STADIUM-STYLE SEATING MOVIE THEATERS:

DOES THE CORNERSTONE OF THE THEATER INDUSTRY'S RECENT TRANSFORMATION VIOLATE THE AMERICANS WITH DISABILITIES ACT?

I. INTRODUCTION

Over the past eight years the "megaplex" movie theater phenomenon has transformed the movie theater industry.[1] Small theaters with sloped-floor seating configurations have been replaced by megaplexes: theaters with more than thirteen screens and stadium-style seating.[2] This trend grew so rapidly that in 1998 as many as seventy-

1. Jon Springer, *Megaplexes alter movie theater picture*, SHOPPING CENTERS TODAY, July 1998, *available at* http://www.icsc.org/srch/sct/current/sct9807/16.htm (last visited Oct. 8, 2003). Discussing the expert panel at the International Council of Shopping Centers Spring 1998 Convention, Springer noted that "though still a relatively new phenomenon, the modern megaplex movie theater has changed the entire theater industry, affecting everything from co-tenancies to architecture to expansion to real estate deals." *Id. See also* Claudia Eller, *Movies See Best Year Since 1959: Admissions bump attributed to terrorism, better theaters*, LOS ANGELES TIMES, Dec. 29, 2002, *available at* www.ohio.com/mld/ohio/4828662.html?template=contentModules/printstory.jsp (last visited Oct. 8, 2003) (recognizing that the "upswing" in movie theater business in 2002-2003 is due to "updated megaplexes featuring stadium seating and state-of-the-art picture and sound presentations"); Dan Ackman, *Management & Trends: Movie Theaters of the Absurd*, FORBES, Mar. 2. 2001, *available at* http://www.forbes.com/2001/03/02/0302movies_print.html (last visited Oct. 8, 2003) ("[T]he increase in theater admissions in the 1990s was a result of new theaters, which attracted customers with stadium seating and other amenities").

2. Springer, *supra* note 1; Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1127 (9th Cir. Aug. 13, 2003) [hereinafter *OPVA*] ("[S]tadium-style movie theaters were rare in this country until the mid-1990s, and the older theaters, which were built on sloping floors, did not generally create the same kinds of dramatic disparities in vertical viewing angles that

five percent of the theaters existing in 1995 had been rendered "functionally obsolete."[3] Industry leaders say the phenomenon began with the 1995 opening of AMC Entertainment Inc.'s Grand Theater in Dallas, Texas, a facility featuring twenty-four screens, five-thousand seats and stadium-style seating.[4]

Stadium-style seating refers to theaters where the majority of seats are placed on raised steps rather than a sloped floor.[5] Primary public entrances in most stadium-style theaters are placed at the front of the auditorium.[6] The first few rows of seats are affixed to a sloped floor; thereafter, seating is placed on stepped platforms.[7] Handicapped seating is generally located in the rows closest to the screen.[8] The stadium-style seating section is inaccessible to wheelchair-bound patrons, as well as disabled persons unable to climb stairs.[9]

Prior to the mid-1990s "all theaters" were constructed with a sloped-floor design, however, today "virtually all newly constructed

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stadium-style theaters do."). This case is reviewed in depth *infra*, Section.III.B.

3. Springer, *supra* note 1 (quoting Charles P. Stilley, President, AMC Realty, a parent company to approximately 2,500 movie screens).

4. Springer, *supra* note 1.

5. *OPVA*, 339 F.3d at 1127. Typically, each tread in a stadium-style seating design is placed fifteen to eighteen inches above the preceding tread. Springer, *supra* note 1.

6. Steven John Fellman, *Differing Legal Decisions Create Confusion, The ADA: A Crying Example of the Need for Regulatory Reform*, IN FOCUS, June 2003, *available at* http://www.infocusmag.com/03June/washreport.htm (last visited Oct. 8, 2003) [hereinafter Fellman, *Differing Legal Decisions*].

7. Steven John Fellman, *Decision in the U.S. District Court for the Central District of California: Court Clarifies Disability Act's Companion-Seating Requirements*, IN FOCUS, October 2003, *available at* http://www.infocusmag.com/03october/washreport.htm (last visited Oct. 8, 2003) [hereinafter Fellman, *Decision in the U.S. District Court for the Central District of California*]. Fellman argued that DOJ "has a responsibility not only to disabled persons but also to operators of public accommodations such as theaters owners." *Id.*

8. Fellman, *Differing Legal Decisions*, *supra* note 6. Some stadiums place handicapped seating in the access aisle that separates the raised and sloped-floor seating areas. *See* United States v. Hoyts Cinemas Corp., 256 F. Supp. 2d 73, 79 (D. Mass. 2003), *appeal docketed*, No. 03-1808 (1st Cir. May 30, 2003). This case is reviewed *infra* Section.IV.

9. United States v. AMC Entm't, Inc., 232 F. Supp. 2d 1092, 1101 (C.D. Cal. 2002), *enforced*, 245 F. Supp. 1094 (C.D. Cal. 2003). This case held that DOJ regulation § 4.33.3 extends "not only to possible obstructions but also refers to viewing angles." *Id.* at 1110. This case is reviewed *infra* Section.IV.

cinemas contain stadium seating."[10] Theaters featuring stadium-style seating now "outperform . . . traditional sloped-floor theater complexes in terms of revenue, revenue per person, and/or attendance per screen."[11] Stadium-style theaters aim to "maximize unobstructed view for theater patrons."[12] In short, these highly profitable theaters are now "the industry benchmark."[13]

Notwithstanding their commercial success, stadium-style seating theaters are controversial.[14] Advocates for the disabled and the

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10. Union Internationale des Cinemas, *Survey of Exhibition Industry Practices: U.S. Answers by John Fithian, NATO President*, (Dec. 9, 2002), *available at* http://www.natoonline.org/UNIC-NATOSurveyUSAnswers.pdf (last visited Oct. 10, 2003). Union Internationale des Cinemas (UNIC) conducted a survey regarding the American movie theater industry addressing issues ranging from "Cinema Construction," "Screen Count," to "Government Regulation of Movie Content." *Id.* UNIC is an international exhibition association that represents more than 25,000 movie screens in Europe and Israel. *See International Union Votes: UNIC Appoints Van Dommelen New Prez*, INFOCUS, Aug. 2003, *available at* http://www.infocusmag.com/03August/international.htm (last visited Oct. 27, 2003).

11. *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1096 (noting that 82 of the 83 theaters AMC built or modified since May 1995 incorporated stadium-style seating).

12. *OPVA*, 339 F.3d at 1127; *see also AMC Entm't, Inc.*, 232 F. Supp. 2d at 1095 (stadium-style seating theaters marketed as "guarantee[ing] that '*all* seats' are the 'best in the house.'" (emphasis added)).

13. *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1096 (quoting an AMC Entertainment, Inc. annual report).

14. Fellman, *Decision in the U.S. District Court for the Central District of California, supra* note 7; *see* Fellman, *Differing Legal Decisions, supra* note 6. Fellman stated that DOJ and the Access Board's efforts to implement Title III of the ADA have resulted in "confusion and uncertainty for operators of public facilities—and frustration for people with disabilities trying to get the regulation amended to reflect new technologies and new concepts of accessible design." *Id.* Steven Fellman lobbies for the National Association of Theater Owners (NATO), a trade organization for more than 10,000 movie screens nationwide. *Id.*; *see* Press Release, U.S. DEP'T OF JUSTICE, *Justice Department Sues Major Movie Theater Chain for Failing to Comply with ADA* (Jan. 29, 1999), *available at* http://www.usdoj.gov/crt/ada/archive/amcpress.htm (last visited Oct. 8, 2003) [hereinafter *Justice Department Sues Major Movie Theater Chain*]. This press release announced that the Attorney General had filed suit against American Multi-Cinema Inc. and AMC Entertainment alleging that the companies' stadium-style theaters violated Title III of the American with Disabilities Act ("ADA"). *Id.*; *see also Stadium Seating for Wheelchairs*, CHARLOTTE OBSERVER, Apr. 11, 2003, *at* 2003 WL 17748706 (reporting the March 31, 2003 release of the decision of the district court for the District of Massachusetts in United States v. Hoyts Cinemas Corporation); *ADA Case Results in Stadium Seats*, DESERET NEWS, Apr. 5, 2003, *at* 2003 WL

Department of Justice[15] ("DOJ") maintain that the popular front entry design subjects disabled patrons to inferior seating.[16] They argue accordingly that these theaters violate Title III of the Americans with Disabilities Act of 1990 ("ADA"),[17] as well as the implementing regulation,[18] known as § 4.33.3.[19] Specifically, they contend DOJ's interpretation of § 4.33.3 warrants judicial deference to the agency regulation.[20] Namely, that § 4.33.3 requires theaters to provide disabled patrons with viewing angles comparable to the viewing angles provided patrons who are not disabled.[21]

17215693 (same).

15. Congress authorized the Department of Justice to promulgate regulations to implement Title III of the Americans with Disabilities Act of 1990. 42 U.S.C. § 12186(b). DOJ is also required to provide technical assistance and enforce Title III. 42 U.S.C. § 12188(b); *see* Brief of Amicus Curiae United States at 1-2, Lara v. Cinemark USA, Inc., 207 F.3d 783 (2000) (No. 99-50204). The Fifth Circuit's *Lara* decision is reviewed in detail *infra* Section.III.

16. Appellants' Replacement Brief at 2, Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003) (No. 01-35554); *see Justice Department Sues Major Movie Theater Chain, supra* note 14; Fellman, *Decision in the U.S. District Court for the Central District of California, supra* note 7.

17. 42 U.S.C. § 12182(a); *see* 42 U.S.C. § 12183(a). This statute is reviewed in detail *infra* Section.II.B.

18. 28 C.F.R. § 36.406, app. A, sec. 4.33.3

19. DOJ regulation § 4.33.3, "Assembly Areas: Placement of Wheelchair Locations," provides as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall provide people with physical disabilities a choice of admission prices and *lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
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> EXCEPTION: Accessible positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. pt. 36, app. A, sec. 4.33.3 (1996) (emphasis added). This regulation is reviewed in detail *infra* Section.II.C.

20. Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 8-9, Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003) (No. 01-35554); Appellants' Replacement Brief at 8-9, *OPVA*, (No. 01-35554).

21. *See OPVA*, 339 F.3d at 1130; *Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 84.

Movie theater owners and motion picture engineers concede that the first several rows of a theater do not "provide the same comfortable . . . view of the screen" as that provided by the stadium-style seating section.[22] Nonetheless, they dispute attempts to read a "comparable viewing angle requirement" into the comparable line of sight requirement.[23] Since the "comparable viewing angle requirement" was developed by DOJ in an *amicus curiae* brief, movie theater owners posit that this interpretation of the law is not binding; it was promulgated without benefit of the notice and comment process used in promulgating agency rules and regulations.[24]

It is the thesis of this comment that these stadium-style movie theaters violate Title III of the Americans with Disabilities Act of 1990.[25] Section one will discuss Title III, the applicable Architectural and Transportation Barriers Compliance Board minimum guideline, and DOJ regulation § 4.33.3. Section two will examine the circuit split between the Fifth, Ninth, and Sixth Federal Circuit Courts of Appeal

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22. *OPVA*, 339 F.3d at 1132 n.7 ("[U]ncontroverted evidence [including that offered from the Society of Motion Picture and Television Engineers (SMPTE)] demonstrates that, not only is the viewing angle objectively uncomfortable for all viewers [in the rows immediately in front of the theater], but the discomfort is exacerbated for wheelchair-bound viewers relative to able-bodied viewers sitting in the same row."); *see AMC Entm't, Inc.*, 232 F. Supp. 2d at 1097; *Justice Department Sues Major Movie Theater Chain*, *supra* note 14; SMPTE ENGINEERING GUIDELINE at 4-5 (1994). The Guideline provides "architectural parameters" and other guidance for designing movie theaters that are optimal in terms of comfort and movie viewing experience. *See AMC Entm't, Inc.*, 232 F. Supp. 2d at 1099 (citing SMPTE ENGINEERING GUIDELINE at 18-189: *Design of Effective Cine Theaters* (1989)).

23. Reply Brief for Defendant-Appellant at 27-29, Lara v. Cinemark USA, Inc., 207 F.3d 783 (2000) (No. 99-50204); *Lara*, 207 F.3d at 788; *see* Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc, 142 F. Supp. 2d 1293, 1295 (D. Or. 2001), *rev'd*, 339 F.3d 1126 (9th Cir. 2003).

24. *Lara*, 207 F.3d at 789; *see* Reply Brief for Defendant-Appellant at 8-12, *Lara*, (No. 99-50204); *Oregon Paralyzed Veterans of Am.*, 142 F. Supp. 2d at 1296; *cf.* Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-706 (1994). The Administrative Procedure Act (APA) of 1946 established rulemaking procedures for federal agencies. *See* 5 U.S.C. § 553. Therein, the APA set forth different treatment for various types of agency rules, "most important[ly]" distinguishing between *legislative rules* and *interpretive rules* by declaring that interpretive rules, unlike legislative rules, may be issued without a formal notice and comment period. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADM. L. REV. 547, 547 (2000) (emphasis added). The Pierce article reviewed the criteria that distinguish "legislative rules" and "interpretive rules." *Id.* at 547-48; *see* 42 U.S.C. § 503.

25. 42 U.S.C. §§ 12181-12189 (1994).

regarding stadium-style theaters. Section three briefly discusses the decisions of several district courts that have considered whether DOJ's interpretation of § 4.33.3 warrants deference. Section four will argue that the Ninth and Sixth Circuit Courts of Appeal appropriately deferred to DOJ's position that § 4.33.3 requires stadium-style movie theaters to provide comparable viewing angles to wheelchair-bound patrons.

II. TITLE III OF THE ADA AND SECTION 4.33.3

A. The Americans with Disability Act of 1990

The ADA[26] prohibits discrimination against disabled Americans and seeks to ensure their "equality of opportunity, full participation, independent living, and economic self-sufficiency" in the United States.[27] The ADA is a "clear and comprehensive national mandate" to eradicate discrimination against disabled persons.[28]

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26. 42 U.S.C. § 12101 *et seq.* The ADA provides disabled Americans anti-discrimination protections comparable to those provided by the Civil Rights Act of 1964 in the context of race, national origin, sex or religion. U.S. Dep't of Justice, Civil Rights Division, Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35408-01 (July 26, 1991); H.R. Rep. No. 101-485, pt. II, at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 305.

27. 42 U.S.C. § 12101(a)(8) (1994). The ADA was passed by huge margins in the House and Senate and is hailed as the "emancipation proclamation" for disabled Americans. James P. Colgate, *If You Build It, Can They Sue? Architects' Liability Under Title III of the ADA*, 68 Fordham L. Rev. 137, 140 (1999). Colgate's article discussed Congress' intent in enacting the ADA and compared "its broad purpose with the narrow judicial interpretations that have sought to limit or invalidate it." *Id.* at 138; *see* Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 345-46 (2000). Rulli discussed the "dark chapter in American history" and examined whether the protections of the ADA have been effectively enforced to safeguard the working poor. *Id.*

28. 42 U.S.C. § 12101(b) (1994). The Act was predicated on congressional findings that forty-three million disabled individuals in the United States were victim to widespread discrimination and had "no legal recourse." § 12101(a)(4), (7). The House of Representatives Education and Labor Committee concluded that "after extensive review and analysis" there was a "compelling need to establish a *clear and comprehensive Federal prohibition of discrimination on the basis of disability.*" H.R. Rep. No. 101-485, pt. II, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310 (emphasis added). The Committee summarized its findings as follows:

Disparate treatment of disabled persons is proscribed in the following contexts: employment (Title I),[29] public services (Title II),[30] public accommodations (Title III),[31] and telecommunications (Title IV).[32]

B. Title III of the ADA: Statutory Scheme

Title III of the ADA governs "public accommodations" and is the statutory provision applicable to movie theaters.[33] Title III governs

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(1) historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
(2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;
(3) current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
(4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and
(5) discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

Id. at 28-29.

29. 42 U.S.C. §§ 12111-12117 (1994).

30. 42 U.S.C. §§ 12131-12134; 12141-12150; 12161-12165 (1994).

31. 42 U.S.C. §§ 12181-12189 (1994). Title III withstood challenge on Article I grounds. *See* Pinnock v. Int'l House of Pancakes Franchise, 844 F. Supp. 574, 584 (S.D. Cal. 1993). The District Court of the Southern District of California held that Title III is a legitimate delegation of congressional authority to the executive branch. *Id.* at 579-580. Specifically, the court held that § 12182(a) was: a valid exercise of Congress' Commerce Clause authority, a valid delegation of authority, and not unconstitutionally vague. *See id.* at 578-84.

32. 47 U.S.C. § 201 *et seq.* (2003). Title IV of the ADA amends the Communications Act of 1934. *Id; see* Colgate, *supra* note 27 at 141.

33. 42 U.S.C. § 12181(7)(C) (1990) (stating that a "motion picture house [or] theater" is considered to be a public accommodation for purposes of Title III); *see* H.R. REP. 101-485, pt. II, *supra* note 24 at 34. The House Committee on Education and Labor illustrated the need for Title III, noting that three primary barriers prevented disabled persons from making full use of public accommodations:

> The first reason is that people with disabilities do not feel that they are welcome and can participate safely in places of public accommodation because of discriminatory actions that have occurred in the past. The second reason is fear and self-consciousness about their disabilities - also stemming from degrading and discriminatory experiences that they or their friends

both new and existing public accommodations, as elucidated in § 12183 and § 12182.[34] Section 12183(a) applies to newly constructed and altered public accommodations, as well as, "all other" newly constructed commercial facilities;[35] section 12182(a) pertains to existing public accommodations.[36] Stadium-style theaters are new facilities for purposes of Title III compliance since the first stadium-style theater was not constructed until after 1993.[37]

The general rule set forth under Title III provides that:

> 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 accommodation of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[38]

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with disabilities have experienced in the past. The third reason is architectural, communication, and transportation barriers.

Id. at 35 (attributing information to hearing testimony); *see* Katherine C. Carlson, Note, *Down in Front: Entertainment Facilities and Disabled Access Under the Americans with Disabilities Act*, 20 HASTINGS COMM. & ENT. L.J. 897, 900 (1998) (citing Kari L. Rutherford, Comment, *The American with Disabilities Act (ADA); Title III: "What is Readily Achievable?,"* 22 W. ST. U. L. REV. 329, 330 (1995)). Carlson's article discussed the ADA's history, purpose and key compliance issues regarding "theaters, sports arenas, and other exhibition facilities." *Id.* at 898.

34. *See* 42 U.S.C. §§ 12182(a), 12183. Congress intended that all new and existing public accommodations would be governed by Title III. *See* H.R. REP. NO. 101-485, pt. II, *supra* note 24 at 23-24; Colgate, *supra* note 27 at 145. New facilities are those accommodations first occupied on or after January 1993: "later than 30 months after July 26, 1990." 42 U.S.C. § 12183(a)(1). Existing public accommodations include all facilities occupied prior to January 1993. § 12183(a)(2). Section 12182 proscribes the following categories of discrimination: "den[ying] participation," providing only "participation in unequal benefit," or affording disabled persons a "separate benefit" from that given to the general public. § 12182(b)(1)(A)(i)-(iii).

35. 42 U.S.C. § 12181(2). A factory or office building is an example of a "commercial facility" that is not considered a place of "public accommodation" for purposes of the ADA. Colgate, *supra* note 27 at 144.

36. 42 U.S.C. § 12182(a). Notably, existing facilities are required to make "only reasonable modifications." *Id.*

37. *Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 76; *see* Fellman, *Decision in the U.S. District Court for the Central District of California*, *supra* note 7; Springer, *supra* note 1; *see* Barbara A. Petrus, *A Primer on the Americans with Disabilities Act*, 2-June HAW. B.J. 6, 7 (1998). Petrus' article provides an introductory review of the scope of ADA Titles I, II and III. *See* Petrus, *A Primer on the Americans with Disabilities Act*, 2-June HAW. B.J. at 1-10.

38. 42 U.S.C. § 12182(a); *see* 28 C.F.R. § 36.102 (2003). Sections 12182 and 12183 are "overlapping" statutory provisions. Colgate, *supra* note 27, at 144-

Section 12183 requires privately owned businesses and facilities to design, construct or remodel new facilities to be "readily accessible and usable"[39] to disabled persons, to the "maximum extent feasible."[40] Facilities governed by § 12183(a) are also obligated to provide disabled people access to the public accommodation in the "most integrated setting appropriate" for a particular individual.[41] Therefore, new and altered facilities must be either designed and constructed, or modified, to the "maximum extent feasible."[42]

The compliance obligations imposed by § 12182(a) and § 12183(a) are not unlimited.[43] The ADA's distinctive balance and flexibility are apparent in the statutory design of Title III.[44] The strong non-discrimination and integration goals of the ADA are weighed against the countervailing interests of the public accommodations subject to the law.[45] Accordingly, private owners, operators, lessees or

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45. Section 12182(a) sets forth the general rule for existing public accommodation compliance. *Id.* Section 12183 makes clear that § 12182(a) applies to new facilities. 42 U.S.C. § 12183. Moreover, § 12183(a) requires new facilities to be "readily accessible" to the disabled, a higher standard than the "readily achievable" standard existing facilities must meet. § 12182(b)(2)(A)(iv). *See* Colgate, *supra* note 27 at 144-45.

39. 42 U.S.C. § 12183(a)(1).

40. § 12183(a)(2); *see* Carlson, *supra* note 33 at 901; Petrus, *supra* note 37 at 7.

41. 42 U.S.C. § 12182(b)(1)(B); 28 C.F.R. § 36.203 (2003).

42. 42 U.S.C. § 12183(a)(2). Existing facilities must also adhere to the "most integrated setting" requirement. *Id.*

43. *See* H.R. REP. NO. 101-485, pt. IV, *supra* note 24 at 546 ("The phrase "full and equal enjoyment" does not require that individuals with disabilities must attain the identical result of level of achievement as nondisabled persons, but does mean that individuals with disabilities must be afforded an equal opportunity to attain substantially the same result.").

44. Stephen L. Percy, *Administrative Remedies and Legal Disputes: Evidence on Key Controversies Underlying Implementation of the Americans with Disabilities Act*, 21 BERKLEY J. EMP. & LAB. L. 413, 413-414 (2000). Percy's article detailed the "themes of flexibility and balance" embodied in the ADA. *Id.* Namely, that the strong anti-discrimination mandate of the ADA is weighed against the burden posed to entities subject to the statute. *Id.* at 414-15. Percy noted that compliance determinations "grant[] administrative agencies and the courts a key role in defining the reach and breadth of disability rights mandates." *Id.*

45. *See* 42 U.S.C. § 12183(a)(1); *see* H.R. REP. NO. 101-485, pt. IV, *supra* note 24 at 545-46 (articulating the appropriate analysis for determining whether Title III requires a modification); Percy, *supra* note 44 at 413-14 (explaining same); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, ADA TITLE III TECHNICAL ASSISTANCE MANUAL, § 4.4200 (1993), *available at* http://www.usdoj.gov/crt/ada/taman3.html (last visited Oct. 10, 2003)

lessors of newly constructed facilities are not held to the same "readily accessible" standard if doing so would be "structurally impracticable."[46]

Title III sets forth only broad affirmative standards for the modification and design of public accommodations.[47] The statutory language does not set forth detailed compliance requirements.[48] Section 12186(b) charged DOJ with responsibility for promulgating regulations.[49]

C. Title III of the ADA: Enforcement

The provisions of Title III may be enforced by two mechanisms.[50] The statute provides a private right of action for disabled persons discriminated against under the ADA.[51] Additionally, Congress delegated the primary responsibility for enforcing the statute

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[hereinafter TITLE III TECHNICAL ASSISTANCE MANUAL].

46. 42 U.S.C. § 12183(a)(1); *see also* Colgate, *supra* note 27 at 145; *see, e.g.*, TITLE III TECHNICAL ASSISTANCE MANUAL, *supra* note 43. The access requirement of Title III is more onerous for new and altered facilities because it is possible for accessibility changes to be considered in the early phases of planning; comparable changes may be hugely expensive for existing facilities. TITLE III TECHNICAL ASSISTANCE MANUAL, *supra* note 43.

47. *See* 42 U.S.C. §§ 12181-12189 (1994).

48. *See id.*; *see also* Percy, *supra* note 44 at 414 (discussing the flexibility of the provisions of Title III and noting that "the ADA purposively does not seek to specifically define all mandates or answer all questions about implementation").

49. 42 U.S.C. § 12186(b) ("[T]he Attorney General shall issue regulations in an accessible format to carry out the provision of this subchapter . . . that include standards applicable to facilities and vehicles covered under section 12182 of this title."); *see OPVA*, 339 F.3d at 1129 (recognizing that Congress directed DOJ "to issue regulations that provide substantive standards applicable to facilities covered under Title III"); *see* discussion *infra* Part I.C.

50. 42 U.S.C. § 12188(a)-(b).

51. § 12188(a)(1); *see also* Carlson, *supra* note 33 at 902. Notably, Title III provides different remedies for suits pursued by private citizens and those filed by the Attorney General. *See* 42 U.S.C. § 12188(a)-(b). Civil actions brought by private citizens under Title III may only be awarded injunctive relief. § 12188(a). Conversely, the Attorney General may seek "any equitable relief" deemed appropriate by the court, as well as, civil penalties. § 12188(b)(2). Punitive damages are not permitted under Title III. § 12188(b)(4). The statute expressly requires judicial consideration to account for "any good faith effort or attempt" of an entity in assessing a civil penalty. § 12188(b)(5). Nonetheless, there is no scienter requirement to establishing a violation of Title III. *See* § 12188; Carlson, *supra* note 33 at 903.

to the Attorney General.[52] Federal courts and federal agencies, therefore, significantly shape Title III implementation.[53]

D. The ADA Accessibility Guidelines and DOJ Regulation § 4.33.3

The Architectural and Transportation Barriers Compliance Board[54] ("Access Board"), thirteen community members appointed by the President with at least seven being disabled persons, drafted the initial substantive guidelines to "flesh out" the broad mandate of Title III.[55] Thereafter, DOJ promulgated regulations consistent with the guidelines issued by the Access Board.[56] Congress explicitly directed

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52. 42 U.S.C. § 12188(b). The Attorney General, in turn, delegated responsibility for ADA enforcement and implementation to the Assistant Attorney General of the DOJ Civil Rights Division. Delegation of Authority, 55 Fed. Reg. 40653-02, 40,653 (Oct. 4, 1990); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY SECTION, *at* http://www.usdoj.gov/crt/drs/drsroles.htm#anchor724954 (last visited Oct. 31, 2003) (authority further assigned to the Disability Rights Section of the DOJ Civil Rights Division); *see generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY SECTION, *at* http://www.usdoj.gov/crt/drs/drshome.htm (last visited Oct. 31, 2003) ("The primary goal of the Disability Rights Section is to achieve equal opportunity for people with disabilities in the United States by implementing the Americans with Disabilities Act (ADA)."). More specifically, the Attorney General's responsibilities include investigating allegations of Title III violations and monitoring public accommodations' compliance. 42 U.S.C. § 12188(b)(1)(A)(i). The Attorney General may bring suit against a facility subject to Title III under two circumstances: reason to believe a "pattern or practice" of discrimination exists or that an incident of discrimination that "raises an issue" has been perpetrated against disabled persons. § 12188(b)(1)(B).

53. Percy, *supra* note 44 at 413-14.

54. The Access Board membership is comprised of thirteen community members appointed by the President, at least seven of whom must be disabled persons. 29 U.S.C. § 792(A). Additionally each of the twelve cabinet departments is presented on the board. § 792(B). Access Board responsibilities include creating guidance materials and establishing "minimum guidelines and requirements for the standards" set forth under Title II and Title III of the ADA. § 792(b)(2)-(3). While not required by statute, the community members on the board represent a wide range of professions. *See* THE ACCESS BOARD, BOARD MEMBERS AND MEETINGS, *at* http://www.access-board.gov/about/boardmembers.htm (last visited Nov. 2, 2003) (complete list of Access Board Membership).

55. Proposed Rules: Architectural and Transportation Barriers Compliance Board, 56 Fed. Reg. 2296 (Jan. 22, 1991) (to be codified at 28 C.F.R. pt. 36); *see* 42 U.S.C. § 12186(c).

56. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544 (1991) (to

that Title III regulations be promulgated by this "unusual" two-part procedure.[57]

The Access Board is responsible for "establish[ing] and maintain[ing] . . . minimum guidelines and requirements for the standards" promulgated under Title III.[58] More specifically, the Access Board must provide architectural guidance regarding acceptable wheelchair-accessible seating placement in theaters, arenas, stadiums and similar facilities.[59]

The Access Board issued guidelines by notice and comment in 1991.[60] The standards, the Americans with Disability Act Accessibility Guidelines ("ADAAG"), published by the Access Board, outline "scoping and technical" requirements for public accommodations under Title III.[61] Section 4.33.3 of the ADAAG, "Assembly Areas: Placement of Wheelchair Locations," provides:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall provide people with physical disabilities a choice of admission prices and *lines of sight comparable* to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in

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be codified at 28 C.F.R. pt. 36); *see* 42 U.S.C. § 12186(c).

57. Adam A. Milani, *"Oh, Say, Can I See – And Who Do I Sue If I Can't": Wheelchair Users, Sightlines Over Standing Spectators, and Architect Liability Under the Americans with Disabilities Act*, 52 FLA. L. REV. 523, 529 (2000) (the two-part procedure is unusual because Congress gave "initial drafting responsibility" for the DOJ regulation to the Access Board rather than to DOJ). This article first surveyed case law addressing whether § 4.33.3 of the DOJ Title III regulations mandates that wheelchair-accessible seating be provided with unobstructed sight lines. *Id.* at 529. Milani argued DOJ's interpretation of its regulation: 1) is reasonable; 2) the Technical Assistance Manual interpretation is not subject to the Administrative Procedure Act's notice and comment periods; and 3) permitting only "substantial compliance" with the unobstructed view requirement is not consistent with the ADA. *Id.* at 527; *see* 42 U.S.C. § 12186(b).

58. 29 U.S.C. § 792(b)(3)(B).

59. *See* 28 C.F.R. pt. 36, app. A, sec. 4.33.3 (assembly areas).

60. 56 Fed. Reg. 2296 (1991) (proposed rule); 56 Fed. Reg. 35,408 (1991) (final rule) (codified by DOJ at 28 C.F.R. pt. 36).

61. ACCESS BOARD, ADA ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES (ADAAG) (2002), *available at* http://www.access-board.gov/adaag/html/adaag.htm#purpose (last visited Oct. 26, 2003) [hereinafter ADAAG]; *see OPVA*, 339 F.3d at 1129.

> wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.[62]

Furthermore, the Appendix to ADAAG § 4.33.3 states, in applicable part, that "the location of wheelchair areas can be planned so that a variety of positions within the seating area are provided [so as to] allow choice in *viewing* and price categories."[63]

Thereafter, DOJ promulgated its regulations by notice and comment.[64] As required by § 12186 of the ADA, these regulations are compatible with the ADAAG "minimum guidelines and requirements."[65] In fact, the language of the regulations is identical to the ADAAG.[66] DOJ regulation 28 C.F.R. § 36.406 expressly states that compliance with the ADAAG for newly constructed or altered facilities is mandatory.[67]

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62. ADAAG, *supra* note 60 at § 4.33.3 (emphasis added).

63. *Id.*

64. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 7452 (1991) (proposed rule); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544 (1991) (final rule) (codified at 28 C.F.R. pt. 36) (promulgated pursuant to 42 U.S.C. § 12186(c)).

65. 56 Fed. Reg. 35,408 (1991) (codified at 28 C.F.R. pt. 36) (promulgated pursuant to 42 U.S.C. § 12186(c)).

66. 28 C.F.R. pt. 36, app. A, sec. 4.33.3 (1996) ("Wheelchair areas shall be an integral part of any fixed seating plan and shall provide people with physical disabilities . . . lines of sight comparable to those for members of the general public"). In addition to mandating a general comparable sightline requirement, the regulation also prescribes location requirements necessary for compliance with the ADA. 28 C.F.R. Pt. 36, app. A sec. 4.1.3(19)(a) (1999). *See* ADAAG, *supra* note 60 at § 4.33.3 (emphasis added). For instance, while existing facilities must disperse wheelchair accessible seating throughout the seating area, this requirement does not apply to new facilities. ADAAG, *supra* note 60 at § 4.1.3(19)(a). Section 4.33.3 permits new facilities with fewer than 300 seats, such as stadium-style theaters, to cluster handicapped seating. *See Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 77.

67. 28 C.F.R. § 36.406 (1991). The full text of the § 36.406, "Standards for new construction and alterations" follows:

> (a) New construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to this part (ADAAG).
>
> (b) The chart in the appendix to this section provides guidance to

III. STADIUM-STYLE MOVIE THEATERS AND SECTION 4.33.3: THE CIRCUIT SPLIT

Whether DOJ's interpretation of § 4.33.3 warrants deference is at the heart of determining whether stadium-style movie theaters comply with Title III. Federal courts that have addressed this issue have reached dramatically different conclusions. A conflict between the Fifth and the Ninth and Sixth Circuit Courts of Appeal could prompt the Supreme Court to address the divergence.[68]

> the user in reading appendix A to this part (ADAAG) together with sub-parts A through D of this part, when determining requirements for a particular facility.

Id; see also United States v. Nat'l Amusements, Inc., 180 F. Supp. 2d 251, 258 (D. Mass. 2001) ("The Court infers from ADA § 306(d) [42 U.S.C. § 12186(d)] that Congress intended that the Attorney General's regulations and the Access Board's guidelines . . . would similarly set forth the standards, which, if followed, would be sufficient to satisfy Title III obligations with respect to the design of a structure."). In addition to mandating a general comparable sightline requirement, the regulation also prescribes location requirements necessary for compliance with the ADA. 28 C.F.R. pt. 36, app. A, sec. 4.1.3(19)(a) (1999). For instance, while existing facilities must disperse wheelchair accessible seating throughout the seating area, this requirement does not apply to new facilities. § 4.1.3(19)(a). Section 4.33.3 permits new facilities with fewer than 300 seats, such as stadium-style theaters, to cluster handicapped seating. *See Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 77.

68. Petition for certiorari was filed in *OPVA* October 27, 2003 and is pending. *OPVA*, 339 F.3d 1126 (9th Cir. 2003), *petition for cert. filed*, 72 USLW 3310 (U.S. Oct. 27, 2003) (No. 03-641), *sub nom.* Regal Cinemas, Inc. v. Stewmon, 2004 WL 47220 (No. 03-641). Notably, the Court invited the Solicitor General to file a brief presenting the United States' position regarding *OPVA*. UNITED STATES SUPREME COURT, *Orders in Pending Cases* (Jan. 12, 2004), *available at* http//:www.supremecourtus.gov/orders/courtorders/011204pzor.pdf (last visited January 24, 2004); *see OPVA*, 339 F.3d at 1136 (Kleinfeld, J., dissenting) ("The Fifth Circuit went the other way from . . . *Lara*, so now we have a circuit conflict."); *see* Fellman, *Decision in U.S. District Court for the Central District of California*, *supra* note 7; David Watson, *Movie Theaters May Not Relegate Wheelchair Patrons To Front*, METROPOLITAN NEWS-ENTERPRISE, Aug. 14, 2003, at 1, *available at* http://www.metnews.com/articles/oreg081403.htm (last visited Oct. 8, 2004). Analyzing the Ninth Circuit's *OPVA* decision, Watson quoted attorney Greg Hurley as saying that a "good chance" exists that the Supreme Court will address the case given the conflict between the Fifth and Ninth Circuits. Watson, *Movie Theaters May Not Relegate Wheelchair Patrons To Front*, METROPOLITAN NEWS-ENTERPRISE, Aug. 14, 2003, at 1, *available at* http://www.metnews.com/articles/oreg081403.htm (last visited Oct. 8, 2004). Hurley submitted an *amicus curiae* brief to the Ninth Circuit for the National Association of Theater Owners (NATO) in *OPVA*. *Id.* Petition for certiorari was filed in *United States v. Cinemark* February, 4, 2003 and is pending. United States v. Cinemark USA, Inc., 2003 WL 22508500, at *1 (6th

A. *Lara v. Cinemark USA, Inc.*: Fifth Circuit Court of Appeals refuses to recognize a viewing angle requirement in § 4.33.3

In *Lara v. Cinemark USA, Inc.*, several disabled individuals and two disability advocacy groups sued an El Paso, Texas movie theater, Tinseltown, for violation of the ADA.[69] Defendant Cinemark USA, Inc. (Cinemark) owned and operated Tinseltown, a cinema featuring stadium-style seating in all of its twenty theaters.[70] The public entered Tinseltown theaters at the front of the auditorium.[71] Patrons had to climb steps to reach all rows of seating with the exception of one.[72] The entry level, immediately below the screen, contained a single row of seating.[73] In the eighteen Tinseltown theaters at issue, the handicapped seating was clustered in the first row.[74]

The district court considered plaintiffs' allegation that defendant's stadium-style theaters violated § 4.33.3 by providing wheelchair-accessible seating with inferior viewing angles and, therefore, incomparable "lines of sight."[75] The court noted that the issue was one of first impression and that no decisional law had considered whether § 4.33.3 encompasses a "viewing angle requirement."[76] In a plain-meaning analysis, the court concluded that defendant's theaters provided the handicapped seating with inferior "lines of sight."[77] Accordingly, the district court held that defendant's

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Cir. 2003), *petition for cert. filed,* 2004 WL 239389 (U.S. Oct. 27, 2003) (No. 03-1131).

69. Lara v. Cinemark USA, Inc., 1998 WL 1048497, at *1 (W.D. Tex. 1998), *rev'd,* 207 F.3d 783 (5th Cir. 2000); *see Lara,* 207 F.3d at 784-85.

70. *Lara,* 207 F.3d at 785.

71. *Lara,* 1998 WL 1048497, at *1.

72. *Id.*

73. *Id.*

74. *Id.* The remaining two theaters at the Tinseltown megaplex featured a second public entrance behind the final row of seating. Plaintiffs did not challenge the legality of those two theaters in this action. *Id.* at *1 n. 2.

75. *Lara,* 1998 WL 1048497, at *1-*2; Brief of Amicus Curiae United States at 1-2, *Lara* (No. 99-50204).

76. *Lara,* 1998 WL 1048497, at *1-*2.

77. *Id.* at *2. The district court reasoned:

> [The] Tinseltown theaters do [] not afford wheelchair-bound patrons comparable lines of sight... The average viewing angle from this row is above thirty-five degrees, which the Plaintiffs' expert witness has property described as "well into the discomfort zone." It should be stressed that this is not some abstract scientific theory that is difficult for the layperson to comprehend. It simply

stadium-style theaters "denied the full and equal enjoyment of the movie going experience" to wheelchair-bound patrons.[78]

On appeal, the Fifth Circuit reversed, rejecting the district court's plain language interpretation of § 4.33.3.[79] The panel concluded that due to an "absence of specific regulatory guidance," § 4.33.3 does not require a viewing angle requirement.[80] The Fifth Circuit based its conclusion on two factors.[81]

First, contrary to the district court's conclusion, § 4.33.3 is ambiguous.[82] From the face of the regulation there is no indication whether movie theaters must provide "comparable viewing angles or simply unobstructed lines of sight."[83] Distinguishing the "unobstructed view requirement" of § 4.33.3, the court noted that, in a distinct line of cases, federal courts have considered whether Section 4.33.3 requires that wheelchair seating enjoy views that are unobstructed by standing audience members.[84] The court noted that neither the Access Board nor

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> means that a person seated in the "wheelchair row" has to lift his or her eyes and/or crane his or her neck at a very unconfortable angle in order to view the feature on the motion picture screen. For the disabled patron, therefore, "Tinseltown" becomes "Headache City." The wheelchair-bound patron is denied the full and equal enjoyment of the movie going experiencein these eighteen theaters.

Id. Notably, the district court did not discuss the interpretation of § 4.33.3 offered by DOJ in its *amicus curiae* brief and, hence, did not reach the administrative law issues that form the crux of the circuit conflict addressed by this comment. *See id.* at *1-*3.

78. *Id.* at *2. In 1999, the district court issued a decision assessing damages and injunctive relief. Lara v. Cinemark USA, Inc., 1999 WL 305108, at *4 (W.D. Tex. 1999). After two remedy hearings, the district court ordered defendant to retrofit the eighteen theaters as follows: relocating the handicapped seating farther from the screen above the entry level; and lowering the movie screen by one foot. *Id.* In addition, pursuant to Section 121.004(b) of the Texas Human Resources Code, legal fees were awarded to the individual plaintiffs in the amount of in the amount of $100, respectively. *Id; see* TEX. HUM. RES. CODE. ANN. § 121.004 (Vernon 2003).

79. *Lara*, 207 F.3d at 789.

80. *Id.*

81. *See id.* at 788-89.

82. *See id.*

83. *Id.* at 788; *see* Reply Brief for Defendant-Appellant at 3-4, *Lara*, (No. 99-50204).

84. *See, e.g.*, Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 583-84 (D.C. Cir. 1997) (holding that Section 4.33.3 requires that handicap seating enjoy a view that is "unobstructed" by standing audience members); Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730, 737 (3rd Cir. 1999) (holding that Section 4.33.3 does not require Title III public

DOJ had contemplated the possibility of a viewing angle requirement until after the 1991 promulgation of § 4.33.3.[85] Likewise, while the unobstructed view requirement of § 4.33.3 is cited in the 1994 DOJ Title III Technical Assistance Manual, there is no mention of a viewing angle requirement.[86] The court emphasized how,the Access Board, in its 1999 proposed revisions to § 4.33.3, treated the viewing angle requirement issue.[87] The Fifth Circuit deemed it "significant[]" that in discussing "lines of sight," the Access Board's proposed regulatory amendments only discuss obstructed views but also make clear that recognizing a viewing angle requirement would necessitate changes in the proposed regulations just to "codify DOJ's litigating position."[88]

Second, the ADA vests regulatory power in the hands of both DOJ and the Access Board.[89] Therefore, to interpret § 4.33.3 to embody a viewing angle requirement would be inappropriate.[90] The panel reasoned that there was a "lack of any evidence" that the Access Board contemplated § 4.33.3 enforced a viewing angle requirement and also that the Access Board expressly noted that it was still considering DOJ's litigating position.[91] The court, thus, did not find that DOJ's

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accommodations to provide views unobstructed by other patrons); Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 743 (D.Or. 1997) (holding that Section 4.33.3 does not intend to address whether or not an unobstructed view is required). *See also* Laura F. Carlson, *Don't Roll In My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 REV. LITIG. 399, 415-17 (2000) (recognizing that there are two "primary areas of contention for arenas and theaters as a result of the ADA: line of sight and choice of seating."). Carlson reviewed ADA issues in the sports and entertainment fields and studies how the media covers these controversies. *Id.* at 401; *see generally* Milani, *supra* note 53 (reviewing § 4.33.3 "unobstructed view requirement" line of cases).

85. *Lara*, 207 F.3d at 788; *cf.* Reply Brief for Defendant-Appellant at 5-7, *Lara*, (No. 99-50204) (arguing that "lines of sight comparable" only encompasses a "*dispersal requirement*" but that obligation does not apply to small movie theaters (emphasis added)).

86. *Lara*, 207 F.3d at 788; *see* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, ADA TITLE III TECHNICAL ASSISTANCE MANUAL SUPPLEMENT, § III- 7.5180 (1994), *available at* http://www.usdoj.gov/crt/ada/taman3up.html (last visited Oct. 10, 2003).

87. *Lara*, 207 F.3d at 788; *see Proposed Rules, Architectural and Transportation Compliance Board*, 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999).

88. *Lara*, 207 F.3d at 788.

89. *Id.* at 789; 42 U.S.C. § 12186(b)-(c).

90. *Lara*, 207 F.3d at 788.

91. *Id.*; *see* Reply Brief for Defendant-Appellant at 8, *Lara*, (No. 99-50204)

interpretation set forth in the *amicus curiae* brief it filed in *Lara* warranted deference.[92] Based on the foregoing arguments, the Fifth Circuit reversed the district court's decision and rendered judgment for defendant.[93]

B. *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*: Ninth Circuit Court of Appeals recognizes a viewing angle requirement

In *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.* ("*OPVA*"), plaintiffs, a veterans association and three disabled moviegoers, brought suit against several movie theater owners[94] alleging that their stadium-style theaters violated the ADA by failing to provide comparable "lines of sight."[95] Defendants' theaters featuring stadium-style seating provided public entrances at the front of the auditoria and placed all wheelchair seating in the first five rows of the theater.[96] Plaintiffs claimed that defendants' stadium-style theaters violated § 4.33.3 by failing to provide handicapped persons with viewing angles comparable to those enjoyed by the general public.[97]

("[I]t is unreasonable to permit the DOJ to impose a new substantive meaning that contradicts the plain meaning and enforcement history of the regulation at issue.").

92. *See Lara*, 207 F.3d at 789.

93. *Id.* at 788-89. The panel noted that a contrary decision would "require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers." *Id.* at 789; *but see* Brief for the United States as Amicus Curiae in Support of Appellees Urging Affirmance at 15 n.10, Lara v. Cinemark USA, Inc., 207 F.3d 783(2000) (No. 99-50204).

94. Plaintiffs' complaint named Regal Cinemas, Inc. and Eastgate Theatre Inc., d/b/a Act III Theaters, Inc. as defendants. Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293, 1294 (D. Or. 2001), *rev'd*, 339 F.3d 1126 (9th Cir. 2003).

95. *OPVA*, 339 F.3d at 1128.

96. *Id.* at 1127.

97. *Id.* at 1127-28. The Ninth Circuit noted that:

> Plaintiffs' experts, who visited the theaters and conducted research there, found that the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating - a difference the experts termed a "tremendous disparity." In reality, however, the disparity is even greater, because wheelchair-bound patrons cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied

The district court granted defendants' summary judgment motion under Title III.[98] Finding the Fifth Circuit's *Lara* decision persuasive, the district court held that defendants' stadium-style theaters complied with § 4.33.3.[99] Thus, the trial court held that DOJ's interpretation of § 4.33.3 was not entitled to deference.[100]

On appeal, the Ninth Circuit rejected the district court's conclusion that the § 4.33.3 "lines of sight" language does not impose a viewing angle requirement on assembly areas such as movie theaters.[101] Accordingly, the Ninth Circuit reversed and remanded the case, directing the district court to grant plaintiffs' summary judgment motion on the ADA claim.[102] In so doing, the Ninth Circuit explicitly repudiated the Fifth Circuit's interpretation of § 4.33.3 articulated in the *Lara* decision.[103]

The court based its decision on administrative law principles requiring judicial deference to agency rulemaking and to agency interpretations of their own regulations.[104] First, the Ninth Circuit

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patrons sitting in the same part of the theater.
Id. at 1128; *see* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 6, *OPVA* (No. 01-35554).

98. *Oregon Paralyzed Veterans of Am.*, 142 F. Supp. 2d 1293, 1298 (D. Or. 2001), *rev'd*, 339 F.3d 1126 (9th Cir. 2003). Plaintiffs filed three claims against defendants: I) ADA claim; II) Oregon state law negligence; III) Oregon state law discrimination claim. *Id.* at 1294. The district court granted the defendants' motions for summary judgment on each claim. *Id.* at 1299.

99. *Id.* at 1297. Finding *Lara* persuasive, the district court explained: "[a]s tempting as it is to rely on the 'plain meaning' of the regulation, I find the reasoning of the Fifth Circuit in *Lara* to be persuasive, given its reliance on the history of Section 4.33.3 and the context in which it was promulgated." *Id.*

100. *Id.* at 1297. ("[T]he Fifth Circuit's analysis in *Lara* demonstrates that it would be unreasonable and inconsistent with the history of Section 4.33.3 (including statements by the Access Board) to interpret it to require stadium-style theaters to provide wheelchair- bound moviegoers with comparable viewing angles."); *see OPVA.*, 339 F.3d at 1130 (citing *Lara*, 207 F.3d at 788-89) ("The district court also expressed skepticism that an amicus brief was an appropriate forum to announce an agency's interpretation of a rule in any case.").

101. *OPVA*, 339 F.3d at 1130 (citing *Oregon Paralyzed Veterans of Am.*, 142 F. Supp. 2d at 1297-98).

102. *Id.* at 1133.

103. *Id.*

104. *See id.* (discussing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) and Lal v. Immigration & Naturalization Serv., 255 F.3d 998, 1004 (9th Cir. 2001)). In a parenthetical to its citation to *Lal*, the Ninth Circuit noted that case's holding, that the degree of deference owed to an agency's understanding of its own regulation, presented a distinct issue from Chevron,

analyzed whether DOJ's interpretation of § 4.33.3, that the regulation "encompass[es] factors in addition to physical obstructions such as viewing angle," was an unreasonable position.[105] The court concluded that the applicable rule of judicial deference provides that "agency interpretations of their own regulations [are owed] substantial deference."[106] The panel noted that, despite the district court's implication to the contrary, there was no legal precedent for concluding that a regulatory interpretation first articulated in an *amicus curiae* brief was less controlling than "one promulgated elsewhere."[107]

Second, the Ninth Circuit examined the reasonableness of DOJ's interpretation of § 4.33.3.[108] According to the court, the plain language understanding of a "line of sight" with regards to a movie theater is as follows: the line stretching from a movie patron's eye to the movie screen where a film is projected "taking into account the

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U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and its line of cases. *Id.* at 1131. *Chevron* addressed the deference owed to an agency's interpretation of a statute, rather than its regulation. *Id.* This case is discussed further *infra* Section.IV. Notably, prior to the "viewing angle" litigation, two circuit courts recognized that DOJ is more than a passive recipient of the Access Board's regulations and, thus, its interpretation of § 4.33.3 warrants deference. *Paralyzed Veterans of America*, 117 F.3d at 585; *see Caruso*, 193 F.3d at 736. In *Paralyzed Veterans of America*, the D.C. Circuit stated in relevant part:

> [DOJ] has a good deal more legal/policymaking authority than would be true if it had merely a prosecuting role... Congress, by specifically requiring the publication of a technical manual that would further refine or interpret in detail the regulation's substantive obligations, contemplated a continuing administration of the regulation that approaches, if not equates with, the adjudicatory authority of other statutory schemes.

Paralyzed Veterans of America, 117 F.3d at 585. Furthermore, Third Circuit noted in *Caruso* that DOJ was a "'member of the [Access] Board' and 'participated actively . . . in preparation of both the proposed and final versions of the [guidelines].'" *Caruso*, 193 F.3d at 736 (citing 28 C.F.R. pt. 36, app. B, at 632).

105. *OPVA*, 339 F.3d at 1132.

106. *Id.* at 1131 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)); Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 11-12, *OPVA* (No. 01-35554).

107. *OPVA*, 339 F.3d at 1131, n.6 (citing Auer v. Robbins, 519 U.S. 452, 462 (1997) (considering the deference owed to the Department of Labor's interpretation of its own regulation first articulated in an *amicus curiae* brief)). The *amicus curiae* brief filed by DOJ in the *Lara v. Cinemark* litigation first promulgated DOJ's interpretation of § 4.33.3 as imposing a "viewing angle requirement" in. *Id.* at 1130.

108. *OPVA*, 339 F.3d at 1131-32.

angle from the viewer's eye to those points."[109] The panel noted that the movie theater engineering guidelines' understanding of lines of sight includes the "vertical viewing angle" between a patron's eye and the "top of the [movie] screen."[110] The court observed that this understanding was significantly similar to that set forth in an *amicus curiae* brief submitted by an industry specialist on behalf of defendant movie theaters.[111] With this understanding of "line of sight," the Ninth Circuit analyzed whether DOJ's interpretation of § 4.33.3 was unreasonable.[112]

The Ninth Circuit did not find it dispositive that the Access Board had not contemplated stadium-style seating when drafting § 4.33.3.[113] Rather, the panel clarified that the issue before the court was "whether a broadly drafted regulation – with a broad purpose – may be applied to a particular factual scenario not expressly anticipated at the

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109. *Id.* at 1131 (applying the definition of "line of sight," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1316 (1993), to the context of movie theaters); Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 13-14, *OPVA* (No. 01-35554).

110. *OPVA*, 339 F.3d at 1131-32 (citing SMPTE ENGINEERING GUIDELINE at 4-5 (1994)). The following excerpt of the SMPTE Guideline was included in the court of appeals' opinion:

> In addition to ensuring that everyone will see well, seating in the effective cine theater must avoid *physical discomfort, which occurs when the vertical viewing angle to the top of the screen image is excessive* or the lateral viewing angle to the centerline of the screen requires uncomfortable head and/or body position. Since the *normal line of sight is 12 to 15 below the horizontal,* seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical *discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35,* and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15.

Id. (citing SMPTE ENGINEERING GUIDELINE at 4-5 (1994)) (emphasis added). Furthermore, the Ninth Circuit noted that the "*average* vertical viewing angle" provided to wheelchair-accessible seating is 42 degrees. *Id.* at 1132 n.7. Continuing, the court observed that "there is objective evidence that disabled persons would likely experience discomfort" in defendants' theaters at issue in the case. *Id.*

111. *OPVA*, 339 F.3d at 1131-32 (comparing the SMPTE Engineering Guideline to the *amicus curiae* brief submitted by Steven John Fellman noting that "NATO explained that the lines of sight are measured in degrees . . .").

112. *See id.* at 1132-33.

113. *See id.* The court noted that the District of Massachusetts had similarly rejected the Fifth Circuit's understanding in United States v. Hoyts Cinemas Corporation. *Id.* at 1133 n. 8 (citing Hoyts Cinemas Corp., 256 F. Supp. 2d at 88). This case is reviewed further *infra* Section.IV.

time the regulation was promulgated."[114] The panel court recognized that in *Pennsylvania Department of Corrections v. Yeskey* the Supreme Court "answered [this question] in the affirmative."[115] Finding such a conclusion applicable to §12182(a), the Ninth Circuit held that § 4.33.3 includes a viewing angle requirement and that DOJ's interpretation of § 4.33.3 was reasonable and entitled to deference.[116]

Judge Kleinfeld dissented.[117] He asserted that the Access Board was the appropriate body to resolve the meaning of § 4.33.3, not the Ninth Circuit.[118] The dissent then criticized the majority's decision as "unjust" and unreasonable.[119] Applying the "obscure and debatable" architectural inferences of the majority's holding retroactively to "thousands" of movie theaters is "unfair" and "irresponsible."[120]

Additionally, the dissent asserted that DOJ's interpretation of § 4.33.3 constitutes "new law rather than a permissible construction of existing regulations."[121] In decrying the majority's "legislative effort,"

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114. *OPVA*, 339 F.3d at 1133.

115. *Id.* (citing Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (holding that where unambiguous statutory text can be applied to factual scenarios not explicitly contemplated by Congress "[i]t demonstrates breadth" not ambiguity)). The Ninth Circuit acknowledged that the *Yeskey* case considered whether deference was owed to a state agency's interpretation of a statute. *Id.*; *see Yeskey*, 524 U.S. at 212 (considering whether the ADA applies to state prisons); *see also* Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 Ala. L. Rev., 193, 221-22 (2000) (discussing the impact of Pennsylvania Department of Correction v. Yeskey).

116. *OPVA*, 339 F.3d at 1132 ("We do not accept the *Lara* court's suggestion that the legislative and administrative history of § 4.33.3 compels a different answer.").

117. *Id.* at 1133-37 (Kleinfeld, J., dissenting).

118. *See id.* at 1137 (Kleinfeld, J., dissenting) ("We know perfectly well that the Access Board is addressing wheelchair spaces and stadium seating, and there is no justification for jumping in front of them.").

119. *Id.* at 1134 (Kleinfeld, J., dissenting).

120. *Id.* (Kleinfeld, J., dissenting). The dissent asserted that the court should defer to the "Access Board process" because even if the Access Board adopts DOJ's litigating position "the requirements will be clear, precise and prospective." *Id.* Theater owners, the dissent stated, "need to know not only what the Ninth Circuit rejects, but what construction and reconstruction will be acceptable." *Id.* at 1137.

121. *OPVA*, 339 F.3d at 1135 (Kleinfeld, J., dissenting). The dissent observed that the regulations surrounding § 4.33.3 are very precise, some specifying compliance standards down to the millimeter. *Id.* at 1134 (Kleinfeld, J., dissenting). *See, e.g.*, 28 C.F.R. pt. 36, app. A., § 4.31.8 (length of telephone cord required to be, at minimum, 29 inches); *id.* at § 4.32.3 (counters and tables

the dissent noted that the majority failed to recognize that § 4.33.3 imposes other substantive obligations on movie theater owners, such as wheelchair seating being required to be "an integral part" of the general seating area and "companion seating be placed next to wheelchair seating."[122] Finally, the dissent asserted that the majority's decision was unenforceable due to the "highly subjective" nature of moviegoers' preferences for seat selections.[123]

C. *United States v. Cinemark USA, Inc.*: Sixth Circuit Court of Appeals Recognizes a Viewing Angle Requirement

In *United States v. Cinemark USA, Inc.*, the Attorney General alleged that defendants' stadium-style movie theaters violated § 4.33.3 by failing to provide handicapped persons with comparable "lines of sight."[124] The government claimed that § 4.33.3 compliance requires movie theaters to provide wheelchair-bound patrons with both an unobstructed view and viewing angles comparable to those enjoyed by ambulatory moviegoers.[125] The district court rejected the DOJ's position that its interpretation of § 4.33.3 warranted deference.[126]

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must provide wheelchair seating with knee clearance of "at least 27in (685mm) high, 30 in (760 mm) wide, and 19 in (485 mm) deep."). Accordingly, the dissent asserted, the marked lack of specificity in § 4.33.3 makes DOJ's particularized interpretation of this ambiguous term unreasonable. *OPVA*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

122. *Id.* at 1134 (Kleinfeld, J., dissenting). Several district courts have addressed whether stadium-style theaters violate the integration component of § 4.33.3. *See, e.g.*, Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698 (D. Or. 1997) (holding that failing to appropriately integrate wheelchair-accessible seating in the facility's seating plan violated the ADA); *see* Milani, *supra* note 57 at 527-28.

123. *OPVA*, 339 F.3d at 1136 (Kleinfeld, J., dissenting) ("All the majority tells us with any clarity is that it is not satisfied with the existing state of affairs, where wheelchair patrons sit in the front rows.").

124. United States v. Cinemark USA, Inc., 2001 U.S. Dist. LEXIS 24418, at *11-*12 (N.D. Ohio Nov. 19, 2001), *rev'd*, 2003 WL 22508500 (6th Cir. 2003). In August 1999, the Northern District of Ohio judge denied Cinemark USA, Inc.'s motion to dismiss on a variety grounds. *Id.* at *1. The district court held that the Attorney General's action was not served in an improper venue and was not duplicative pursuant to the Administrative Procedures Act (APA). *Id.* Therefore, neither a change of venue was appropriate nor a stay of action was appropriate. United States v. Cinemark USA, Inc., 66 F. Supp. 2d 881, 890 (N.D. Ohio 1999).

125. United States v. Cinemark USA, Inc., 2001 U.S. Dist. LEXIS 24418, at *15, *29 (N.D. Ohio Nov. 19, 2001), *rev'd*, 2003 WL 22508500 (6th Cir. 2003).

126. *Id.* at *21-*22.

The Sixth Circuit reversed and remanded.[127] The court held that wheelchair patrons must be provided with unobstructed views that are "'comparable' to those of other patrons."[128] Finding the Ninth Circuit persuasive, the Sixth Circuit reached its conclusion on the basis of three findings.[129]

First, the court found that the plain language meaning of "lines of sight comparable" is that wheelchair-accessible seating "be similar, or at least roughly similar, to those of other patrons."[130] The court stated that interpreting comparable to mean only "capable of being compared" would deprive the term of any substantive meaning.[131] Furthermore, the panel noted that interpreting § 4.33.3 to encompass a viewing angle requirement "furthers the central goals" of Title III.[132] Conversely, providing wheelchair moviegoers with only unobstructed views would not afford them "equal enjoyment" of stadium-style theaters in contravention of § 12182(a).[133]

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127. United States v. Cinemark USA, Inc., 2003 WL 22508500, at *1 (6th Cir. 2003).

128. *Id.*

129. *See id.*

130. *Id.* at *4.

131. Cinemark USA, Inc., 2003 WL 22508500, at *4.

132. *Id.* at *5. The court noted:

> The thrust of that mandate leads us to conclude that the term "lines of sight comparable to those for members of the general public" requires that wheelchair users be afforded comparable viewing angles to those provided for the general public. Only then will wheelchair users have "equal enjoyment" with the general public.

Id.

133. *Id.* Moreover, the panel stated:

> Under the district court's interpretation, a wheelchair-using patron could be relegated to the worst seats in the theater (assuming it was still among some seats for the general public), so long as the disabled patron still had an "unobstructed view" of the screen. This does not comport with the "full and equal enjoyment" language of Title III, nor does it seem likely that this is all the DOJ and the Access Board were attempting to guarantee for disabled persons when they formulated ADAAG § 4.33.3. A more reasonable interpretation of ADAAG § 4.33.3, given the purpose of Title III, is that the DOJ and the Access Board intended to assure disabled patrons seats of "comparable" quality to those provided for members of the general public.

Id.

Second, the panel expressly found the Fifth Circuit's *Lara* decision unpersuasive.[134] The Sixth Circuit noted that the Fifth Circuit selectively quoted from the Access Board's 1999 proposed rulemaking; the Fifth Circuit failed to mention language in the rulemaking that indicated the Access Board intended § 4.33.3 to impose a viewing angle requirement.[135] Also, the panel rejected the Fifth Circuit's conclusion that in its 1999 notice of proposed rulemaking the Access Board suggested that adopting DOJ's interpretation would require codification.[136] The court noted that the Access Board's use of the term "specific" in explaining that it was still considering DOJ's position merely indicated that it had not yet decided whether it would make the "requirements *explicit* in its final rule."[137] In sum, the court concluded that in interpreting § 4.33.3 to require only "similarly unobstructed view[s]," the Fifth Circuit *Lara* decision effectively ignored the "purpose of Title III."[138]

Third, the Sixth Circuit concluded that DOJ's interpretation of § 4.33.3 bolsters the court's own interpretation of the law.[139] An agency's interpretation of its own regulation warrants deference so long as it is not "plainly erroneous or inconsistent with the regulation" or contradictory to positions proffered by that agency.[140] The court concluded that DOJ's position that § 4.33.3 encompasses a viewing angle component is "consistent with the plain meaning of the

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134. United States v. Cinemark USA, Inc., 2003 WL 22508500, at *5-*6.

135. *See id.* at *6. In particular, the court noted that the Fifth Circuit failed to acknowledge that the Access Board's 1999 rulemaking discussion of § 4.33.3 "demonstrates that lines of sight have a qualitative aspect: lines of sight can be 'inferior,' not simply obstructed or unobstructed." *Id.* (citing Proposed Rules, Architectural and Transportation Compliance Board, 64 Fed. Reg. § 62,248, 62,278 (Nov. 16, 1999)).

136. *Id.*

137. *Id.* (emphasis added).

138. United States v. Cinemark USA, Inc., 2003 WL 22508500, at *6. The court explained:

> [DOJ's interpretation] is consistent with our conclusion that the plain meaning of ADAAG § 4.33.3 requires that there be greater points of commonality between lines of sight than that the lines of sight share an unobstructed view; in order to be comparable, viewing angles must also be taken into account to some degree. Since this DOJ interpretation is consistent with the plain meaning of the regulation, it is entitled to deference.

Id. at *7 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

139. United States v. Cinemark USA, Inc., 2003 WL 22508500, at *7.

140. *Id.* (quoting Bragdon v. Abbott, 524 U.S. 624, 648 (1998)).

regulation" and therefore, warrants deference.[141] Accordingly, the panel remanded the case, directing the district court to determine the extent to which wheelchair-accessible seating must enjoy similar viewing angles to those enjoyed by the general public.[142]

IV. WHY THE NINTH AND SIXTH CIRCUITS GOT IT RIGHT – DOJ'S INTERPRETATION OF § 4.33.3 WARRANTS JUDICIAL DEFERENCE

Stadium-style movie theaters in the Fifth Circuit versus the Sixth and Ninth Circuits, respectively, now face very different compliance obligations pursuant to § 4.33.3.[143] Theaters in the Fifth

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141. *Id.* at *7.

142. *Id.* at *8. The court also rejected four alternative arguments offered by the defendant in support of the district court's decision. *Id.* Most importantly, the court endorsed "limited remedial measures" articulated by DOJ for stadium-style theaters. *Id.* The court quoted statements made by the DOJ attorney at oral argument, including the following:

> I want to make very clear to the court, we have emphasized repeatedly the United States is not—has not and is not going to argue, for example, that the entire interior of the theater be gutted or torn down. We are going to work with the defendants to come up with a reasonable approach .... where you have an elevated stadium section, certainly I think getting the wheelchair up to the first row of the stadium section, not the traditional style, would dramatically improve the experiences for people in wheelchairs ... for the typical stadium-style theater that we've seen, if the wheelchair space was up on the first row of that elevated section, I think, as a remedial matter, we would be satisfied.

Id. at *9 n.10 (quoting transcript of oral argument testimony of a DOJ attorney).

143. *See* United States v. Cinemark, 2003 WL 22508500, at *1; *OPVA*, 339 F.3d at 1133. *But see Lara*, 207 F.3d at 789. District courts in five circuits have addressed whether stadium-style theaters violate § 4.33.3 by not providing comparable viewing angles. In addition to the three cases decided by the Fifth, Ninth and Sixth Circuit Courts of Appeal, district courts in the Second, Ninth and First Circuits have also considered this issue. *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1113; Meineker v. Hoyts Cinemas Corp., 216 F. Supp. 2d 14, 18 (N.D.N.Y. 2002), *vacated and remanded on other grounds*, 69 Fed. Appx. 19, 23 (2d Cir. 2003), *remanded to* Meineker v. Hoyts Cinemas Corp., No. 1:98-CV-1526 (N.D.N.Y. filed Aug. 11, 2003); *Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 85-86. Notably, all three courts declined to follow the Fifth Circuit. *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1113; *Meineker*, 216 F. Supp. 2d at 18; *Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 85-86. These district court decisions' analysis of the legality of stadium-style theaters focused on whether § 4.33.3 imposes a viewing angle requirement. *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1113 (holding that DOJ's litigating position that § 4.33.3 imposes a viewing angle requirement warranted deference); *Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 89-90 (same); *cf. Meineker*, 216 F. Supp. 2d at 18 (recognizing that § 4.33.3 requires

Circuit comply with § 4.33.3 so long as they provide wheelchair-accessible seating an unobstructed view of the screen.[144] However, an identical stadium-style theater in the Ninth and Sixth Circuits violates Title III unless it provides wheelchair seating with unobstructed views with viewing angles similar to those provided to able-bodied patrons.[145] The question is, therefore, which court is right and why?

Fundamentally, the conflict between the circuits concerns whether judicial deference is owed to DOJ's interpretation of § 4.33.3.[146] The Ninth and Sixth Circuits correctly held that deference is

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that wheelchair seating having viewing angles "comparable to . . . a *significant portion* of the general public").

In addition, the *Meineker* and *Hoyts Cinemas* courts considered an alternative argument proffered by DOJ: that stadium-style theaters violate the "integration" requirement of § 4.33.3. *Meineker*, 216 F. Supp. 2d at 18-19; *Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 86-89. The applicable language of § 4.33.3 provides: "Wheelchair areas shall be an *integral* part of any fixed seating plan. . . EXCEPTION: Accessible positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress." 28 C.F.R. pt. 36, app. A, § 4.33.3 (1996) (emphasis added). While the *Meineker* court rejected the DOJ argument, the *Hoyts* court recognized that locating wheelchair seating in a "totally separate" area violates the integrated requirement of § 4.33.3. *Meineker*, 216 F. Supp. 2d at 18-19 (integration requirement of § 4.33.3 does not apply to stadium-seating theaters due to the regulation's exception); *but see Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 86-89 (placing wheelchair seating in a "totally separate" sloped-floor seating area in the front of the theater "cannot be an 'integral' part of that theater's 'fixed seating plan'"); *cf. Civil Rights – Americans with Disabilities Act – Ninth Circuit Holds that Movie Theaters Must Provide Comparable Viewing Angles for Patrons in Wheelchairs. – Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003)*, 117 Harv. L. Rev. 727 (2003). The article discusses *OPVA* and criticizing the Ninth Circuit's decision for "perpetuat[ing] the notion that discrimination against people with disabilities can be cured by adding enough ramps and cross-aisles to make the world physically accessible for people with medical problems." *Civil Rights – Americans with Disabilities Act – Ninth Circuit Holds that Movie Theaters Must Provide Comparable Viewing Angles for Patrons in Wheelchairs. – Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003)*, 117 Harv. L. Rev. at 734. While recognizing that *OPVA* "pleased disability advocates," the article argues that tying the decision to the § 4.33.3 integration requirement instead of viewing angle would have "advanc[ed] the debate over disability discrimination from a physical, medical one to a deeper discourse about social isolation and stigmatic injury." *Id.*

144. *See Lara*, 207 F.3d at 789.

145. United States v. Cinemark, 2003 WL 22508500, at *1; *see OPVA*, 339 F.3d at 1133.

146. *OPVA*, 339 F.3d at 1133 (DOJ's interpretation of § 4.33.3 "is valid and entitled to deference"); *see* United States v. Cinemark, 2003 WL 22508500, at *7

owed to DOJ's interpretation of the meaning of § 4.33.3.[147] As previously discussed, these circuits found that the comparable "lines of sight" language of § 4.33.3 is ambiguous and, accordingly, granted deference to DOJ's reasonable interpretation of its own regulation.[148] Conversely, the Fifth Circuit unpersuasively concluded that DOJ's understanding of § 4.33.3 was unreasonable and declined to give it deference, imposing its own understanding of the DOJ regulation.[149]

The principles of judicial deference set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and its line of cases direct courts to afford agency interpretations of statutes they are "entrusted to administer" by Congress with "considerable weight.[150] This framework also applies to interpretations of regulations: "[courts] must give substantial deference to an agency's interpretation of its own regulations."[151]

(DOJ interpretation is consistent with the plain meaning of the regulation and, therefore, is entitled to deference); *but see Lara*, 207 F.3d at 789 (DOJ position not controlling).

147. *See* United States v. Cinemark, 2003 WL 22508500, at *7; *OPVA*, 339 F.3d at 1133.

148. *See OPVA*, 339 F.3d at 1132; *see also* United States v. Cinemark, 2003 WL 22508500, at *7 (conclusion implicit).

149. *See Lara*, 207 F.3d at 788-89.

150. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). In *Chevron*, the Supreme Court considered whether the Environmental Protection Agency's regulation defining "stationary source" under the Clean Air Act of 1977 constituted a "permissible construction of the statute." *Id.* at 866. The Court held that judicial review of an agency's regulation requires two inquiries: i) whether Congress provided guidance on the specific issue; and ii) if not, whether the agency's interpretation of the law is reasonable. *Id.* at 842-43. Absent a finding that the regulation is "arbitrary, capricious or manifestly contrary to the statute," the agency's interpretation of the statute must be given all due deference. *Id.* at 844. After examining the language of the statute, legislative history, and policy concerns, the Court deemed that because the EPA regulation was reasonable, it warranted deference. *See id.* at 859-65.

151. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (citing Martin v. Occupational Safety & Health Review, 499 U.S. 144, 150-51 (1991)). In *Thomas Jefferson Univ.*, the Supreme Court considered whether the Department of Health and Human Services' (HHS) interpretation of its Medicaid reimbursement regulation, 42 C.F.R. § 41385(c), was entitled to deference. *See id.* at 506. The Court concluded that HHS's interpretation warranted deference because it was reasonable and "faithful to the regulation's plain language." *Id.* at 518. In its analysis, the Supreme Court characterized as "broad" the deference owed to an agency's interpretation of its own regulation. *Id.* at 512; *see* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (deference not owed to opinion letter on account of its

In *Christensen v. Harris County*, the Supreme Court spoke explicitly to the deference owed to an agency's informal interpretation of its own regulation.[152] The court noted that interpretations of regulations articulated in mediums such as opinion letters, agency manuals, and policy statements, do not carry the full force of law because they are not subjected to a formal public hearing process or adjudication.[153] Nevertheless, the court continued, interpretations set forth in these mediums are "entitled to respect"[154] to the extent that they have the "power to persuade."[155]

The Supreme Court explicitly addressed the deference owed DOJ's interpretation of compliance requirements under Title III of the ADA in *Bragdon v. Abbott*.[156] The Supreme Court stated that because Congress authorized DOJ to implement Title III by promulgating regulations and issuing technical assistance "explaining the responsibilities of covered individuals and institutions . . .[DOJ's] views are entitled to [*Chevron*] *deference*."[157] In *Auer v. Robbins*, the Supreme Court established that where the language of a regulation is

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"unpersuasive . . . interpretation of the statute at issue in this case."). This case is discussed *infra* note 186.

152. *Christensen*, 529 U.S. at 586-87. In *Christensen*, the Supreme Court held that the Department of Labor's (DOL) interpretation of its own regulation, articulated in an opinion letter, was not entitled to deference. *Id.* at 587. The Court concluded that because the regulation was not ambiguous, DOL's opinion letter was not persuasive. *Id.* (stating that a contrary ruling would "create *de facto* a new regulation" (emphasis in original)).

153. *Id.* at 586-87. The Court stated clearly, however, that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation." *Id.* at 587.

154. *Id.* at 587 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). In *Skidmore*, the Supreme Court articulated factors with which to assess the persuasiveness of an agency's interpretation: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements . . . ." Pierce, *supra* note 23 at 572 (citing *Skidmore*, 323 U.S. at 229)).

155. *Christensen*, 529 U.S. at 587 (citing EEOC v. Arabian Am. Oil Co., 449 U.S. 244, 256-58 (1991) (interpretive guideline)).

156. *See* Bragdon v. Abbott, 524 U.S. 624, 646 (1998). This case held that human immunodeficiency virus (HIV) is encompassed in the definition of "disability" pursuant to 42 U.S.C. § 12182(a). *Id.* at 628. The Supreme Court reasoned that its conclusion was "reinforced" on account of the fact that it was consistent with DOJ's interpretation of the term "disability." *Id.* at 646 (citing 36 C.F.R. § 36.203(a) (1997)).

157. *Id.* at 646 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

ambiguous, an agency's *amicus brief* interpreting its "own regulation[] . . . is, under our jurisprudence, *controlling* unless 'plainly erroneous or inconsistent with the regulation.'"[158]

Numerous courts have deemed the "comparable lines of sight" language of § 4.33.3 to be ambiguous.[159] Indeed, the Fifth Circuit itself concluded that the "lines of sight" language contained in § 4.33.3 is unclear.[160] Thus, the issue becomes whether DOJ's interpretation of § 4.33.3 is reasonable and "conforms to the purpose and wording of the regulation."[161]

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158. Auer v. Robbins, 519 U.S. 452, 461 (1997) (emphasis added) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)); *cf.* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (finding that agency interpretations that are "nothing more than an agency's convenient litigating position" do not warrant deference). Notably, the DOJ interpretation of § 4.33.3 addressed by this comment is easily distinguishable from the retroactive rule at issue in *Bowen*. Unlike the Department of Health and Human Services' interpretation of the Medicare statute, DOJ's interpretation of § 4.33.3 is not inconsistent with either the regulation or DOJ's prior statements regarding the regulation. *See OPVA*, 339 F.3d at 1132-33. Moreover, in *Thomas Jefferson University*, the Supreme Court noted that where an agency provides a reasonable interpretation of an ambiguous regulation "there is little, if any, reason not to defer to its construction." *Thomas Jefferson Univ.*, 512 U.S. at 517 (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).

159. *See OPVA*, 339 F.3d at 1131 (finding DOJ's interpretation warrants deference after stating that "[w]hen the meaning of regulatory language is ambiguous, the agency's interpretation controls") (citing Lal v. Immigration & Naturalization Serv., 255 F. 3d 998, 1004 (9th Cir. 2001)); *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1111 ("The language of § 4.33.3, 'lines of sight comparable,' itself implies that the standard is a flexible one."); United States v. Cinemark, 2003 WL 22508500, at *7 (conclusion implicit); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 580 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998). In *Paralyzed Veterans of America*, the D.C. Circuit considered whether the regulation contains an *unobstructed* view requirement. *Paralyzed Veterans of Amer.*, 117 F.3d at 580 (emphasis added). The court concluded that the § 4.33.3 "lines of sight comparable" language is "ambiguous" and accordingly, considered whether DOJ's interpretation of the technical manual is owed deference. *Id.* at 580, 583 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). The court held that DOJ's interpretation warranted deference. *Id.* at 588.

160. *Lara*, 207 F.3d at 788 ("The text of section 4.33.3 provides little guidance as to whether theaters must provide wheelchair-bound moviegoers with comparable viewing angles or simply unobstructed lines of sight.").

161. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150-51 (1991). *Accord Thomas Jefferson Univ.*, 512 U.S. at 512.

The conclusion that § 4.33.3 requires that wheelchair seating be provided with comparable viewing angles is "eminently reasonable."[162] The common meaning of "lines of sight" provides powerful support for this conclusion.[163] Indeed, "lines of sight" inherently connotes viewing angle considerations. The dictionary, as noted by the Ninth Circuit, defines "line of sight" as "a line from an observer's eye to a distant point (as on a celestial sphere) toward which he is looking or directing an observing instrument."[164]

Notably, the Ninth and Sixth Circuit's understanding of the plain language meaning of "lines of sight" is identical to the definition rendered by the Third Circuit in considering the meaning of § 4.33.3 in the context of a facility providing live music and entertainment.[165] Moreover, while not precedential, it is notable that in the context of an existing theater, the district court for the District of Columbia interpreted "lines of sight comparable" to encompass a viewing angle requirement.[166] The district court held that DOJ's interpretation of § 4.33.3 forwarded in an *amicus curiae* brief warranted deference.[167]

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162. *Hoyts Cinemas Corp.*, 232 F. Supp. at 87.

163. *See OPVA*, 339 F.3d at 1131. The plain language of § 4.33.3 is the starting point for interpreting the regulation. *Lara*, 207 F.3d at 787. Conversely, the Fifth Circuit's conclusion that "lines of sight" does not encompass viewing angle considerations, but rather implies only an "unobstructed view," was premised on dubious support. *OPVA*, 339 F.3d at 1131. In fact, the only authority cited by the court of appeals in support of its assertion were from areas of the law wholly irrelevant to public assembly areas: a communications antennae regulation, United States Coast Guard Tankermen certification, and a regulation pertaining to snowmobile use in the National Parks. *Lara*, 207 F.3d at 788-789 (citing 47 C.F.R. § 73.685 (2000), 46 C.F.R. § 13.103 (2000), and 36 C.F.R. § 2.18 (2000), respectively).

164. *OPVA*, 339 F.3d at 1131 (citing Webster's Third New International Dictionary, "line of sight," at 1316 (1993)).

165. *See* Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730 (3rd Cir. 1999) (music and entertainment facility). In *Caruso*, the Third Circuit considered whether defendant's facility violated § 4.33.3 by failing to provide wheelchair seating with a view of the entertainment unobstructed by standing patrons. *Id.* The court held that Section 4.33.3 did not impose an "unobstructed view" requirement. *Id.* at 736-37. In its analysis, the Third Circuit recognized that the phrase "lines of sight comparable" used in § 4.33.3 encompasses viewing angle considerations in the context non-movie theater facilities. *See id.* at 731-32.

166. Fiedler v. Am. Multi-Cinema, Inc., 871 F. Supp. 35, 39 (D.D.C. 1994). In *Fiedler*, the district court considered whether DOJ's interpretation of § 4.33.3 warranted deference in the context of existing facilities. *Id.* at 40. Although stadium-style theaters are "new facilities" and, thus, not subject to the dispersal requirement applicable to existing facilities, the deference the

Additionally, the movie theater industry itself understands "line of sight" to imply viewing angle considerations in the context of cinemas.[168] The SMPTE Guideline, discussed previously, for example, notes that: "for most viewers, physical discomfort occurs when the *vertical viewing angle* to the top of the screen exceeds 35, and when the horizontal *line of sight* measured between a perpendicular to his seat and the centerline of the screen exceeds 15."[169]

Movie theater executives and trade organizations have repeatedly recognized that "lines of sight" commonly refers to viewing angle.[170] For instance, in designing stadium-style theaters, architects

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D.C. Circuit paid to the DOJ's understanding of § 4.33.3 is notable. *See id.* at 37 n.4, 39.

167. *Id.* at 39. Specifically, the district court held that "[a]s the author of the regulation, [DOJ] is also the *principal arbiter as to its meaning*." *Id.* (emphasis added) (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)).

168. *OPVA*, 339 F.3d at 1131-32 (citing SMPTE ENGINEERING GUIDELINE at 4-5 (1994)); *see AMC Entm't Inc.*, 232 F. Supp. 2d at 1100 (citing SMPTE Guidelines, Lucasfilm Guidelines and NATO [National Association of Theater Owners] testimony before the Access Board). Moreover, as early as 1994 DOJ signaled to the industry that it understood § 4.33.3 to encompass viewing angle considerations. Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 11 n.6, *OPVA*, (No. 01-35554). DOJ sent a letter to Yakima County Stadium in 1994 stating that § 4.33.3 compliance entailed providing wheelchair-accessible seating in "each price range, level of amenities, and *viewing angle*." *Id.* (citing letter); *see Indep. Living Res.*, 982 F. Supp. at 709 (citing letter). Also, in 1997, DOJ attorney Joe Russo, speaking to theater owners regarding § 4.33.3 requirements, stated that "[n]obody runs into the movie theater to see Terminator 200 and runs to the front seat so they can get neck strain like this." *Indep. Living Res.*, 982 F. Supp. at 1105 n.15 (noting that this comment was "not inconsistent" with DOJ's interpretation of § 4.33.3 set forth in *Lara*). DOJ filed its *amicus curiae* brief with the *Lara* district court in 1998. *Lara*, 1998 WL 1048497, at *1.

169. *OPVA*, 339 F.3d at 1131 (emphasis added) (citing SMPTE ENGINEERING GUIDELINE at 4-5 (1994)).

170. *Id.* at 1132 ("Indeed, the National Association of Theater Owners ("NATO"), participating in this case as amicus curiae on behalf of the appellees, has advanced a similar conception of viewing angle") (citing Steven John Fellman, *NATO Position Paper on Wheelchair Seating in Motion Picture Auditoriums* at 6 (1994) ("NATO explained that lines of sight are measured in degrees . . . .")). *Accord Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 87 ("The motion picture industry itself has admitted as much via writings by the National Association of Theater Owners and other treatises and papers written by major studios.") (citing *AMC Entm't, Inc.*, 232 F. Supp. 2d at 1099-1103); *AMC Entm't Inc.*, 232 F. Supp. 2d at 1103 (citing deposition of AMC Entertainment Inc. official who admitted that the "lines of sight from the sloped-floor seating have 'inferior sight lines'" in stadium-style theaters). Interestingly, prior to the commencement of litigation concerning whether § 4.33.3 encompasses viewing angles, one commentator writing in 1998

advised Hoyts that "it should place wheelchair-accessible seats in the stadium section to avoid litigation."[171] Moreover, in 1995, the National Association of Theater Owners (NATO) advised the ADAAG Review Advisory Committee that the "best sight lines" and "most desirable seats" typically are those in the back of movie theaters.[172]

Furthermore, not only are the Ninth and Sixth Circuits correct, the Fifth Circuit's decision is troubling. In particular, it is puzzling that the Fifth Circuit emphasized that the Access Board's 1999 Proposed

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observed that, "in applying the ADA to newly *constructed movie theaters*, the statute and regulations are *relatively clear and easy to apply* . . . in newly constructed theaters disabled patrons must be given the option to sit in the front, middle, or back of the theater just as the able-bodied are." Carlson, *supra* note 33 at 904 (emphasis added).

171. *Hoyts. Cinemas Corp.*, 256 F. Supp. 2d at 92. Notably, Hoyts Cinemas executives "responded that the architects should eliminate wheelchair accessible seating in the stadium sections to keep costs down and because 'there was enough precedent to argue in court to do this.'" *Id.*

172. *AMC Entm't Inc.*, 232 F. Supp. at 1102-03. NATO submitted a Citizens Petition to DOJ in August 1999. Fellman, *Differing Legal Decisions*, *supra* note 6 (stating that DOJ has not yet agreed to "meaningful discussions" regarding the requirements § 4.33.3 places on the location of wheelchair-accessible seating in stadium-style theaters). Therefore, not only is "line of sight" understood by the industry to encompass viewing angle considerations, the industry recognizes an *objective* scheme for evaluating the adequacy of viewing angles provided to different seats in stadium-style theaters. This is significant given the Fifth Circuit's claim that recognizing a viewing angle requirement would necessitate courts issuing decisions based upon disabled moviegoers' "subjective and undoubtedly diverse preferences." *See Lara*, 207 F.3d at 789. As the Ninth Circuit stated:

> We disagree with the Fifth Circuit's suggestion . . . that it is impossible to parse "comparability" without embarking on subjective judgments of where each individual prefers to sit in a movie theater. The point is this: Able-bodied movie theater patrons in a stadium-style theater may choose from a wide range of viewing angles, most of which are objectively comfortable according to SMPTE standards, regardless of what personal viewing preferences individuals may have *within* that comfortable range. As it currently stands in the theaters at issue, however, wheelchair-bound patrons may sit only in the first few rows, where uncontroverted evidence demonstrates that, not only is the viewing angle objectively uncomfortable for all viewers, but the discomfort is exacerbated for wheelchair-bound viewers relative to able-bodied viewers sitting in the same row.

OPVA, 339 F.3d at 1132 n.7. It is striking that NATO's comments were made prior to stadium-seating theaters' rise in popularity. Springer, *Megaplexes alter movie theater picture*, *supra* note 1. The industry's dramatic change of heart regarding the importance of viewing angle to the full enjoyment of cinemas reeks of self-interest. *See OPVA*, 339 F.3d at 1131-32.

Rulemaking supported its holding that DOJ's interpretation was unreasonable.[173] Contrary to the Fifth Circuit's assertion, the ADAAG regulations did define viewing angle in the context of its discussion of the "line of sight" language.[174] It is disconcerting that the Fifth Circuit selectively quoted from the Federal Register in an effort to "bolster its holding."[175]

Lastly, the Fifth Circuit's conclusion, that § 4.33.3 only requires facilities to provide an unobstructed view, is arguably inconsistent with the language of the regulation itself requiring "lines of sight *comparable*."[176] As the Ninth and Sixth Circuits noted, it is difficult to conclude, that providing wheelchair-bound moviegoers with "objectively uncomfortable" seats while ambulatory patrons enjoy a choice of superior viewing angles, constitutes "full and equal enjoyment" of stadium-style movie theaters.[177] In any case, the Fifth

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173. *AMC Entm't Inc.*, 232 F. Supp. 2d at 1110-11.

174. The Fifth Circuit omitted the following language from the Access Board's proposed rulemaking:

> As stadium-style theaters are currently designed, patrons using wheelchair spaces are *often relegated* to a few rows of each auditorium, *in the traditional sloped floor area* near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen.

Hoyts Cinemas Corp., 256 F. Supp. 2d at 84, n.8. (quoting 64 Fed. Reg. 62,277 (emphasis added)); *AMC Entm't Inc.*, 232 F. Supp. 2d at 1111 (noting Fifth Circuit's selective quotation of Access Board's proposed rulemaking).

Importantly, the Access Board issued a revised proposed draft of the ADAAG in 2002. DRAFT FINAL ADA AND ABA ACCESSIBILITY GUIDELINES, 36 C.F.R. §§ 1190-1191 (Apr. 2, 2002), *available at* http://www.access-board.gov/adaag/html/adaag.htm (last visited Oct. 31, 2003); *see Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Recreation Facilities*, 67 Fed. Reg. 56,352, 56,354 (Sept. 3, 2002). In pertinent part, the proposed ADAAG stated, "wheelchair spaces . . . shall provide spectators with a range of seating locations and *viewing angles* equivalent to, or better than, the range of seating locations and viewing angles available to all other spectators." *Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Recreation Facilities*, 67 Fed. Reg. at 56,354. To date, DOJ has not promulgated the new regulation. *See* ACCESS BOARD, REVISION OF ADA AND ABA ACCESSIBILITY GUIDELINES, *at* http://www.access-board.gov/ada-aba/status.htm (last visited Oct. 15, 2003).

175. *See AMC Inc.*, 256 F. Supp. 2d at 84 n.8; *see Hoyts Cinemas Corporation*, 256 F. Supp. 2d at 84 ("The language the *Lara* court omitted from the proposed ADAAG guidelines "could hardly be more clear.").

176. *See Lara*, 207 F.3d at 788.

177. *OPVA*, 339 F.3d at 1133 (citing 42 U.S.C. § 12182(a)); *see* United States

Circuit's interpretation of § 4.33.3, which it substituted for DOJ's interpretation, is fundamentally inconsistent with the purpose of § 12182(a), and the ADA generally: "The [A]ct is designed to provide equal opportunities to people with disabilities. Inherent in that principle—without need for explicit regulatory guidance—is that theaters cannot provide patrons who use wheelchairs with second-class seating and call that equality."[178]

Given the expansive purpose of the ADA, arguing that movie theaters need only provide disabled moviegoers with an unobstructed, objectively uncomfortable view is derisory.[179]

V. CONCLUSION

Clearly the Ninth Circuit's decision in *OPVA* created a conflict between it and the Fifth Circuit in *Lara* and in so doing placed the meaning of § 4.33.3 in flux.[180] The Sixth Circuit widened the schism

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v. Cinemark, 2003 WL 22508500, at *5. The Ninth Circuit explained that the Fifth Circuit's decision meant "[n]o matter where in the theater the seats are, and no matter how sharp the viewing angle, so long as there is no physical object standing between the disabled patron and the screen, DOJ is not free to interpret its own regulation as requiring anything more." *OPVA*, 339 F.3d at 1133.

178. Jennifer L. Reichert, *Suit Brought By Moviegoers Who Use Wheelchairs Tests Limits of ADA*, 36 JUL TRIAL 133, 134 (July 2000) (quoting Chai Feldblum, Professor of Law at Georgetown University, who was involved in "drafting and negotiating the ADA"). Reichert discussed the release of the Fifth Circuit's *Lara* decision. *Id*; *see* Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 14, *OPVA*, (No. 01-35554) ("The comparability requirement of Standard 4.33.3 must be read in the context of Title III's [sic] purpose of providing persons with disabilities "equal enjoyment" of the benefits of public accommodations . . . [t]he Fifth Circuit's holding in *Lara* thus thwarts one of the central goals of Title III of the ADA."). Notably, the district court for the District of Oregon in *Independent Living Resources* also stated:

> [I]n enacting the ADA, Congress intended to do more than to simply maintain the *status quo*. Congress intended to establish higher standards for newly constructed structures, and to change the manner in which buildings were designed so that persons with disabilities could more fully share in the benefits that are available from public accommodations.

Indep. Living Res., 982 F. Supp. at 748 (commenting on the ADA generally in the context of the § 4.33.3 "unobstructed view requirement").

179. *See Hoyts Cinemas Corp.*, 256 F. Supp. 2d at 90 ("Cinemas' interpretation is not consistent with the principles underlying the ADA itself and, therefore, is indefensible.").

180. *See supra* note 67.

by backing the Ninth Circuit's interpretation of § 4.33.3 and repudiating the Fifth Circuit's holding.[181] As the dissent in *OPVA* noted, § 4.33.3, "a purportedly uniform federal regulation . . . [now] means something different in the Ninth Circuit from what it means in the Fifth."[182]

The Ninth and Sixth Circuits correctly ruled that DOJ's understanding of § 4.33.3 warrants deference.[183] Administrative law principles of deference dictate that agency interpretations of their own regulations be honored, provided that the position is reasonable and consistent with their prior interpretations.[184] The movie theater owners themselves acknowledge that seating in the front rows of the stadiums is greatly inferior to that seating provided in the stadium-seating section.[185] Allowing public accommodations to escape their legal obligation pursuant to the ADA, namely to make their facilities as accessible as possible to the disabled, is contrary to the statute's purpose and mandate.[186]

At the same time, it is important for DOJ to provide more detailed guidance to industry owners going forward. Accordingly, the Access Board and DOJ ought to work together to endorse more precise viewing angle standards, while maintaining the flexibility required to apply the relevant standards to new venue designs. The government and the industry should make every effort to expedite bringing stadium-

181. United States v. Cinemark, 2003 WL 22508500, at *5.
182. *OPVA*, 339 F.3d at 1136 (Kleinfeld, J., dissenting).
183. *See* United States v. Cinemark, 2003 WL 22508500, at *11; *OPVA*, 339 F.3d at 1133.
184. *See* United States v. Cinemark, 2003 WL 22508500, at *7 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-213 (1988)).
185. *OPVA*, 339 F.3d at 1132.
186. H.R. Rep. 101-485, pt. II, *supra* note 26 at 22 ("The purpose of the ADA is to provide a *clear and comprehensive national mandate to end discrimination* against individuals with disability and to bring persons with disabilities into the economic and social mainstream of American life . . . .") (emphasis added).

style theaters into compliance with the ADA, thereby providing disabled patrons "full and equal enjoyment" of stadium-style theaters.[187]

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187. The time is ripe for speedily realizing stadium-style theater compliance with § 12182(a) given that the top movie theater chains have recently emerged from bankruptcy protection. Eller, *supra* note 1; *see* Katie Hollar, *AMC watches as top theater chain Regal declares bankruptcy*, Oct. 12, 2001, THE BUSINESS JOURNAL OF KANSAS CITY, *available at* http://kansascity.bizjournsl.com/kansascity/stories/2001/10/08/daily63.html (last visited Oct. 12, 2003) ("The bankruptcy of Regal Cinemas, Inc. [October 11, 2001] makes AMC Entertainment Inc. the only Top 10 cinema chain to resist bankruptcy and maintain available financing."). Holler noted that between 1999 and October 12, 2001 the following theaters filed for bankruptcy: Dickinson Theaters, Inc., United Artists Theater Co., Carmike Cinemas, Edward Theatres Circuit Inc. [d/b/a Act III Cinemas, Inc], Mann Theaters, General Cinemas, Loews Cineplex Entertainment Corp., Wehrenberg Theatres and Regal Cinemas, Inc. Hollar, *AMC watches as top theater chain Regal declares bankruptcy*, Oct. 12, 2001, THE BUSINESS JOURNAL OF KANSAS CITY, *available at* http://kansascity.bizjournsl.com/kansascity/stories/2001/10/08/daily63.html (last visited Oct. 12, 2003). Moreover, the significant importance of ensuring stadium-style theaters' compliance with § 4.33.3 can not be overstated; the combined effects of the megaplex craze and industry leaders emerging from bankruptcy suggest that stadium-style theaters are here to stay. Eller, *supra* note 1 (noting that bankruptcy has allowed theater owners to "shed unprofitable old theaters"); Union Internationale des Cinemas, *supra* note 10 ("Now virtually all newly constructed cinemas contain stadium seating.").