Spector*, 356 F.3d at 645 (quoting *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 250 (1999)).

<sup>86</sup> *Spector*, 356 F.3d at 648.

<sup>87</sup> *Id.* at 649.

<sup>88</sup> *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000).

<sup>89</sup> *Id.* at 1242.

<sup>90</sup> *Id.*

<sup>91</sup> *Spector*, 356 F.3d at 649.

<sup>92</sup> *See* Sup. Ct. R. 10(a) (recognizing that conflict among circuit court rulings can be reason to grant writ of certiorari). The Eleventh Circuit covers Florida, Georgia, and Alabama; the Fifth Circuit covers Texas, Louisiana, and Mississippi.

<sup>93</sup> *See* Brief of *Amici Curiae* Paralyzed Veterans of America, American Association of People with Disabilities, The Council of Parent Attorneys and Advocates, Inc., Epilepsy Foundation, United Spinal Association, United Cerebral Palsy, The Arc of the United States, American Council of the Blind, National Multiple Sclerosis Society, and The Training and Advocacy Support Center of the National Association of Protection and Advocacy Systems, Inc., in Support of Petitioners; Brief of *Amici Curiae* Nine Associations Representing Persons with Disabilities in Support of Petitioner (AARP, Alexander Graham Bell Association for the Deaf and Hard of Hearing, American Diabetes Association, Association on Higher Education and Disability, Depression and Bipolar Support Alliance, Disability Rights Education and Defense Fund, Inc., Judge David L. Bazelon Center for Mental Health Law, National Association of Councils on Developmental Disabilities, and National Association of the Deaf); Brief of *Amicus Curiae* Jonathan M. Guttoff in Support of Petitioners; Brief of Texas, Arizona, California, Illinois, Massachusetts, Missouri, Utah, and Washington as *Amici Curiae* in Support of Petitioners; Brief for the United States as *Amicus Curiae* Supporting Petitioners. The briefs are available online at <[http://www.goldsteinhowe.com/blog/archive/2004\\_12\\_12\\_SCOTUSblog.cfm#110314602661730727](http://www.goldsteinhowe.com/blog/archive/2004_12_12_SCOTUSblog.cfm#110314602661730727)> (last visited Jan. 31, 2005).

<sup>94</sup> *See* Brief of *Amicus Curiae* International Council of Cruise Lines in Support of Respondent; Brief of *Amicus Curiae* Mediterranean Shipping Company Crociere, S.P.A.; Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Respondent; Brief for the Commonwealth of the Bahamas Maritime Authority as *Amici Curiae* in Support of Respondent; Brief *Amicus Curiae* of American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), Britannia Steam Ship Insurance Association Ltd., Japan Shipowners' Mutual P&I Association, London Steam Ship Owners Mutual Insurance Association Ltd., North of England Protecting and Indemnity Association Ltd., Shipowners' Mutual Protection and Indemnity Association (Luxembourg), Standard Steamship Owners Protection and Indemnity Association

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(Bermuda) Ltd., Steamship Mutual Underwriting Association (Bermuda) Ltd., Sveriges Angfartygs Assurans Forening, United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., and West of England Shipowners Mutual Insurance Association (Luxembourg) in Support of Respondent.

<sup>95</sup> *Spector*, 356 F.3d at 644 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957)).

<sup>96</sup> 11 U.S. (7 Cranch) 116, 144 (1812).

<sup>97</sup> 262 U.S. 100, 124 (1923).

<sup>98</sup> *Id.*; see also *Patterson v. Bark Eudora*, 190 U.S. 169, 176 (1903) (“[W]hen a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country.”).

<sup>99</sup> *Cunard*, 262 U.S. at 120.

<sup>100</sup> *Id.* at 125-26.

<sup>101</sup> 42 U.S.C. § 12102(b)(1).

<sup>102</sup> *Cunard*, 262 U.S. at 126.

<sup>103</sup> 353 U.S. 138 (1957).

<sup>104</sup> 372 U.S. 10 (1963).

<sup>105</sup> *Mali v. Keeper of the Common Jail (Wildenhus’s Case)*, 120 U.S. 1, 12 (1887).

<sup>106</sup> *McCulloch*, 372 U.S. at 19, n.9; see Restatement (Third) of the Foreign Relations Law of the United States, § 502 cmt. a (1987) (“Under international law, the flag state is responsible for adopting and enforcing laws to protect the welfare of the crew and passengers aboard a ship.”).

<sup>107</sup> *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 248 (1999)

<sup>108</sup> *Spector*, 356 F.3d at 645 (quoting *ARAMCO*, 499 U.S. at 248).

<sup>109</sup> *Id.* at 646.

<sup>110</sup> *Id.*

<sup>111</sup> *Cunard*, 262 U.S. at 130.

<sup>112</sup> See *Grogan v. Hiram Walker & Sons*, 259 U.S. 80, 89-90 (1922) (holding that National Prohibition Act prohibited transfer of alcoholic beverages from one British vessel to another in New York harbor).

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<sup>113</sup> 282 U.S. 234 (1931). While *Uravic* was subsequently overruled on statutory grounds, its reasoning with regard to the application of U.S. law to foreign-flagged ships remains valid. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 348 (1991).

<sup>114</sup> *Id.* at 238.

<sup>115</sup> *Id.* at 240.

<sup>116</sup> *Id.* at 238.

<sup>117</sup> *Id.* at 240.

<sup>118</sup> See, e.g., *Wildenhus's Case*, 120 U.S. at 12 (upholding on public safety grounds the application of New Jersey's general murder statute to prosecute murder of one Belgian national by another aboard a Belgian vessel while docked in a New Jersey port).

<sup>119</sup> *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 309 (citing *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953)).

<sup>122</sup> *Id.* at 310.

<sup>123</sup> *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959).

<sup>124</sup> 398 U.S. at 310.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 309.

<sup>127</sup> *Id.* at 310.

<sup>128</sup> See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 Berkeley J. Emp. & Lab. L. 377, 385-87 (2001) (comparing scope of Title III to the narrower public accommodations provisions of the Civil Rights Act of 1964); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 470-73, 493-501 (1991) (noting that Title III covers, "with a few exceptions such as the sale or rental of housing, almost every facet of American life in which a business establishment or other entity serves or comes into contact with members of the general public").

<sup>129</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1904) (quoted in *Spector*, 356 F.3d at 646).

<sup>130</sup> *Spector*, 356 F.3d at 647; see International Convention for Safety of Life at Sea, 32 U.S.T. 47 (1974).

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<sup>131</sup> *Spector*, 356 F.3d at 647.

<sup>132</sup> 42 U.S.C. § 12182(b)(2)(A)(iv).

<sup>133</sup> See Title III Technical Assistance Manual III-1.2000(D) (Supp. 1994); see also U.S. Const. art. VI, § 2 (“Treaties . . . shall be the supreme Law of the Land.”).

<sup>134</sup> Americans with Disabilities Act Accessibility Guidelines for Passenger Vessels; Large Vessels, 69 Fed. Reg. 69244 (Nov. 26, 2004).

<sup>135</sup> SOLAS, Technical Provisions, 32 U.S.T. 47 (emphasis added).

<sup>136</sup> Ironically, this last aspect — NCL’s exclusion of persons with disabilities from evacuation drills — is itself a violation of SOLAS: “Clear instructions to be followed in the event of an emergency shall be provided for *every* person on board.” SOLAS: Consolidated Edition 2001, at 303 (Int’l Mar. Org. ed., 2001) (emphasis added).

<sup>137</sup> SOLAS applies to *all* passenger vessels on international voyages, regardless of the ship’s registry. Under the Fifth Circuit’s reasoning, even U.S.-flagged cruise ships would get a free pass from the ADA because of the “conflict” with SOLAS.

<sup>138</sup> Royal Caribbean International, Accessibility Onboard, *available at* <<http://www.royalcaribbean.com/allaboutcruising/accessibleseas/home.do>> (last visited Jan 15, 2005). The website also provides specific information regarding accessibility for individuals with visual, hearing, and other mobility impairments.

<sup>139</sup> Press Release, Society for Accessible Travel and Hospitality, Royal Caribbean International Supports SATH (July 27, 2004), *available at* <<http://www.sath.org/index.html?section=PressReleases&id=4259>> (last visited Jan. 15, 2004); Royal Caribbean International, Feel Right at Home, *available at* <<http://www.royalcaribbean.com/allaboutcruising/accessibleseas/feelRightAtHome.do>> (last visited Jan. 15, 2005)

<sup>140</sup> See Princess Cruise Lines, Accessibility for Passengers with Disabilities, *available at* <<http://www.princess.com/about/policy.jsp?policyId=na405>> (last visited Jan. 15, 2005).

<sup>141</sup> *Id.*

<sup>142</sup> See *Access Now, Inc. v. Cunard Line Ltd.*, No. 00-7233-Civ (S.D. Fla. Apr. 18, 2001) (Ex. 1 to Notice of Conditional Class Certification, Proposed Settlement, and Fairness Hearing).

<sup>143</sup> *Id.* (Order Approving Settlement Agreement, Oct. 31, 2001, *available at* 2001 U.S. Dist. LEXIS 21481). In a class action brought against Costa Cruises, the cruise line agreed to make substantial modifications to its ships as part of a settlement. See *Access Now, Inc. v. Costa Crociere, S.P.A.*, No. 00-7231-CIV (order approving class settlement) (S.D. Fla. Oct. 21, 2004).

<sup>144</sup> 42 U.S.C. § 12101(a)(9).

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<sup>145</sup> *Id.* § 12101(a)(8).

<sup>146</sup> 42 U.S.C. § 12182(a) (emphasis added).

<sup>147</sup> H.R. Rep. No. 101-485(I) (1990), at 24 (emphasis added); *see also* H.R. Rep. No. 101-485(III), at 22 (“The purpose of the [ADA] is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life.”).

<sup>148</sup> *See* 42 U.S.C. § 12181(7).

<sup>149</sup> H.R. Rep. No. 101-485(III), at 25 (citing Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream* (1986)).

<sup>150</sup> *See, e.g.*, Kurt Ulrich, *Monarchs of the Sea* (1999, St. Martin’s Press); *Titanic* (Paramount Studios, 1997); Frederick Emmons, *American Passenger Ships: The Ocean Lines and Liners, 1873-1983* (1985, Univ. of Del. Press); *The Love Boat* (1977-1986, ABC Television).

<sup>151</sup> *See* Melissa Grace, et al., *Bow to the Queen: New Yorkers Stand at Attention as QM2 Ends 1st Voyage Here*, N.Y. Daily News, Apr. 23, 2004, at 2; James Barron, *A Queen Arrives, and Even in Jaded New York, Jaws Drop*, N.Y. Times, Apr. 23, 2004, at B2.

<sup>152</sup> ICCL, *Inside Cruising*, *supra* note 1.

<sup>153</sup> Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *Pol. Theory* 202, 222 (1992) (quoted in Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 *Ala. L. Rev.* 997, 1015 (2004)).

<sup>154</sup> *See* 42 U.S.C. § 12181(7).

<sup>155</sup> *See, e.g.*, S. Rep. No. 101-116, at 20 (1989) (citing testimony that the ADA would permit people with disabilities to “have the same aspirations and dreams as other American citizens” and “know that their dreams can be fulfilled,” and that America is true to its ideal of equality, which is “the full measure of the American dream”).

<sup>156</sup> *Id.* at 96.

<sup>157</sup> 136 *Cong. Rec.* S9684 (July 13, 1990).