

## Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.: The Rise of Stadium Seating in Movie Theaters and the Disabled's Fight for a Comparable Seat in the House

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**OREGON PARALYZED VETERANS OF AMERICA v.  
REGAL CINEMAS, INC.: THE RISE OF STADIUM  
SEATING IN MOVIE THEATERS AND THE  
DISABLED'S FIGHT FOR A COMPARABLE  
SEAT IN THE HOUSE**

*Off to the movies we shall go, where we learn everything that  
we know.<sup>1</sup>*

INTRODUCTION

The screen goes dark and the words "Spider-Man 2" emblazon the screen.<sup>2</sup> In your field of vision, however, all you see is "ider-Ma." You scan from left to right to get the full title. Then the movie begins. You sit up straight, but that hurts your neck. You slouch down in the seat, and when that fails to improve your view, you continue slouching until your rear end is halfway off the seat, but to no avail. The fast-moving images on screen appear to be one giant blur. You begin to get nauseous. Your head starts hurting. You bemoan the influence of lightning-quick, MTV-style editing on today's motion pictures. You glance around and notice that almost everyone else sitting behind you in the stadium section of the theater seems to be doing just fine. At that point, the person in the wheelchair sitting next to you leans over and says, "Not the greatest view, is it?"

Stadium seating in movie theaters has become a big draw for audiences since its inception in 1995.<sup>3</sup> The advantages of the stadium-style theaters are numerous, and it is universally recognized that stadium seating "provides a markedly superior view and experience to traditional seating in traditional theaters."<sup>4</sup> Yet, in a majority of these the-

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1. *SOUTH PARK: BIGGER, LONGER & UNCUT* (Paramount Pictures 1999).

2. *SPIDER-MAN 2* (Columbia Pictures 2004). This film met with almost unanimous critical praise and shattered the five-day box office record, grossing over \$152 million. See Box Office Mojo, at [www.boxofficemojo.com](http://www.boxofficemojo.com) (last visited Jan. 23, 2005).

3. The first movie theater to introduce the stadium seating concept was AMC's Grand Theater 24 of Dallas, Texas in 1995. *United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092, 1095 (C.D. Cal. 2002). AMC Entertainment, Inc. is a nationwide theater chain based in Kansas City, Missouri. *Id.*

4. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 79 (D. Mass. 2003), *vacated by* 380 F.3d 558 (1st Cir. 2004).

aters,<sup>5</sup> disabled moviegoers lack the option to sit in stadium seats, and are relegated to the traditional section of the theater. Since 1998, stadium-style movie theaters have faced increasing amounts of litigation over their compliance with the Americans with Disabilities Act (ADA).<sup>6</sup> Specifically, the litigation concerns Title III of the ADA and section 4.33.3 of the ADA Accessibility Guidelines (ADAAG) issued by the Architectural and Transportation Barriers Compliance Board (Access Board) and adopted by the Department of Justice (DOJ).<sup>7</sup> Title III of the ADA applies to sports and entertainment facilities.<sup>8</sup>

Section 4.33.3 of the ADAAG has been subject to various interpretations and analyses by courts and government regulatory agencies in the past few years.<sup>9</sup> The portion of section 4.33.3 at issue is the phrase "lines of sight comparable to those for members of the general public."<sup>10</sup> Both the DOJ and disabled patrons throughout the United States have argued that "lines of sight comparable" applies to both physical obstructions and viewing angles.<sup>11</sup> The federal circuit courts and other state district courts disagree on whether to defer to such an interpretation. Some courts have held that section 4.33.3 only requires that wheelchair users have unobstructed views and not that they sit at comparable viewing angles to the screen.<sup>12</sup> On the other

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5. For example, the court in *United States v. Hoyts* found only two instances where movie theaters had placed wheelchair-accessible seats in both the stadium section and traditional section. *Id.* at 80.

6. David Watson, *Ninth Circuit Rules: Movie Theaters May Not Relegate Wheelchair Patrons to Front*, METRO. NEWS ENTER., Aug. 14, 2003, at 1 (quoting Kathleen Wilde of the Oregon Advocacy Center in Portland). See also 42 U.S.C. §§ 12181–12189 (2000).

7. See cases cited *infra* note 9.

8. Mita Chatterjee, Note, *Access Denied and Not Designed: The Ninth Circuit Drafts a Narrow Escape for Architect Liability Under the Americans with Disabilities Act* in *Lonberg v. Sanborn Theatres, Inc.*, 9 VILL. SPORTS & ENT. L. FORUM 293, 294 (2002).

9. See, e.g., *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004) (holding that section 4.33.3 applies to lines of sight and physical obstructions, but the term "integral" does not require wheelchair seats in a particular part of the theater); *Meineker v. Hoyts Cinemas Corp.*, 69 Fed. Appx. 19 (2d Cir. 2003) (remanding the case to the district court to determine whether the DOJ's interpretation is entitled to deference in light of the Ninth Circuit's decision); *United States v. Cinemark USA, Inc.*, 348 F.3d 569 (6th Cir. 2003) (imposing a viewing angle requirement and remanding to the district court to determine the extent of that requirement); *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003) (holding that the DOJ's interpretation of section 4.33.3 is entitled to deference); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000) (holding that the DOJ's interpretation of section 4.33.3 is not entitled to deference and the regulation only requires lines of sight that are free of physical obstructions); *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092 (C.D. Cal. 2002) (holding that the DOJ's interpretation is entitled to deference).

10. 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

11. See cases cited *supra* note 9 and accompanying text.

12. See *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000) (holding that section 4.33.3 only applies to physical obstructions and not to viewing angles).

hand, a number of other courts have agreed with the DOJ and have deferred to its interpretation of section 4.33.3.<sup>13</sup> One of the most notable court decisions to shed light on this issue is *Oregon Paralyzed Veterans of America v. Regal Cinemas*.<sup>14</sup>

In *Oregon Paralyzed Veterans of America*, the United States Court of Appeals for the Ninth Circuit addressed the dispute surrounding wheelchair patrons' viewing angles in stadium-style movie theaters and the DOJ's interpretation of section 4.33.3.<sup>15</sup> The Ninth Circuit held that stadium seating does not provide "full and equal enjoyment" of movie theater services by disabled patrons under Title III of the ADA.<sup>16</sup> Consequently, movie theaters in the Ninth Circuit are placed in the precarious position of being in violation of the ADA with no clear indication of how they can successfully alter or retrofit their theaters to comply with the guidelines offered by the court.<sup>17</sup> This ruling is in direct conflict with that of the United States Court of Appeals for the Fifth Circuit in *Lara v. Cinemark*, which held that stadium-style theaters comply with the ADA and provide "full and equal enjoyment" by providing unobstructed views.<sup>18</sup>

This Note addresses the conflict in federal courts over the interpretation of language in section 4.33.3, specifically the various constructions of the phrase "lines of sight comparable to those for members of the general public,"<sup>19</sup> and the consequences that flow from the Ninth Circuit's retroactive regulation.<sup>20</sup> Scholars have commented on this conflict in the past, but no one has yet explored a specific plan that movie theaters can put into effect.<sup>21</sup> This Note attempts to craft a feasible plan for movie theaters to follow. The circuit split between the Fifth and Ninth Circuits, coupled with the number of other lawsuits currently in litigation across the country and further still, the Supreme Court's denial of certiorari in the *Oregon Paralyzed Veterans of*

13. Excluding *Lara*, see cases cited *supra* note 9.

14. 339 F.3d 1126 (9th Cir. 2003).

15. See *id.* at 1131. "The language at issue is [section] 4.33.3's reference to 'lines of sight comparable to those for members of the general public.'" *Id.* (quoting *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293 (D. Or. 2001)).

16. *Id.* at 1133.

17. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1136 (Kleinfeld, J., dissenting).

18. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000). See *infra* Part II.

19. 28 C.F.R. pt. 36, app. A., § 4.33.3 (2003).

20. See *infra* notes 422–513 and accompanying text.

21. See generally Chatterjee, *supra* note 8; Ellsworth, *infra* note 319; McKibbin, *infra* note 109; Milani, *infra* note 32; and Joshua D. Watts, Note/Comment, *Let's All Go to the Movies, and Put an End to Disability Discrimination: Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc. Requires Comparable Viewing Angles for Wheelchair Seating*, 34 GOLDEN GATE U. L. REV. 1 (2004).

*America* case,<sup>22</sup> indicate that the issue of wheelchair patrons' viewing angles in stadium-style movie theaters demands attention. Part II of this Note discusses the background of the case, including the history of stadium seating in movie theaters,<sup>23</sup> the legislative history of Title III of the ADA,<sup>24</sup> the Access Board and DOJ's role in administering guidelines,<sup>25</sup> and a summary of other cases that have addressed the issue.<sup>26</sup> Part III discusses the facts, procedural history, holding, reasoning, and dissenting opinion of *Oregon Paralyzed Veterans of America v. Regal Cinemas*.<sup>27</sup> Part IV presents an analysis of the key issues raised by the Ninth Circuit in *Oregon Paralyzed Veterans of America*.<sup>28</sup> Part V reflects upon the impact of the decision and offers possible solutions to the various issues in question.<sup>29</sup> Finally, Part VI of this Note concludes that the Ninth Circuit's decision should only be applied prospectively. Part VI further argues that the DOJ should refrain from further litigation against stadium-style movie theaters and seek the Access Board's assistance to revise section 4.33.3 or adopt a new regulation.<sup>30</sup>

## II. BACKGROUND

This section begins with a discussion of the history of stadium seating in movie theaters, and the enhanced movie-going experience such seating provides. This section next addresses the motion picture theater exhibition industry guidelines and their relevance. It also discusses the legislative history of Title III of the ADA. Finally, this section concludes with summaries of other decisions that have addressed the issue—those that have held that section 4.33.3's language covers physical obstructions only, as well as those that have held it covers both physical obstructions and viewing angles.

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22. 339 F.3d 1126 (9th Cir. 2003). On Monday, June 28, 2004, the Supreme Court refused to hear Regal's appeal to consider the issue, and sent the case back to the district court with the Ninth Circuit's decision intact. *Or. Paralyzed Veterans of Am. v. Regal Cinemas*, 339 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2903 (2004).

23. *See infra* notes 32–68 and accompanying text.

24. *See infra* notes 69–76 and accompanying text.

25. *See infra* notes 77–113 and accompanying text.

26. *See infra* notes 114–194 and accompanying text.

27. *See infra* notes 195–269 and accompanying text.

28. *See infra* notes 270–421 and accompanying text.

29. *See infra* notes 422–513 and accompanying text.

30. *See infra* notes 514–522 and accompanying text.

A. *Enhancing the Movie-Going Experience: Stadium Seating in Movie Theaters*

Invented in 1995, stadium seating has come into widespread use in recent years.<sup>31</sup> Stadium seating gets its name from the difference in elevation from row to row that “creates the effect of a viewing angle similar to that found when sitting in a tiered sports stadium.”<sup>32</sup> All stadium-style theaters are split into two different sections: a stadium section and a traditional section.<sup>33</sup> These two sections are usually separated by an access aisle.<sup>34</sup> The majority of seats in a stadium-style movie theater are located in the stadium section.<sup>35</sup> In many, if not most of these theaters, wheelchair locations are clustered in the traditional section.<sup>36</sup> Patrons access the stadium seating by climbing up stairs.<sup>37</sup> These seating platforms raise each row of seats eighteen inches above the row directly in front of it.<sup>38</sup> The gradual elevation of each row allows patrons to see around the person in front of them, thereby giving them a direct view of the screen.

The purpose of stadium seating in movie theaters is to “maximize unobstructed views” for moviegoers.<sup>39</sup> Its popularity can be largely attributed to the enhanced movie-going experience it affords. Stadium seating “virtually suspends the moviegoer in front of the wall-to-wall screen” and totally envelops the audience in the movie because of the “enhanced sight and sound presentation.”<sup>40</sup> This enhanced movie-going experience helps ensure that all stadium seats are the

31. See *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1095 (C.D. Cal. 2002).

32. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 78 (D. Mass. 2003), vacated by 380 F.3d 558 (1st Cir. 2004). Sports stadiums have had their own legal problems in complying with the ADA and section 4.33.3. See generally 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 (2000).

33. *Hoyts Cinemas*, 256 F. Supp. 2d at 78. The traditional section is comprised of the two to four rows of seats located in the front of a theater on a flat, gradually sloped floor. *AMC Entm't*, 232 F. Supp. 2d at 1095. These seats are much closer to the screen than those in the stadium section. *Hoyts Cinemas*, 256 F. Supp. 2d at 78. In theaters without stadium sections, all seating is elevated using a sloped floor and is “accessed by walking up or down an adjacent sloped aisle.” *AMC Entm't*, 232 F. Supp. 2d at 1095.

34. *Hoyts Cinemas*, 256 F. Supp. 2d at 78.

35. Stadium seats constitute roughly seventy percent or more of a theater's seats. *Hoyts Cinemas*, 256 F. Supp. 2d at 78.

36. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 563 (1st Cir. 2004).

37. *AMC Entm't*, 232 F. Supp. 2d at 1095.

38. *Id.* Most theaters provide seating like a typical sports stadium-stepped seating where steps are sloped at about five percent. See generally Jennifer L. Reichert, *Suit Brought by Moviegoers Who Use Wheelchairs Tests Limits of ADA*, 36 JURY TRIAL 133 (2000).

39. *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1127 (9th Cir. 2003).

40. *AMC Entm't*, 232 F. Supp. 2d at 1095 (internal quotation marks omitted). These claims have been made in AMC press releases, advertisements, and other publicity materials. *Id.*

best seats in the house. In addition, stadium seats have a host of other benefits over traditional seating. Stadium seats usually tilt backward and rock back and forth; they have reclining, wide arm rests, are generally wider than traditional seats, and have longer seatbacks and more leg room.<sup>41</sup> Also, because of the stadium section's elevation, the screen can be expanded. This pleases many moviegoers who place stock in the phrase: "bigger is better," since movie screens are generally larger in a stadium-style theater.<sup>42</sup> Indeed, moviegoers have indicated a clear preference for stadium-style theaters as a result.<sup>43</sup>

### B. *Wheelchair and Companion Seating Placement*

While stadium theaters have enjoyed increasing levels of popularity since their introduction, they have also been the subject of much litigation since 1998.<sup>44</sup> The reason for the litigation is simple: wheelchair patrons cannot access the stadium seating.<sup>45</sup> The majority of wheelchair-accessible seats in stadium theaters are located in the traditional section of the theater.<sup>46</sup> In any given stadium-style theater, wheelchair seats can be found either in the front rows of the traditional section or in the seats along the access-aisle immediately in front of the stadium section. Bigger theaters with capacities of over three hundred people are the exception. These theaters provide wheelchair seating in the far rear of the stadium section where the seats are ac-

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41. *Hoyts Cinemas*, 256 F. Supp. 2d at 79.

42. *Id.* at 78.

43. AMC stated in a recent annual report that stadium-style theaters have "become the industry benchmark" and that AMC customers have "overwhelmingly embraced" the concept. *AMC Entm't*, 232 F. Supp. 2d at 1096 (internal quotation marks omitted).

44. See *Watson*, *supra* note 6, at 1 (quoting Kathleen Wilde of the Oregon Advocacy Center in Oregon). From 1996–2000, the Department of Justice (DOJ) made no changes to section 4.33.3. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 563 (1st Cir. 2004). Before stadium seating became popular, the most prominent case involving movie theaters was a suit brought by two wheelchair-using women against the United Artists EmeryBay theater in Emeryville, California. The women claimed that they were forced to sit in degrading and inferior areas in the back of the theater. See *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994). The case gave rise to the term "wheelchair ghetto" and United Artists eventually settled the case, agreeing to provide wheelchair seating in a variety of different locations and to modify existing seats by installing removable aisle-side armrests. The settlement agreement can be found at *Untitled*, <http://www.usdoj.gov/crt/foia/md2.txt> (last visited Jan. 23, 2005). For the rationale behind the settlement, see Katherine C. Carlson, Comment, *Down in Front: Entertainment Facilities and Disabled Access Under the Americans With Disabilities Act*, 20 HASTINGS COMM. & ENT. L.J. 897, 904–11 (1998).

45. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1127.

46. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 78–80 (D. Mass. 2003), *vacated* by 380 F.3d 558 (1st Cir. 2004). It should be noted that wheelchair-accessible seats are not actual seats. Rather, they are empty spaces that wheelchairs can fit into. *Id.*

cessed by elevator.<sup>47</sup> Nevertheless, the general result is that all wheelchair patrons “have no choice but to sit in the first few rows of the theater.”<sup>48</sup> Very rarely do stadium theaters place wheelchair-accessible seats among the stadium section.<sup>49</sup>

The viewing angles in a movie theater can be both vertical and horizontal.<sup>50</sup> In the traditional section, the vertical viewing angle is significantly sharper than in the rest of the theater, ranging between twenty-four and sixty degrees,<sup>51</sup> with a forty-two degree average.<sup>52</sup> In contrast, the median vertical viewing angle in the stadium section is twenty degrees.<sup>53</sup> Physical discomfort occurs for most viewers when the vertical viewing angle (measured diagonally from the viewer’s seat to the top of the screen) exceeds thirty-five degrees, and when the horizontal viewing angle (measured perpendicular from the viewer’s seat to the centerline of the screen) exceeds fifteen degrees.<sup>54</sup> For wheelchair patrons, this physical discomfort is often heightened because they cannot slouch in their seats or recline their bodies.<sup>55</sup>

The biggest problem for wheelchair patrons is their lack of choice in the matter.<sup>56</sup> Non-disabled patrons have their pick of any seat in the

47. This is by mandate of section 4.33.3 of the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which provide that “when the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location.” 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

48. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1128.

49. *Hoyts Cinemas*, 256 F. Supp. 2d at 80.

50. For information on optimal viewing distances, which take into account both viewing angles and a selected screen size, see Viewing Distance Calculator, at <http://www.myhometheater.homestead.com/viewingdistancecalculator.html> (last visited Nov. 5, 2004). Entering the main viewing location along with the screen shape and size will produce certain calculated results, including the current viewing angle and maximum recommended distances (as recommended by both the Society of Motion Picture & Television Engineers and Lucasfilm’s THX). *Id.*

51. The National Association of Theater Owners (NATO) said, “[L]ine of sight is usually considered in terms of degrees . . . the degree of line of sight will vary from seat to seat in a motion picture theater and also vary from within any given seat to various portions of the screen.” *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092, 1101 (C.D. Cal. 2002).

52. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1128.

53. *Id.*

54. *Id.*

55. *Id.* It has been argued that the discomfort from limited flexibility in wheelchairs results from inadequate wheelchair manufacturing. *Id.* at 1137 (Kleinfeld, J., dissenting). NATO addressed limited flexibility, finding that seats in the rear of a theater gave patrons with limited flexibility the best viewing angles because viewing angles were smallest. *AMC Entm’t*, 232 F. Supp. 2d at 1101.

56. However, other problems abound. Kathy Stewmon, a wheelchair user since 1989, said in her affidavits and deposition testimony,

Sitting in [the front row], so close to the screen, the screen was so huge that I couldn’t focus on it; it made me dizzy trying to focus. I had to keep moving my head and neck back and forth to look at the whole movie screen. I found myself losing the story because I was working so hard to watch the screen; I couldn’t concentrate on the movie . . . I only lasted about 15 minutes in the front row—I couldn’t tolerate it. My family



theater. Wheelchair patrons, on the other hand, are forced to sit in the first few rows at the front of many theaters.<sup>57</sup> Because of the difficulty and danger in trying to carry a wheelchair up stairs, wheelchair patrons cannot sit in the stadium section even if there are empty stadium seats.<sup>58</sup> Wheelchair patrons argue that being relegated to the traditional section amounts to a violation of section 4.33.3 because the regulation requires “comparable” viewing angles.<sup>59</sup> For wheelchair patrons, unobstructed views of the screen and location among general public seating alone are not enough to satisfy the requirements of section 4.33.3.

### C. *Industry Guidelines for the Operation of Motion Picture Theaters*

Several organizations within the motion picture industry have issued guidelines for the operation of movie theaters.<sup>60</sup> These guidelines do not “necessarily represent current standard operating conditions and practices.”<sup>61</sup> Rather, they act as recommendations on how to achieve the optimal operation of movie theaters.

The Society of Motion Picture and Television Engineers’ (SMPTE) engineering guidelines directly address the customer’s viewing experience and lines of sight. Four elements affect the viewing experience and lines of sight: “(1) image size; (2) image distortion; (3) visibility;

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members dragged my wheelchair up the stairs, which was [a] very dangerous thing to do, so I could watch the movie.

*Or. Paralyzed Veterans of Am.*, 339 F.3d at 1128.

57. *Id.*

58. Even if patrons were to carry a wheelchair up the stairs, there are no blocked out spaces among the stadium seats for wheelchairs to fit in. *See Hoyts Cinemas*, 256 F. Supp. 2d at 78. The wheelchair would have to sit in the middle of the stairway, causing a safety hazard. *See generally Fiedler v. American Multi-Cinema, Inc.*, 871 F. Supp. 35 (D.C. Cir. 1994).

59. *See supra* note 10.

60. This Note singles out the Society of Motion Picture and Television Engineers (SMPTE) and Lucasfilm Ltd. (Lucasfilm).

61. LUCASFILM LTD., THX THEATRE ALIGNMENT PROGRAM: RECOMMENDED GUIDELINES FOR PRESENTATION QUALITY AND THEATRE PERFORMANCE FOR INDOOR THEATRES 2 (2000), <http://www.film-tech.com/manuals/TAPGUIDELINES.pdf>.

and (4) comfort.”<sup>62</sup> According to the SMPTE, the ideal line of sight is fifteen degrees below the horizontal centerline of the screen.<sup>63</sup>

Lucasfilm is *Star Wars* director George Lucas’ film and entertainment company,<sup>64</sup> and its guidelines stress the importance of stadium seating as an optimum condition and endorse the recommendation that “the vertical viewing angle from the first row should not exceed [thirty-five degrees].”<sup>65</sup> To keep viewing angles comfortable, “all seats should be contained within a [forty-five degree] Iso-Deformation Line.”<sup>66</sup> The guidelines also point out that “sight lines, floor pitch, seat back tilt, and viewer comfort all interact.”<sup>67</sup> Accordingly, auditoriums should be constructed to provide unobstructed sightlines and comfortable viewing angles.<sup>68</sup>

#### D. Legislative History of the ADA and Title III

Congress enacted the ADA on July 26, 1990 based upon findings that the disabled suffered from discrimination, isolation, segregation, and lack of physical access to certain facilities.<sup>69</sup> These congressional

62. *AMC Entm’t*, 232 F. Supp. 2d at 1099 (citing Soc’y of Motion Picture & Television Eng’rs, No. EG 18-1994, *SMPTE Engineering Guideline: Design of Effective Cine Theaters 5* (1994)). This Engineering Guideline has been withdrawn by action of the Committee on Theatrical Projection at the SMPTE meeting on March 5, 2003. See SMPTE, Engineering Committees, at [http://www.smpete.org/engineering\\_committees/](http://www.smpete.org/engineering_committees/) (last visited Jan. 23, 2005). Although withdrawn, the fact has had no impact on the validity of the cases that cite to it. For example, in November 2003, the Sixth Circuit cited the Oregon Paralyzed Veterans of America case as support for its position and did not even mention the withdrawal of SMPTE Guideline 5. See *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 578 (6th Cir. 2003). In fact, the only effect of Guideline 5’s withdrawal is that courts no longer cite to it in their opinions. See generally *id.* See also *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004).

63. *AMC Entm’t*, 232 F. Supp. 2d at 1099 (citing Soc’y of Motion Picture & Television Eng’rs, No. EG 18-1994, *SMPTE Engineering Guideline: Design of Effective Cine Theaters 5* (1994)).

64. See Company History, Lucasfilm Ltd., at <http://www.lucasfilm.com/inside/history/> (last visited Jan. 23, 2005).

65. LUCASFILM LTD., *supra* note 61, at 16.

66. *Id.* Iso-Deformation zones—the areas containing iso-deformation lines—exist in movie theaters, where the lines of sight can be “at such angles as to cause distortion of the visual image . . . circles [become] ellipses, squares [become] rhombuses, and all shapes [become] distorted.” *AMC Entm’t*, 232 F. Supp. 2d at 1099 (discussing Rubens Meister, *The Iso-Deformation of Images and the Criterion for Delimitation of the Usable Areas in Cine-auditoriums*, J. SOC’Y OF MOTION PICTURE & TELEVISION ENG’RS 179-182 (Mar. 1966)).

67. Lucasfilm, Ltd., *supra* note 61, at 10.

68. *Id.*

69. 42 U.S.C. §§ 12101(a)(1)-(3), (5) (2000). The ADA was “[h]ailed as the ‘emancipation proclamation’ for the disabled” and “the most sweeping piece of civil rights legislation possible in the history of our country.” Chatterjee, *supra* note 8, at 299 (quoting James P. Colgate, Note, *If You Build It, Can They Sue? Architect’s Liability Under Title III of the ADA*, 68 FORDHAM L. REV. 137, 140 (1999)) (internal quotations omitted). See also 136 Cong. Rec. 17,251, 17,280 (1990); and 136 Cong. Rec. 17,364, 17,376 (1990). In a nationwide poll conducted before the ADA was passed into law, two-thirds of all disabled Americans were shown to have not at-

findings revealed that a majority of the disabled population “do not go to movies, do not go to the theatre, do not go to see musical performances, and do not go to sporting events.”<sup>70</sup> Further, Congress concluded that such discrimination “left them severely disadvantaged socially, vocationally, economically, and educationally,” while denying them “the opportunity to achieve independent living and economic self-sufficiency.”<sup>71</sup>

Congress recognized that structures and attitudes could have “deleterious effects of discrimination” in people’s lives, and it sought to counteract such effects through Title III of the ADA.<sup>72</sup> Title III prohibits discrimination in places of public accommodation,<sup>73</sup> specifically stating that: “[n]o person shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place or public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>74</sup> It covers movie theaters, theatrical venues, concert halls, and stadiums, among others,<sup>75</sup> and ensures that people with disabilities “enjoy the same forms of entertainment as the general population,” enabling them to participate in and interact with mainstream society.<sup>76</sup>

### E. *The Regulatory Authority of the ADAAG*

The ADAAG are a set of regulations promulgated by the Access Board and adopted by the DOJ that govern the required accessibility standards under Title III of the ADA. This subsection begins by dis-

tended a movie in the past year for fear of nonparticipation and self-consciousness. Case Comment, *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 Am. v. Regal Cinemas, Inc., 117 HARV. L. REV. 727, 733 (2003) [hereinafter Comment].

70. Chatterjee, *supra* note 8, at 300 (discussing H.R. Rep. No. 101-485, pt. II, at 34 (1990)).

71. *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092, 1108 (C.D. Cal. 2002) (discussing 42 U.S.C. § 12101(a)(6), (8), (9)). The ADA was thus intended “to bring persons with disabilities into the economic and social mainstream of American life.” Milani, *supra* note 32, at 562 (quoting S. Rep. No. 101-116, at 58 (1989)).

72. Carlson, *supra* note 44, at 900.

73. 42 U.S.C. §§ 12181-12189 (2000). Movie theaters are considered places of public accommodations under the ADA. *Id.* § 12181(7)(c).

74. *Id.* § 12182(a). Title III also requires that newly constructed public accommodations, those designed or constructed after January 23, 1993, be “readily accessible to and usable by” people with disabilities. *Id.* § 12183(a)(1). Existing facilities that were altered after January 26, 1992 must be readily accessible and usable by people with disabilities “to the maximum extent feasible.” *Id.* § 12183(a)(2). Public accommodations must give patrons with disabilities “functionally equivalent” experiences to those of other patrons. 28 C.F.R. §§ 36.202, .203, .302 (2003).

75. See Carlson, *supra* note 44, at 900.

76. *Id.*

Discussing the history of the Access Board's and DOJ's involvement in Title III regulation. It then lays out the text of section 4.33.3, the provision-at-issue. This subsection then briefly introduces the DOJ's interpretation of section 4.33.3, and the due deference courts usually afford it. Finally, this subsection presents the Access Board's Notice of Proposed Rulemaking, and the Access Board's recent Amendment to the ADAAG, adopted in July 2004.

### 1. Access Board and DOJ Involvement

Congress charged the DOJ, acting through the Attorney General, with enforcing Title III of the ADA, and it also provided individuals a private right of action to seek injunctive relief.<sup>77</sup> In order to carry out the provisions of Title III, Congress directed the DOJ to issue regulations that would apply to any of the facilities covered by Title III.<sup>78</sup> In issuing regulations, the DOJ is required to meet the minimum guidelines and requirements issued by the Access Board.<sup>79</sup>

The Access Board is a federal agency created by the Rehabilitation Act of 1973.<sup>80</sup> The Access Board's mission is to eliminate the "architectural, transportation, communication, and attitudinal barriers confronting people with disabilities."<sup>81</sup> Similar to the DOJ's responsibilities under the Act,<sup>82</sup> Congress charged the Access Board with responsibilities in connection with Title III, such as "'establish[ing] and maintain[ing] minimum guidelines and requirements for the standards issued."<sup>83</sup> These Access Board guidelines serve as a model for the DOJ in establishing Title III standards.<sup>84</sup>

77. See 42 U.S.C. §§ 12188(a)–(b) (2000). "In actions instituted by the Attorney General, a wider range of remedies [beyond injunctive relief] are available." Carlson, *supra* note 44, at 903. These other remedies include appropriate equitable relief and monetary damages. *Id.* (citing 42 U.S.C. § 12188(b)(2)(A)–(C)). Punitive damages are not allowed. *Id.* at n.38 (citing 42 U.S.C. § 12188(b)(2)(A)–(C)). The DOJ also issues technical assistance manuals and files suit to enforce compliance with the ADA. See *id.* §§ 12188(b), 12206 (2000). For instance, the court may grant any equitable relief it considers appropriate, including monetary damages, and may assess civil penalties in any amount not exceeding \$50,000 for the first violation and \$100,000 for subsequent violations. *Id.* (citing 42 U.S.C. § 12188(b)(2)(A)–(C)).

78. *Id.* § 12186(b). The DOJ also issues technical assistance manuals and files suit to enforce compliance with the ADA. See *id.* §§ 12188(b), 12206.

79. See 42 U.S.C. § 12204 (2000).

80. See 29 U.S.C. § 792(a) (2000).

81. *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 731 n.2 (3d Cir. 1999) (citing 29 U.S.C. § 792(b) (2000)).

82. Differences between the Access Board and the DOJ exist, particularly in relation to the guidelines each agency issues. The Access Board's guidelines "are the substantive rules they develop and promulgate." *Caruso*, 193 F.3d at 734 n.5. DOJ guidelines, on the other hand, are "interpretation[s] of a substantive rule, not the substantive rule itself." *Id.*

83. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1129 (citing 29 U.S.C. § 792(b)(3)(B) (2000)).

84. 29 U.S.C. § 792(b) (2000).

On July 26, 1991, four years before movie theaters began implementing stadium seating, the Access Board published the ADAAG.<sup>85</sup> That same day, pursuant to its statutory authority under Title III and following a notice and comment period,<sup>86</sup> the DOJ promulgated final regulations which put into practice Title III of the ADA, and incorporated the ADAAG without change.<sup>87</sup> Section 4.33.3 of the ADAAG pertains to the placement of wheelchairs in public accommodations. It is “worded identically” to the Access Board’s original text addressing the issue of lines of sight.<sup>88</sup>

## 2. *The Provision at Issue: Section 4.33.3*

Section 4.33.3 provides:

Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. . . . 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.<sup>89</sup>

This standard contains three separate requirements: sightlines, integration, and dispersal. This Note focuses mostly on the sightlines requirement. The language of section 4.33.3 “was originally drafted by the Access Board as part of its proposed accessibility guidelines in early 1991.”<sup>90</sup>

85. See 56 Fed. Reg. 35,408 (July 26, 1991).

86. See 56 Fed. Reg. 7452 (Feb. 22, 1991); 56 Fed. Reg. 2296 (Jan. 22, 1991).

87. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 562 (1st Cir. 2004); see also 28 C.F.R. § 36.406 (2003). While the DOJ adopted the Access Board’s guidelines as its own regulations, “it may still adopt different interpretations of those regulations, so long as they are ‘consistent’ with the Board’s guidelines.” *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Engineers*, 950 F. Supp. 389, 391 (D.C. Cir. 1996) (citing 42 U.S.C. §§ 12186(b), (c) (2000)).

88. *Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 193 F.3d 730, 735 (3d Cir. 1999). Courts have held that it can be “plausibly inferred” that the DOJ “deliberately intended the regulation to mean the same thing as did the Board—but it is not a necessary inference.” Milani, *supra* note 32, at 543 (footnote omitted) (internal quotation marks omitted). Courts have also held that despite the name difference between the Access Board’s regulations and the DOJ’s regulations, these standards are used “interchangeably.” *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 708 (D. Or. 1997). See also *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35,544 (July 26, 1991) (codified at 28 C.F.R. pt. 36) (discussing why the DOJ’s and Access Board’s regulations are identical).

89. 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

90. See Milani, *supra* note 32, at 530.

### 3. DOJ's Interpretation of Section 4.33.3

Because the language of section 4.33.3 is ambiguous, particularly the phrase “lines of sight comparable to those for members of the general public,”<sup>91</sup> the DOJ has drafted its own interpretation of the provision.<sup>92</sup> According to the DOJ, wheelchair locations in stadium-style movie theaters “must be provided [with] lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt.”<sup>93</sup>

The DOJ argues that wheelchair users may not “be relegated to locations with viewing angles decidedly inferior to those available to most audience members” and that they must be given “comparable” viewing angles that are similar or equivalent to those of most of the general public.<sup>94</sup> In addition, the DOJ construes the “integral” requirement of section 4.33.3 to mean that theater owners must provide wheelchair seating in areas where the general public usually chooses to sit.<sup>95</sup> The fact that the majority of moviegoers choose to sit in the stadium section supports the DOJ’s position.<sup>96</sup> The DOJ therefore reasons that the usual wheelchair placement should be changed to give wheelchair patrons sight lines “equivalent to or better than the viewing angles provided by 50 percent of the seats in the auditorium,” by placing wheelchair seats in the stadium section.<sup>97</sup>

Section 4.33.3 is also interpreted to mean that wheelchair locations must be provided with comparable, unobstructed views to the

91. See 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

92. The *D.C. Arena* court held that no authoritative interpretation of the phrase “lines of sight comparable” was ever issued until 1994, when the DOJ’s Technical Assistance Manual (TAM) supplement was published. *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 587 (D.C. Cir. 1997). For specifics on the DOJ’s interpretation, see United States Department of Justice, The ADA Title III Technical Assistance Manual § III-7.5180 (Supp. 1994), at <http://www.usdoj.gov/crt/ada/taman3.html> (last visited Jan. 23, 2005). The main controversy surrounding the DOJ’s 1994 Technical Assistance Manual (TAM) Supplement is “whether it is a valid interpretation of a pre-existing regulation” or merely an attempt to issue a new regulation. *Id.*

93. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1130. The DOJ presented this interpretation in an amicus brief filed in 2000 in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000). Lines of sight mean the lines “extending from the viewer’s eye to the points on the screen where the film is projected, taking into account the angle from the viewer’s eye to those points.” *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1131.

94. *Meineker v. Hoyts Cinemas Corp.*, 69 Fed. Appx. 19, 23 (2d Cir. 2003) (emphasis omitted) (internal quotation marks omitted).

95. *Id.* (emphasis omitted).

96. *Id.* (emphasis omitted).

97. See Access Board’s comments in 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999).

screen.<sup>98</sup> Taken together, the DOJ's interpretations of section 4.33.3 require that wheelchair patrons have comparably unobstructed views and viewing angles.<sup>99</sup>

a. Due Deference to DOJ Interpretation?

Whether or not the DOJ's interpretation is entitled to deference is an issue raised in many of the litigated stadium-style movie theater cases. The general rule is that "[a] court must give deference to the interpretation of a regulation by the agency charged with enforcing that regulation unless that agency's interpretation is 'plainly erroneous or inconsistent' with the regulation."<sup>100</sup> Courts must defer to the agency's interpretation of a regulation, unless alternative readings are compelled by the regulation's plain language or by indications of the agency's intent during promulgation.<sup>101</sup> The Supreme Court has noted, however, that deference was inappropriate where the agency's position is not a "reasoned and consistent view" and contrary to views advocated in past cases.<sup>102</sup> Thus, courts must decide whether the DOJ's interpretation is reasonable and consistent with the history of the regulation in order to defer to it.<sup>103</sup> Several district courts have differed on the question of whether deference ought to be afforded to the DOJ's interpretation of section 4.33.3.<sup>104</sup>

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98. In December 1994, the DOJ published, without notice and comment, its TAM Supplement explicitly stating that "lines of sight comparable" required sightlines unobstructed by standing spectators. Milani, *supra* note 32, at 532. For a discussion of notice and comment requirements, see *infra* note 190. Theaters can achieve unobstructed views by elevating wheelchair seating, positioning areas for wheelchairs toward the front of the seating sections, or by placing the wheelchair locations at the back so that patrons' views are not blocked by the people in front of them. 1994 DOJ TAM Supp. § III-7.5180, available at <http://www.usdoj.gov/crt/ada/taman3up.html> (last visited Jan. 23, 2005).

99. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 563 (1st Cir. 2004).

100. *Meineker*, 69 Fed. Appx. at 23.

101. *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 735 (3d Cir. 1999) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

102. *Meineker*, 69 Fed. Appx. at 23-24.

103. Interpretations are considered reasonable when they "sensibly conform[ ] to the purpose and wording of the regulations." *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1131 (internal quotation marks omitted).

104. See *Meineker*, 69 Fed. Appx. at 24. The ADAAG's sightlines issue was finally addressed when this Notice was issued. The Access Board's proposed rules were based on recommendations made by the ADAAG Review Advisory Committee, a group formed in 1994 consisting of twenty-two representatives from "the design and construction industry, the building code community, State and local government entities, and people with disabilities." 64 Fed. Reg. 62,248-49 (Nov. 16, 1999).

#### 4. *The Access Board's Notice of Proposed Rulemaking*

On November 16, 1999, the Access Board issued a Notice of Proposed Rulemaking that acknowledged the DOJ's interpretation of section 4.33.3 with respect to stadium-style movie theaters.<sup>105</sup> In it, the Access Board said it was only considering whether section 4.33.3 should be modified to reflect the DOJ's interpretation.<sup>106</sup>

After taking the issue under consideration, the Access Board recognized that additional language was needed to give effect to the DOJ's interpretation.<sup>107</sup> In July of 2004, it amended the ADAAG.<sup>108</sup>

#### 5. *The Access Board's Amendment to the ADAAG*

The Access Board amendment, effective September 1, 2004, calls for wheelchair patrons to have the option of choosing from a variety of seating locations within theaters of capacities over 300 so that their viewing angles equal or surpass those of all the other patrons.<sup>109</sup> Stadium seating or "vertical dispersal," would not be required in smaller theaters, those under 300, if the wheelchair locations presented viewing angles that equaled or surpassed the average viewing angle in the theater.<sup>110</sup> In light of this amendment, the DOJ has announced plans "to revise its Title III regulations" in January 2005.<sup>111</sup> This amendment is significant in that not all wheelchair seating is required in stadium sections. Smaller theaters can keep wheelchair patrons in the traditional section as long as the viewing angles meet the average equivalent.<sup>112</sup> This does, however, present some ambiguity because it is not a firm requirement.<sup>113</sup>

105. *United States v. Cinemark USA, Inc.*, No. 1-99-CV-705, 2001 U.S. Dist LEXIS 24418, at \*18 (N.D. Ohio Nov. 19, 2001).

106. *See* 64 Fed. Reg. at 62,277-78.

107. *Id.*

108. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 565 (1st Cir. 2004).

109. *Id.* (citing 69 Fed. Reg. 44,084, 44,198 (July 23, 2004) (to be codified at 36 C.F.R. pt. 1191, app. B, § 221)). The amendment was approved on January 14, 2004, and went into effect as part of the revised ADAAG on September 21, 2004. Laura K. McKibbin, Comment, *The ADA Takes on the Movie Industry: Do the Disabled Have a Right to the Best Seats in the House?*, 38 U.S.F.L. REV. 831, 849 (2004).

110. *Hoyts Cinemas*, 380 F.3d at 565. (citing 69 Fed. Reg. 44,084, 44,198 (July 23, 2004) (to be codified at 36 C.F.R. pt. 1191, app. B, § 221)).

111. *Id.* at 565 n.6.

112. *Id.* at 565.

113. *See* McKibbin, *supra* note 109, at 852 (arguing that although theaters should still place wheelchair seats in the stadium section, the DOJ must clarify whether smaller theaters are required to in order to avoid future litigation).



### F. Relevant Case Law

#### 1. No "Wheelchair Ghettos": Cases Involving Traditional-Style Movie Theaters: *Fiedler v. American Multi-Cinema, Inc.*

In 1994, Marc Fiedler, a disabled moviegoer, brought suit against AMC Theaters.<sup>114</sup> At the theater he attended, wheelchair seating was only made available in the last row of seats at the back of the theater.<sup>115</sup> Fiedler argued this seating violated Title III of the ADA, specifically section 4.33.3, in that AMC deprived him of full and equal enjoyment of the theater facilities by relegating him to the back of the theater.<sup>116</sup> AMC claimed its theater fell under the exception to section 4.33.3, which allowed public accommodations to "cluster" wheelchair seating at one location in "bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent."<sup>117</sup>

AMC and Fiedler disagreed about the interpretation of the exception in section 4.33.3. AMC argued that section 4.33.3's exception should be interpreted to mean that wheelchair seating does not have to be dispersed if the slope of the aisle in a theater exceeds five percent.<sup>118</sup> Fiedler and the DOJ maintained that section 4.33.3's exception had nothing to do with the slope of the floors and aisles, and everything to do with "the angle of vision between spectator and spectacle."<sup>119</sup> The United States District Court for the District of Columbia held that the DOJ, as author of the regulation, is the "principal arbiter" of its meaning.<sup>120</sup> Thus, the court concluded that AMC could not relegate wheelchair seating to the back of its theaters.<sup>121</sup>

AMC also argued that, in an emergency, a wheelchair patron could get in the way of other patrons trying to exit the premises, and thus, dispersal of wheelchair seating was not required.<sup>122</sup> Fiedler contended he posed no such danger. The court, however, found AMC's argument persuasive and called for an "individualized assessment" to de-

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114. *Fiedler v. Am. Multi-Cinema, Inc.*, 871 F. Supp. 35, 36 (D.C. Cir. 1994).

115. *Id.*

116. *Id.*

117. 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

118. *Fiedler*, 871 F. Supp. at 38.

119. *Id.* The DOJ's interpretation amounted to the following: disabled people are to have equal access to both the least and most desirable seats at theatrical events. *Id.*

120. *Fiedler*, 871 F. Supp. at 39.

121. *Id.* See also *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 712 (D. Or. 1997) (arguing that an arena owner may not create a "wheelchair ghetto" that consigns wheelchair users to the least desirable seats in the house). These "wheelchair ghettos" were particularly "troubling" to this court as well as subsequent courts in part because African-American moviegoers used to be regularly restricted to "colored balconies" and were "unable to join the majority of patrons in the theater's more desirable seats." See Comment, *supra* note 69, at 734.

122. *Fiedler*, 871 F. Supp. at 39.

termine whether Fiedler's presence near the front of the theater "pose[d] a significant threat to his fellow theater-goers."<sup>123</sup> If such presence would constitute a "'direct threat to the health or safety of others,'" AMC would not be obligated to comply with the ADA.<sup>124</sup>

2. *Lara v. Cinemark USA, Inc.: Holding Section 4.33.3's "Lines of Sight Comparable" Language Only Applies to Unobstructed Views of the Screen*

Significantly, *Lara v. Cinemark USA, Inc.*<sup>125</sup> appears to be the only case to hold that section 4.33.3 does not apply to viewing angles. Defendant Cinemark challenged the determination of the District Court for the Western District of Texas that the ADA required stadium-style theaters "to offer wheelchair patrons lines of sight comparable to those enjoyed by the general public."<sup>126</sup> Cinemark owned a chain of theaters where, because of a steep grade, stadium seating was inaccessible to wheelchairs.<sup>127</sup> A group of disabled patrons and two advocacy groups brought suit alleging the theaters relegated wheelchair-users to inferior seating areas in violation of section 4.33.3.<sup>128</sup>

Cinemark first argued that the "lines of sight comparable" provision only applied to theaters with capacities over three hundred, and thus, its theaters with seating for under three hundred people were explicitly permitted to provide wheelchair seating in a single area.<sup>129</sup> The Fifth Circuit disagreed, holding that the "lines of sight" language required more than mere dispersal.<sup>130</sup> It concluded that there were "two independent requirements" necessitated by section 4.33.3: (1) that theaters with more than three hundred seats are required to designate areas for wheelchairs in at least two locations; and (2) that smaller theaters provide "comparable" sightlines and ticket prices for all patrons.<sup>131</sup>

123. *Id.* at 40.

124. *Id.* at 39 (citing 42 U.S.C. § 12182(b)(3) (2000)).

125. 207 F.3d 783 (5th Cir. 2000).

126. *Id.* at 784.

127. *Id.* at 785.

128. *Id.* The plaintiffs alleged that they were not given comfortable viewing angles because Cinemark had placed wheelchair seating in areas "too near the screen and too far below screen-level." *Id.* The average viewing angle in Cinemark's theaters was about thirty-five degrees, which the district court found uncomfortable. *Id.* at 786.

129. *Lara*, 207 F.3d at 786-87.

130. The court reasoned that the "lines of sight" language differed from the dispersal requirement, that the phrase "choice of" only modified ticket prices and not lines of sight, and to hold otherwise allowed smaller theaters to avoid the requirements of section 4.33.3. *Id.* at 787.

131. *Id.* at 787-88.

More successfully, Cinemark argued that its theaters gave wheelchair patrons “lines of sight comparable” because wheelchair seating is free from obstructions and placed in the middle of general seating.<sup>132</sup> The court noted that no other court had yet considered whether theaters must provide wheelchair seating areas “with ‘viewing angles’ as comfortable as those enjoyed by the general public.”<sup>133</sup> Questions regarding viewing angles in entertainment facilities did not begin until after the DOJ issued section 4.33.3.<sup>134</sup> Persuaded by the lack of clear meaning of the phrase “lines of sight” in the ADA context at the time the DOJ adopted section 4.33.3, the common meaning of “lines of sight,” and the lack of evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement,<sup>135</sup> the court concluded that the phrase only required that movie theaters provide lines of sight free from obstructions.<sup>136</sup> Essentially, section 4.33.3 does not require that theaters provide wheelchair patrons “with the same viewing angles available to the majority of non-disabled patrons.”<sup>137</sup>

### 3. *Cases Holding section 4.33.3’s “Lines of Sight Comparable” Language Applies to Both Unobstructed Views and Viewing Angles*

This section discusses the cases that have agreed with the Ninth Circuit, and its *Oregon Paralyzed Veterans of America* decision, and held that section 4.33.3’s “lines of sight comparable” language applies to both unobstructed views and viewing angles.

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132. *Id.* at 788.

133. The court found that a number of courts had already considered whether section 4.33.3 required auditoriums to provide wheelchair seating with lines of sight unobstructed by standing spectators. *Id.* See, e.g., *Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 193 F.3d 730, 736 (3d Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 583–84 (9th Cir. 1997) (holding that the language of section 4.33.3 is subject to the DOJ’s interpretation and that the DOJ never adopted a position contrary to the interpretation set forth in the 1994 TAM); and *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997).

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

135. The court did not want to impose a viewing angle requirement without evidence of Access Board intent because, as it noted, to do so “would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.” *Lara*, 207 F.3d at 789. In other contexts, however, the phrase clearly means unobstructed view. See *id.* at 788–89 (citing 47 C.F.R. § 73.685 (2000) (discussing the FCC regulation that requires that antennae have lines of sight without obstruction)); *id.* (citing 36 C.F.R. § 2.18 (2000) (discussing the regulation that permits those under age sixteen to drive snowmobiles as long as they are “within line of sight” of someone responsible who is over twenty-one years old)).

136. *Lara*, 207 F.3d at 788–89.

137. *Id.* at 789.

## a. United States v. Hoyts Cinemas Corp.

Decided in August, 2004, *United States v. Hoyts Cinemas Corp.* was one of many cases to hold that section 4.33.3 applies to both unobstructed views and viewing angles.<sup>138</sup> In that case, the government sued over five hundred individual movie theaters throughout the United States.<sup>139</sup> The government argued that two cinema chains' stadium-style theaters denied wheelchair users "equal access to the stadium section," in violation of Title III of the ADA and section 4.33.3.<sup>140</sup>

According to the government, both Hoyts' and National Amusements' theaters violated the ADA because they banished disabled patrons to the "worst seats in the theater, which are closest to the screen and . . . provide[d] wheelchair-bound theater patrons with the poorest viewing angles."<sup>141</sup> The cinema chains argued that they complied with section 4.33.3, in accordance with *Lara*, by providing wheelchair seats among general public seating with unobstructed views to the screen.<sup>142</sup> They also contended that the government was trying to make a new rule by interpreting the ADAAG "beyond recognition."<sup>143</sup>

The United States District Court for the District of Massachusetts found the *Lara* reasoning flawed for several reasons,<sup>144</sup> and deferred to what it found to be a reasonable interpretation of section 4.33.3. The court held that the "lines of sight comparable" requirement of section 4.33.3 applied to viewing angles and that wheelchair seating in the traditional section did not offer "lines of sight comparable to those

138. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004).

139. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 75 (D. Mass. 2003), *vacated by* 380 F.3d 558 (1st Cir. 2004). Forty-one of Hoyts' theaters and fifty-two of National Amusements' theaters had capacities of 300 or more, and provided wheelchairs access to the stadium section via elevator. *Id.* at 80.

140. *Id.* at 74. Both Hoyts' and National Amusements' theaters placed wheelchair-accessible seating along the access aisle in the traditional section. *Id.* at 80.

141. *Id.* at 82.

142. *Id.* The two theater chains argued that the DOJ's interpretation of section 4.33.3 required that wheelchair seating "provide a better viewing angle than most seats in the theater, including many in the stadium section." *Hoyts Cinemas*, 256 F. Supp. 2d at 82. The court replied that it did not require wheelchair seating to be the "best seats in the house;" only that they could not be the worst. *Id.* at 88.

143. *Id.* at 82. Hoyts and National Amusements argued that instead of stretching its interpretation of section 4.33.3 and bringing suit, the Government should change the regulations. *Id.*

144. This court agreed with the Government that the *Lara* court: (1) "decided the case without any support in the regulation's language for [its] interpretation;" (2) "relied on a history that only looked at Technical Assistance Manuals written before stadium seating had been invented;" (3) "did not grant deference;" and (4) "selectively quoted proposed regulations to bolster its holding and ignored sections that took viewing angles into account." *Id.* at 84 (citation omitted).

for members of the general public.”<sup>145</sup> Accordingly, wheelchair seating in the access aisle, in the traditional section, or both did not satisfy section 4.33.3.<sup>146</sup> Compliance with “lines of sight comparable” required the theaters to offer wheelchair seating in the stadium section.<sup>147</sup> The court’s holding was applicable prospectively to the construction or refurbishment of theaters occurring on or after commencement of the suit.<sup>148</sup> The holding was not retroactively applied.

On appeal, the United States Court of Appeals for the First Circuit addressed three issues: (1) whether section 4.33.3 encompasses unobstructed views and viewing angles; (2) whether “wheelchair placement in the stadium section is automatically required for all stadium theaters based on the alleged factual superiority of such seating;” and (3) whether the district court’s ruling on retroactivity was correct.<sup>149</sup>

First, the court held that section 4.33.3 takes viewing angles into account.<sup>150</sup> Because “lines of sight” is a “fairly general phrase,” it is “capable of encompassing” both physical obstructions and viewing angles.<sup>151</sup> Furthermore, the court found that the underlying policy of the ADA, equality of access, was best carried out by applying section 4.33.3 to viewing angles, and in doing so, gave weight to the DOJ’s interpretation.<sup>152</sup>

Second, although the court deferred to the DOJ’s interpretation, it disagreed with the “integral” requirement that “wheelchair spaces *always* be placed in the stadium section.”<sup>153</sup> The court distinguished two possible positions: (1) that section 4.33.3 requires wheelchair seating in the stadium section even if the quality of viewing angles in the traditional section are just as good; and (2) that wheelchair seating in the stadium section is required only when the view from the traditional section is “worse than from the stadium.”<sup>154</sup> The court con-

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145. *Id.* at 88.

146. *Hoyts Cinemas*, 256 F. Supp. at 93.

147. *Id.* Furthermore, the court held that the section 4.33.3 requirement that wheelchair-accessible seating comprise an “integral part” of any fixed seating plan also required that wheelchair seats be made available in the stadium section since “[s]eats in a separate front section where no-one would sit willingly, given the superiority of the stadium section are neither ‘necessary’ nor ‘part of’ the whole.” *Id.* at 89. While section 4.33.3 does permit all wheelchair seating to be put in the same place and clustered, that “same place” must be in the stadium section. *Id.* at 88.

148. *Id.* at 93.

149. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 565 (1st Cir. 2004).

150. *Id.* at 566.

151. *Id.*

152. *Id.* at 567. The DOJ interpreted section 4.33.3 to mean that “lines of sight comparable” applied to viewing angles in addition to physical obstructions. *Id.* at 563.

153. *Id.* at 567–68 (emphasis added).

154. *Hoyts Cinemas*, 380 F.3d at 568.

cluded that the second position was more appropriate, and that a blanket determination that all traditional section wheelchair seats are inferior, no matter the theater's size or configuration, was "multiply flawed."<sup>155</sup> The court held, however, that the government still had a case in that some, if not most, of defendants' theaters violated section 4.33.3, but it had to "abandon the all-or-nothing approach" and deal with theaters or groups of theaters on an individual basis.<sup>156</sup>

Third, the court discussed retroactivity and found that the defendants, although they complied with the minimum required by law, could not impose bad viewing angles on wheelchair patrons since to do so clearly hindered the ADA's objectives.<sup>157</sup> The court found that retroactive application of the viewing angle requirement was possibly unfair depending on the obligations "ultimately imposed on the defendants."<sup>158</sup> When even the smallest alteration could result in the complete restructuring of a theater, the issue is an important one and "[s]uch concerns underscore the need for the parties to have due notice and be given an opportunity to argue about retroactivity after the prospective obligations have been established."<sup>159</sup>

Finally, the court stressed the importance of each party showing "an equal dedication" to working out a settlement.<sup>160</sup> It also stated that the Access Board's amendment to the ADAAG would go "a long way to determining for the future the extremely difficult question of how much 'comparability' is required for new construction."<sup>161</sup> The court said no solution to existing theaters would be perfect and that "prompt improvements" were more important than "theoretical perfection."<sup>162</sup> It then vacated the judgment of the district court and remanded the matter.<sup>163</sup>

b. *Meineker v. Hoyts Cinemas Corp.*

In *Meineker v. Hoyts Cinemas Corp.*,<sup>164</sup> the plaintiffs were two disabled patrons who argued that the wheelchair-accessible seating in Hoyts' theaters with capacities under three hundred violated Title III

155. *Id.* at 570.

156. *Id.* at 572.

157. *Id.* at 573.

158. *Id.* at 573-74.

159. *Id.* at 574.

160. *Hoyts Cinemas*, 380 F.3d at 575.

161. *Id.* at 575.

162. *Id.*

163. *Id.*

164. 69 Fed. Appx. 19 (2d Cir. 2003).

of the ADA.<sup>165</sup> In fourteen of the eighteen theaters at issue, wheelchair seating was located at the rear of the traditional section, and “as close to the center of the theater as possible.”<sup>166</sup>

The United States District Court for the Northern District of New York agreed with the DOJ interpretation and held that the lines of sight offered to wheelchair patrons must be “similar” and not just “similarly unobstructed” to the lines of sight offered to the general public.<sup>167</sup> In addition, the court ruled that theaters with wheelchair seating in the very front rows of the traditional section do not provide “lines of sight comparable” in accordance with section 4.33.3.<sup>168</sup> The district court declined, however, to find a violation of Title III of the ADA and held that wheelchair seating at the rear of the traditional section and in the center of the theater satisfied the requirements of section 4.33.3. The Court found no violation of the “integral” requirement of section 4.33.3.<sup>169</sup> The district court reasoned that the exception to section 4.33.3 permitted the clustering of wheelchair seating as long as it is located among general public seating, which the court considered the traditional section to be.<sup>170</sup>

On appeal, the United States Court of Appeals for the Second Circuit addressed whether the DOJ’s interpretation of section 4.33.3 was entitled to deference, and, if so, whether Hoyts Cinemas had sufficient notice of the interpretation to require compliance with it.<sup>171</sup> The Court of Appeals ultimately remanded the case to the district court to determine whether the DOJ interpretation was a “‘fair and considered judgment’ consistent with the history of the regulation,” and whether Hoyts had sufficient notice.<sup>172</sup> The court noted six factors relevant in a sufficient notice determination: (1) the theater’s “notice of, and intent to comply with, the requirements of the ADA at the time of construction or renovation” of its theaters; (2) the theater’s “position in previous legal communications . . . regarding lines of sight;” (3) the information known to the theater’s architect “at the time of construction or renovation” (and his or her understanding of

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165. *Id.* at 21.

166. *Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14, 15 (N.D.N.Y. 2002).

167. *Meineker*, 216 F. Supp. 2d at 18.

168. *Id.* The wheelchair seating in Hoyts’ theaters was modified during this litigation. When the plaintiffs first brought suit, the theaters placed all wheelchair seating in the very front row. *Meineker*, 69 Fed. Appx. at 21. Had they kept the seating in that location, the court would have likely found them in violation of Title III of the ADA. However, Hoyts escaped liability by changing the placement of wheelchair seating to the middle-rear of the traditional section.

169. *Meineker*, 216 F. Supp. 2d at 19.

170. *Id.*

171. *Meineker*, 69 Fed. Appx. at 23.

172. *Id.* at 25.

lines of sight); (4) the theater's principals' understanding of the meaning of lines of sight; (5) "the industry's understanding of the terms used in [section] 4.33.3, including 'comparable lines of sight' at the time of construction and renovation" of the theaters; and (6) "customer seating preference data."<sup>173</sup>

On remand, the United States District Court for the Northern District of New York held that no expert testimony was needed to apply the DOJ's interpretation regardless of whether or not it was given deference.<sup>174</sup> The court never addressed whether the DOJ's interpretation was indeed entitled to deference.

### c. United States v. AMC Entertainment, Inc.

AMC Theaters, a nationwide movie theater chain, provided wheelchair seating in the traditional section of the theater, and the government brought suit in the United States District Court for the Central District of California for violating Title III of the ADA.<sup>175</sup> Using the DOJ interpretation of section 4.33.3, the government moved for summary judgment on the issue of whether its interpretation was reasonable and entitled to deference.<sup>176</sup>

The court granted summary judgment on the "lines of sight" issue, holding that the government's position was the "fair and considered judgment of the DOJ" and a reasonable interpretation.<sup>177</sup> It also held that AMC knew, or should have known, that "lines of sight comparable" referred to both viewing angles and possible obstructions, and was therefore obligated to provide disabled patrons with comparable viewing angles.<sup>178</sup> As a result of its placement of wheelchair seating in the traditional section of the theater, AMC's stadium-style theaters violated section 4.33.3.<sup>179</sup>

AMC raised several arguments. First, it argued that there was no evidence the Access Board or DOJ considered the issue of stadium-style theaters when section 4.33.3 was promulgated.<sup>180</sup> Additionally, it

173. *Id.*

174. *Meineker v. Hoyts Cinemas Corp.*, 325 F. Supp. 2d 157, 160 (N.D.N.Y. 2004).

175. *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1095 (C.D. Cal. 2002).

176. *Id.* at 1108.

177. *Id.* at 1113.

178. *Id.* at 1111. Comparable "imposes a qualitative requirement that the sight line be 'similar' and not merely 'similarly unobstructed.'" *Id.* at 1112 (quoting *Meineker v. Hoyts Cinemas Corp.*, 216 F. Supp. 2d 14 (N.D.N.Y. 2002)).

179. *Id.* This is not a *per se* rule—the requirements of viewing angle comparability vary based on individual theaters' layout. The court only held that a wheelchair patron's movie-going experience had to approximate that of a nondisabled patron. *AMC Entm't*, 232 F. Supp. 2d at 1112 n.19.

180. *Id.* at 1113.



argued that the “lines of sight comparable” provision, prior to the DOJ’s interpretation, was “too vague to provide them with [the] fair warning” required by due process.<sup>181</sup> The court rejected both arguments, stating that section 4.33.3 was not “static and inflexible.”<sup>182</sup> The government did not violate due process in its retroactive application of the DOJ’s interpretation, even though it gave no fair warning to theaters as to what may be prohibited.<sup>183</sup>

Approximately three months later, AMC filed a Motion for Interlocutory Appeal on the “lines of sight” issue, which the court denied.<sup>184</sup> The court decided to wait and see how the Ninth Circuit case of *Oregon Paralyzed Veterans of America v. Regal Cinemas* was decided before ruling on the “lines of sight” issue.<sup>185</sup> No further action has been taken since then.

d. *United States v. Cinemark, USA Inc.*

In another case involving Cinemark, the government brought suit against Cinemark contending that its theaters violated Title III of the ADA and the corresponding regulations.<sup>186</sup> Cinemark operated a chain of stadium-style theaters with wheelchair seating in front of the stadium section.<sup>187</sup> The government argued that section 4.33.3 required Cinemark to provide comparable lines of sight to disabled patrons by offering wheelchair seating with “viewing angles, distance to the screen, obstruction of view and distortion of images” comparable to those offered to the majority of non-disabled patrons.<sup>188</sup>

Cinemark relied on the reasoning in *Lara* and argued that it was persuasive because the DOJ’s position was the same as it was in *Lara*, where the Fifth Circuit rejected it, and because all of Cinemark’s stadium-style theaters met the accessibility requirements upheld in *Lara*.<sup>189</sup> Cinemark also argued the DOJ’s position violated the Administrative Procedure Act because it had satisfied the DOJ-certified

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181. *Id.* at 1114.

182. *Id.* at 1111.

183. *Id.* at 1114.

184. *Id.* at 1101.

185. *AMC Entm’t*, 232 F. Supp. 2d at 1102.

186. *United States v. Cinemark USA, Inc.*, No. 1-99-CV-705, 2001 U.S. Dist. LEXIS 24418, at \*6 (N.D. Ohio Nov. 19, 2001).

187. *Id.* at \*2–3. Cinemark’s theaters with capacities over 300 provided elevator access to seats in the rear of the stadium section. *Id.* at \*3.

188. *Id.* at \*11 (citation omitted) (internal quotation marks omitted). The government believed Cinemark’s location of wheelchair seating to be the “worst in the house.” *Id.* at \*12.

189. *Id.* at \*16–17 (citation omitted).

state accessibility guidelines and received approval to proceed with its stadium-style theaters.<sup>190</sup>

Although the United States District Court for the Northern District of Ohio, Eastern Division followed the reasoning of the Fifth Circuit in *Lara* and held that the DOJ's interpretation of section 4.33.3 was not controlling,<sup>191</sup> the Sixth Circuit reversed because it found the plain meaning of section 4.33.3 required more than just unobstructed views.<sup>192</sup> It remanded the case to the district court "to determine the extent to which lines of sight must be similar for wheelchair patrons" in theaters with stadium seating.<sup>193</sup> In "fashioning [a] remedy" for the remedial measures imposed by deference to the DOJ's interpretation, the court ordered the district court to "take into account [any] previous advice and representations by the government upon which Cinemark . . . reasonably relied."<sup>194</sup>

### III. SUBJECT OPINION: OREGON PARALYZED VETERANS OF AMERICA V. REGAL CINEMAS

This section presents the subject opinion of this Note: the Ninth Circuit case of *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.* This case marked the first time since *Lara v. Cinemark USA, Inc.* that another Court of Appeals addressed the issue of viewing angles in stadium-style movie theatres. It continues to be relevant because its influence is found in the later decisions of the Sixth Circuit and First Circuit. The facts, prior history, arguments presented, holding, reasoning, and dissenting opinion are all discussed below.

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190. See generally 5 U.S.C. §§ 552, 553 (2000). The notice and comment provisions of the Administrative Procedure Act (APA) require administrative agencies that promulgate substantive legislative regulations, such as the DOJ, "to explain the proposed rule's purpose and justification, respond to significant criticisms, and explain why the agency decided to maintain or alter the proposed rule." See Milani, *supra* note 32, at 548–49 (discussing *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 740 (D. Or. 1997)). Interpretative rules, in contrast, do not require a notice and comment period prior to promulgation. 5 U.S.C. § 553(b)(A) (2000). Interpretive rules state what the agency believes the statute to mean and only reminds affected parties of their already existing duties. See Milani, *supra* note 32, at 563 (citation omitted). Substantive rules are intended to make new law and duties. *Id.* To survive APA challenges, the DOJ's interpretation of section 4.33.3 must be viewed as an interpretive rule, since it was issued without any notice or comment. Kurack, *supra* note 92, at \*3. According to Cinemark, the DOJ's interpretation of section 4.33.3 operated as an impermissible new rule of law. *Cinemark USA, Inc.*, 2001 U.S. Dist. LEXIS 24418, at \*17 (citation omitted). Cinemark argued that the DOJ had already certified local guidelines "as 'meeting or exceeding the standards of the ADAAG.'" *Id.* (quoting Cinemark Mem. at 13).

191. *Cinemark USA, Inc.*, 2001 U.S. Dist. LEXIS 24418, at \*21.

192. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 575 (6th Cir. 2003).

193. *Id.* at 579.

194. *Id.* at 582–83.

A. *Facts*

*Oregon Paralyzed Veterans of America v. Regal Cinemas* is an important example of both courts' eagerness to defer to the DOJ's interpretation of section 4.33.3, and their inability to grasp the practical ramifications such deference has on movie theaters.<sup>195</sup> The plaintiffs were three wheelchair patrons from Oregon.<sup>196</sup> The defendants were two theater chains, Regal Cinemas, Inc. and Eastgate Theatre, Inc. (referred to collectively as "Regal"). Regal operates a nationwide theater chain and has more movie screens in its theaters than any other chain in the United States.<sup>197</sup> Like other theater chains at the time, Regal first constructed stadium-style theaters in 1995.<sup>198</sup> This case involved six of Regal's stadium-style theaters in Northern Oregon, the majority of which have less than 250 seats each, and tiers of stadium seats with a rise of up to eighteen inches.<sup>199</sup> Regal's theaters were separated into stadium and traditional sections by an aisle, with wheelchair-accessible seating located in the first five rows of the traditional section and adjacent to general public seating.<sup>200</sup> All wheelchair-accessible seats in Regal's stadium-style theaters had unobstructed views of the screen.<sup>201</sup>

Since patrons must use stairs to get to the stadium seating, wheelchair patrons were restricted from sitting in the stadium seats, and were forced to sit in the first few rows of the theater on a sloped floor, where the vertical viewing angle is sharper.<sup>202</sup> The plaintiffs alleged that they found it difficult to enjoy the movie they were watching and experienced nausea, headaches, and discomfort while sitting in these seats.<sup>203</sup> On appeal, the United States Court of Appeals for the Ninth

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195. See *Or. Paralyzed Veterans of Am. v. Regal Cinemas*, 339 F.3d 1126 (9th Cir. 2003).

196. Oregon Paralyzed Veterans of America (OPVA) was the fourth plaintiff in the original lawsuit, but is not a party in this appeal. Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal [hereinafter Brief Supporting Appellants] at 5, *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003) (No. 01-35554), available at 2001 WL 34134395.

197. *Id.*

198. *Id.*

199. Appellees' Brief at 4, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2002 WL 32154039. Because all six theaters were designed and constructed after January 26, 1993, they are "new construction" subject to the requirements of Title III. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1127 n.2 (quoting 42 U.S.C. § 12183(a)(1)) (internal quotation marks omitted).

200. Appellees' Brief at 4, *Or. Paralyzed Veterans of Am.* (No. 01-35554).

201. *Id.* at 4.

202. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1127-28. The plaintiffs' experts conducted research at Regal's theaters and found the vertical viewing angles ranged from twenty-four to sixty degrees, with a forty-two degree average. *Id.* at 1128.

203. *Id.* at 1127-28.

Circuit considered whether the stadium seating in Regal's six theaters violated Title III of the ADA.<sup>204</sup>

### B. *Prior History*

Both the plaintiffs and Regal moved for summary judgment in district court. The United States District Court for the District of Oregon denied the plaintiffs' motion, but granted Regal's motion for summary judgment. It relied on and adopted the Fifth Circuit's reasoning in *Lara*, and in so doing, rejected the DOJ's interpretation of section 4.33.3 as "inconsistent with the regulation and therefore not entitled to deference."<sup>205</sup> The district court, like the *Lara* court, held that the phrase "lines of sight comparable" in section 4.33.3 did not require wheelchair patrons to have viewing angles comparable to those of non-disabled patrons.<sup>206</sup> The district court found support in the fact that the stadium design in movie theaters was not developed until four years after the DOJ promulgated section 4.33.3.<sup>207</sup>

### C. *Arguments Presented*

The plaintiffs alleged that wheelchair users "do not receive the benefit" of the increased comfort, unobstructed views, and improved movie-going experience that Regal's stadium-style seating provides.<sup>208</sup> Instead, they are confronted with the "significant" disadvantages that accompany wheelchair-accessible seating placement in the first few rows.<sup>209</sup> The plaintiffs also claimed that because most patrons choose to sit in the stadium section of the theater, wheelchair users are "effectively segregate[d]" from most other members of the audience in being relegated to the traditional section.<sup>210</sup> Wheelchair users also do not have the luxury of getting their choice of seat by arriving early—no matter when they arrive, they still have to sit in the "undesirable spaces designated for their use."<sup>211</sup>

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204. *Id.* Two issues addressed by the court, which will not be addressed by this Note were: (1) whether the seating plans violated Oregon's public accommodations statute; and (2) whether Regal was negligent in its design, construction, and operation of its stadium-style theaters. *Id.*

205. *Id.* at 1130.

206. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1129.

207. *Id.* at 1130.

208. Brief Supporting Appellants at 6, *Or. Paralyzed Veterans of Am.* (No. 01-35554).

209. These disadvantages include: looking up at the screen at sharp angles, severe discomfort and pain, difficulty in focusing on the picture, blurry and distorted images on screen, and dizziness or nausea. *Id.*

210. *Id.*

211. *Id.* at 7.

The plaintiffs claimed that these alleged conditions violated Title III of the ADA. First, they argued for adoption of the DOJ interpretation of section 4.33.3: "lines of sight comparable" requires that viewing angles in movie theaters be comparable to those of the general public.<sup>212</sup> The plaintiffs argued the DOJ's interpretation was, at the very least, reasonable, and therefore entitled to deference.<sup>213</sup> Since the DOJ has principal authority to administer provisions of the ADA, the plaintiffs argued that its interpretations are entitled to deference unless "plainly erroneous or inconsistent with the regulation,"<sup>214</sup> and that the DOJ reasonably concluded that factors in addition to physical obstructions, like viewing angles and distance from the screen, "affect whether individuals' views of the movie screen are truly equivalent."<sup>215</sup>

The plaintiffs characterized the *Lara* court's reasoning as "fundamentally flawed" and opposed both the common usage of the term "lines of sight,"<sup>216</sup> and one of Title III's central goals, to provide "equal enjoyment" of the benefits of a movie theater. The plaintiffs argued that the quality of one's viewing experience factors into the ADA's goal to provide "equal enjoyment" of a movie theater's benefits.<sup>217</sup> The plaintiffs further distinguished *Lara* by arguing that the DOJ's authority is not limited by factual situations that were unanticipated when the regulation was issued.<sup>218</sup> The DOJ can still apply the broad language of section 4.33.3 to stadium-style theaters even though the Access Board did not use the term "viewing angle" when promulgating the ADAAG.<sup>219</sup> According to the plaintiffs, it was the DOJ's views, as opposed to the Access Board's, to which courts owe deference in determining the meaning of section 4.33.3.<sup>220</sup> In their replacement brief, the plaintiffs went on to argue that the Access Board "plainly understood" that lines of sight included viewing angles.<sup>221</sup>

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212. *Id.* at 10.

213. *Id.* at 11.

214. Brief Supporting Appellants at 12, *Or. Paralyzed Veterans of Am.* (No. 01-35554) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted)).

215. *Id.*

216. The plaintiffs cite the SMPTE Engineering Guidelines, a NATO position paper stating that "lines of sight are measured in degrees" and indicating that viewing angles are a component of lines of sight, and the *Caruso v. Blockbuster-Sony* case: "viewing angles can affect the quality of lines of sight for purposes of [section] 4.33.3." *Id.* at 16 (citing *Caruso v. Blockbuster-Sony Music Entm't Centre*, 193 F.3d 730 (3d Cir. 1999)).

217. *Id.* at 14.

218. *Id.* at 18-19.

219. See ADAAG for Buildings and Facilities, 56 Fed. Reg. 35,408 (July 26, 1991).

220. Brief Supporting Appellants at 20, *Or. Paralyzed Veterans of Am.* (No. 01-35554).

221. Appellants' Replacement Brief at 21, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2001 WL 34134394.

Second, the plaintiffs argued that the district court erred in finding section 4.33.3 applicable to obstructions and not viewing angles.<sup>222</sup> The plaintiffs said the plain meaning of the regulation required that wheelchair users be given comparable viewing angles to those of the general public.<sup>223</sup> They found error in the district court's reliance on the Fifth Circuit decision in *Lara*, and its rejection of the "plain meaning" interpretation.<sup>224</sup> The plaintiffs argued that both the Access Board and Motion Picture Industry understood that lines of sight referred to both viewing angles and unobstructed views.<sup>225</sup> They found the Access Board's recognition that the first few rows of a theater provide "'inferior lines of sight'" persuasive.<sup>226</sup> The plaintiffs also asserted that the DOJ interpretation was not new because it was set forth in 1994 and has been consistently interpreted since then.<sup>227</sup> Thus, the plaintiffs argued that they were entitled to summary judgment and that the district court's decision against them should be reversed.<sup>228</sup>

Regal urged the court to affirm the district court's decision and hold its seating plans complied with section 4.33.3.<sup>229</sup> Relying on what it deemed the "well-reasoned" decisions of the Fifth Circuit in *Lara*, and the Northern District of Ohio in *United States v. Cinemark*, Regal argued that the "lines of sight comparable" provision of section 4.33.3 referred to unobstructed views, not viewing angles.<sup>230</sup> Regal pointed out that in both cases, the courts found insufficient evidence that either the DOJ or the Access Board had intended section 4.33.3 to refer to viewing angles at the time the regulation was passed.<sup>231</sup>

Regal found support for the district court's decision in the meaning of section 4.33.3's language when issued. First, Regal argued that section 4.33.3's plain language, context, and well-understood meaning indicated that the phrase "lines of sight comparable" referred only to

222. *Id.* at 31.

223. *Id.* at 14–15. The plaintiffs also raised an integration argument that the court chose not to address. See Comment, *supra* note 69, at 727. Their argument was that because floor seats are undesirable for most patrons and because so few actually choose to sit in them, people with disabilities were segregated. *Id.*

224. Appellants' Replacement Brief at 18, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2001 WL 34134394.

225. *Id.* at 21.

226. *Id.* at 24.

227. *Id.* at 25–26.

228. *Id.* at 30.

229. Appellees' Brief at 2, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2001 WL 32154039.

230. *Id.* at 17.

231. *Id.* at 20.

obstruction. The phrase, "lines of sight comparable" had been utilized in regulations since 1980 when the American National Standards Institute (ANSI) first expressed the concept in its uniform standards.<sup>232</sup> The Access Board used the phrase in its guidelines and the DOJ subsequently adopted them in 1991.<sup>233</sup> A similar phrase was also used in the Minimum Guidelines and Requirements for Accessible Design (MGRAD) under the Architectural Barriers Act<sup>234</sup> and in the Uniform Federal Accessibility Standards (UFAS),<sup>235</sup> which was issued by four federal agencies bound by the Access Board.<sup>236</sup> Thus, even though "thousands of movie theaters have been built since 1980, ANSI, MGRAD, UFAS, and ADAAG have never been interpreted to impose viewing angle requirements or quality of sight line considerations."<sup>237</sup> Regal argued the plain meaning of "comparable" was met because the unobstructed wheelchair seats were comparable to similarly unobstructed seats for the general public.<sup>238</sup> Regal noted that the "relative degree of obstruction" takes on greater meaning in sports arenas and live venues than it does in movie theaters.<sup>239</sup> Regal alternatively argued that the exception to section 4.33.3 applied regardless because its stadium-style theaters have floors that slope at a rate of more than five percent (in order to provide unobstructed viewing over the heads and shoulders of others) and thus the wheelchair seating can be "clustered" on "levels having accessible egress."<sup>240</sup>

Additionally, Regal alleged that the DOJ's interpretation of section 4.33.3 should not be given due deference.<sup>241</sup> First, it found that the Access Board's 1999 Notice of Proposed Rulemaking indicated the Access Board believed it was necessary to amend section 4.33.3 in order to validly implement the DOJ's interpretation.<sup>242</sup> According to Regal, this notice confirmed that the DOJ interpretation was "not a

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232. *Id.* at 22 (discussing 47 Fed. Reg. 33,862 (1982)).

233. *Id.*

234. 42 U.S.C. § 12204(2) (2000). In 1982, the Minimum Guidelines and Requirements for Accessible Design (MGRAD) used a phrase similar to "lines of sight comparable." Appellees' Brief at 22, *Or. Paralyzed Veterans of Am.* (No. 01-35554) (citing 42 U.S.C. § 12204(2) (1998)).

235. In 1989, the Uniform Federal Accessibility Standards (UFAS) were issued and adopted the Access Board's guidelines and the language of "lines of sight comparable." *Id.* (citing 49 Fed. Reg. 31,528 (1984)).

236. Appellees' Brief at 22, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2001 WL 32154039.

237. *Id.* at 22-23.

238. *Id.* at 25.

239. *Id.*

240. *Id.* at 26 (internal quotation marks omitted).

241. *Id.* at 34.

242. Appellees' Brief at 27, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2001 WL 32154039.

statement of current accessibility requirements, but rather a preliminary ‘notice and comment’ proposal that ha[d] not yet been converted into law.”<sup>243</sup> Second, Regal characterized the DOJ’s interpretation as a “moving target” in that it had not been consistently interpreted in the same manner and that the DOJ was “still in the process of crafting.”<sup>244</sup>

Finally, Regal argued that acceptance of the DOJ’s interpretation of section 4.33.3 “[v]iolated the notice and comment requirements of the APA and fundamental notions of due process.”<sup>245</sup> Regal said that in implementing Title III of the ADA, Congress understood that full and fair notice, precise and objective building standards, and technical assistance were required for architects and builders.<sup>246</sup> Because public accommodations are expensive to construct and difficult to conform to all of the numerous and exacting objective building standards, clear and unambiguous guidance must be given.<sup>247</sup> Regal argued that acceptance of the plaintiff’s position and the DOJ’s interpretation amounted to retroactive regulation, without notice and comment. Such retroactivity is problematic in that it puts courts in the “ill-equipped” position of making engineering, architectural, and policy determinations regarding “whether a particular design feature is feasible and desirable.”<sup>248</sup> Furthermore, requirements that can change retroactively make it extremely difficult to design new public accommodations structures. If retroactive application were allowed, Regal argued, the court would “usurp” the powers of the Access Board and DOJ, and thus violate the clear intentions of Congress.<sup>249</sup> Accordingly, Regal argued, legal requirements should be accomplished through APA notice and comment, not through litigation, and the district court’s ruling should be upheld.<sup>250</sup>

#### *D. Holding*

The Court of Appeals for the Ninth Circuit reversed the decision of the United States District Court for the District of Oregon and expressly disagreed with the Fifth Circuit’s conclusion in *Lara*.<sup>251</sup> The

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243. *Id.* at 27–28.

244. *Id.* at 36–37.

245. *Id.* at 38.

246. *Id.* at 5–6 (discussing 42 U.S.C. § 12206(a) (2000)).

247. *Id.* at 15.

248. Appellees’ Brief at 38–39, *Or. Paralyzed Veterans of Am.* (No. 01-35554), available at 2001 WL 34134394.

249. *Id.* at 39.

250. *Id.* at 44.

251. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1132 (9th Cir. 2003).



Ninth Circuit held that Regal's stadium seating did not constitute "full and equal enjoyment" of movie theater services under Title III of the ADA.<sup>252</sup> The court upheld the DOJ's interpretation of section 4.33.3, requiring "a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats," as a valid interpretation entitled to due deference.<sup>253</sup> The case was then remanded.<sup>254</sup>

### E. Reasoning

The Ninth Circuit disagreed with the Fifth Circuit's suggestion that "comparability" could not be determined without getting into subjective judgments on seat preference and found the lack of choice on the part of wheelchair patrons to be decisive.<sup>255</sup> Whereas non-disabled patrons could choose from a wide range of viewing angles, wheelchair patrons could only sit in the first few rows, where the viewing angles were considerably less comfortable.<sup>256</sup>

Although the Ninth Circuit agreed with the Fifth Circuit that stadium-style theaters did not exist at the time section 4.33.3 was issued, and that older theaters did not have the same disparity in vertical viewing angles that stadium theaters do, the court reasoned that broadly drafted regulations may be applied to particular factual scenarios even though those scenarios were not expressly anticipated when the regulation was passed.<sup>257</sup> The court held that there was no "full and equal enjoyment" for wheelchair patrons when they had to "crane their necks and twist their bodies in order to see the screen," while non-disabled patrons did not.<sup>258</sup>

### F. Dissenting Opinion

Judge Andrew J. Kleinfeld disagreed with the majority.<sup>259</sup> Judge Kleinfeld pointed to the majority's newly created conflict between the Fifth and Ninth Circuits, and argued that the majority adopted "an

252. *Id.* at 1133. In so holding, the Ninth Circuit overlooked the portion of section 4.33.3 that requires wheelchair seating to be integrated into general public seating ("Wheelchair areas shall be an integral part of any fixed seating plan . . . ." See 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003). See also Comment, *supra* note 69, at 727.

253. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* "[W]here statutory text is unambiguous, 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* (quoting *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)).

258. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133.

259. *Id.* (Kleinfeld, J., dissenting).

unreasonable construction” and put theaters “in a position of impossible uncertainty.”<sup>260</sup>

Judge Kleinfeld argued that the Access Board approach was at odds with the majority’s approach.<sup>261</sup> Under the Access Board’s approach, architects and theater owners are given the information they need to know in order to build new theaters and reconstruct existing ones.<sup>262</sup> Under the majority approach, thousands of theaters will have failed to comply with the law, and will have to “destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time.”<sup>263</sup>

Judge Kleinfeld also argued that the accessibility guidelines surrounding section 4.33.3 are written with “great precision” and that the “use of the vague term ‘comparable’ must be looser by intent.”<sup>264</sup> Furthermore, Judge Kleinfeld argued the DOJ interpretation equates “comparable” to “better than” and that this position is not tenable considering the difference in viewing angles at every seat and the “highly subjective” nature of people’s preferences.<sup>265</sup> According to Judge Kleinfeld, the lines of sight cannot be comparable to all the seats in the house without scattering wheelchair areas, which section 4.33.3 does not require in theaters with capacities under three hundred.<sup>266</sup>

Kleinfeld believed the only guidance the majority gave theater owners was to stop what they are currently doing and to provide viewing angles for wheelchair patrons “within the range of angles offered to the general public.”<sup>267</sup> Kleinfeld asked the majority to at least “offer a holding that can be translated into a floorplan.”<sup>268</sup> He concluded that the best action for the court was to wait and see what the Access Board decides, and found “no justification for jumping in front of them.”<sup>269</sup>

260. *Id.* at 1133 (Kleinfeld, J., dissenting).

261. *Id.* (Kleinfeld, J., dissenting) (discussing 64 Fed. Reg. 62,248, 62,278 (Nov. 16, 1999)).

262. *Id.* (Kleinfeld, J., dissenting).

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

264. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1134–35 (Kleinfeld, J., dissenting). *See also supra* note 133 and accompanying text.

265. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1135–36. Judge Kleinfeld argued that seats in front were not less desirable because theaters did not charge less for them. *Id.* at 1136 (Kleinfeld, J., dissenting).

266. *Id.* at 1136 (Kleinfeld, J., dissenting).

267. *Id.* at 1136 (Kleinfeld, J., dissenting).

268. *Id.* at 1137 (Kleinfeld, J., dissenting).

269. *Id.* (Kleinfeld, J., dissenting).

## IV. ANALYSIS

This section presents an analysis of the key issues raised by the Ninth Circuit in *Oregon Paralyzed Veterans of America*: (1) the circuit split between the Fifth and the Ninth Circuits; (2) the ambiguity of the word “comparable;” (3) whether the DOJ’s interpretation is worthy of due deference; (4) the Access Board’s involvement and recognition of the problem; and (5) the dangers of retroactive regulation.

A. *The Split Between the Ninth and Fifth Circuits: What Can Movie Theaters Extract From the Oregon Paralyzed Veterans of America Decision?*

*Oregon Paralyzed Veterans of America* is notable because it conflicts with and directly challenges the Fifth Circuit’s decision in *Lara v. Cinemark*. Stadium-style seating law is essentially in chaos because of these and other conflicting rulings.<sup>270</sup> The issue of whether the viewing angles offered to disabled patrons must be comparable to those afforded to non-disabled patrons is placed at the forefront of movie theater owners’ and architects’ concerns. The Ninth Circuit requires comparable viewing angles, while the Fifth Circuit does not.<sup>271</sup>

The Fifth Circuit’s decision imposes no additional legal requirements on stadium-style movie theaters: section 4.33.3’s phrase “lines of sight comparable” applies only to physical obstructions.<sup>272</sup> In the majority of stadium-style theaters around the country, the architectural designs and constructions have complied with the requirement to provide wheelchair patrons with unobstructed views of the screen.<sup>273</sup> The question of whether section 4.33.3 prohibits viewer obstruction has never arisen because, as the Fifth Circuit reasoned, both “the DOJ and Access Board explicitly considered [it] before issuing [S]ection

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270. Meena Thiruvengadam, *Theaters’ Seating Takes a Hit*, SAN ANTONIO EXPRESS-NEWS, June 29, 2004, at 1D.

271. Compare *Or. Paralyzed Veterans of Am.*, 339 F.3d 1126 (requiring comparable viewing angles), with *Lara v. Cinemark USA Inc.*, 207 F.3d 783 (5th Cir. 2000) (only requiring unobstructed views).

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

273. Indeed, none of the cases dealing with issues surrounding the DOJ’s interpretation of section 4.33.3, as it relates to lines of sight in stadium-style movie theaters, have had to answer questions relating to viewer obstruction. Some cases have ruled on the issue of viewer obstruction. One court held that section 4.33.3 requires auditorium owners to provide wheelchair areas with lines of sight unobstructed by standing spectators. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 583–84 (D.C. Cir. 1997). Others either held that section 4.33.3 does not cover issues of unobstructed views over standing spectators or that such issues are unnecessary for ADA compliance. See *Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 193 F.3d 730, 736 (3d Cir. 1999), *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 743 (D. Or. 1997).

4.33.3.<sup>274</sup> On the other hand, questions regarding the comparability of viewing angles did not arise until after the DOJ issued section 4.33.3.<sup>275</sup>

The Ninth Circuit found no justification in the fact that the question did not arise until after promulgation of section 4.33.3.<sup>276</sup> Although it leads to a circuit split and the imposition of additional legal requirements on stadium-style movie theaters, the Ninth Circuit was entirely justified in its ruling.<sup>277</sup> However, the Ninth Circuit's decision and subsequent circuit split are problematic.<sup>278</sup>

The first problem that results from the circuit split is that there is no uniform regulation. For theater chains with stadium-style theaters across the country, Ninth Circuit theaters will either have to undergo significant renovations of their stadium seating sections or, depending on the current design, face the possibility of destruction along with costly and time-consuming reconstruction efforts.<sup>279</sup> Meanwhile, theaters in the Fifth Circuit are allowed to maintain the status quo with no additional legal requirements imposed.<sup>280</sup>

For those concerned, namely the wheelchair patrons and movie theater owners, the circuit split leads to incomparable seating in stadium-style movie theaters across the country. This is a problem for wheelchair patrons in the Fifth Circuit because the circuit split ensures that wheelchair users will be treated unequally. Some wheelchair patrons will have seats provided in the stadium section and be able to enjoy the "enhanced" movie-going experience, while others will not. If Title III of the ADA requires "full and equal enjoyment,"<sup>281</sup> then this result is clearly a violation of that requirement, in theory if not in law. The

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

275. *Id.*

276. This fact was deemed "not dispositive." *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133.

277. "[T]he courts do not require an agency of the United States to accept an adverse determination of the agency's statutory construction by any of the Circuit Courts of Appeals as binding on the agency for all similar cases throughout the United States." *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1114 (C.D. Cal. 2002) (quoting *Ry. Labor Executives' Ass'n v. Interstate Commerce Comm'n*, 784 F.2d 959, 966 (9th Cir. 1986)). Courts review an agency's statutory construction using a two-step process: (1) determine if Congress spoke to the issue-in-question in the statute or legislative history; and (2) if Congress did delegate interpretative authority to an agency, courts cannot substitute their own construction of the statutory provision for an agency's reasonable construction. *Ry. Labor Executives' Ass'n v. Interstate Commerce Comm'n*, 784 F.2d 959, 963-64 (9th Cir. 1986).

278. *See Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133-37 (Kleinfeld, J., dissenting).

279. For an example of the cost involved, see *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1999 WL 305108 (W.D. Tex. Feb. 4, 1999), *rev'd on other grounds*, 207 F.3d 783 (5th Cir. 2000). In 1999, the anticipated cost of retrofitting, according to Cinemark's plan, was approximately \$15,000 per auditorium, and under the plaintiffs' plan, \$22,000 per auditorium. *Id.*

280. *See generally Lara*, 207 F.3d 783.

281. *See* 42 U.S.C. § 12182(a) (2000).

ultimate result of the Ninth Circuit decision is that there is no “equality” of movie-going experiences among wheelchair patrons in the United States.

A second problem involves the ambiguity as to what these stadium-style theaters in the Ninth Circuit must do to comply with the ADA. The Ninth Circuit ruled that viewing angles must be comparable, but gave no instructions or indications as to how theaters can achieve this comparability.<sup>282</sup> The only suggestion offered by the *Oregon Paralyzed Veterans of America* majority is that viewing angles for wheelchair patrons must be “within the range of angles offered to the general public.”<sup>283</sup> Yet, looking to the plain language of the phrase, “within the range of angles,” offers no more clarification than “lines of sight comparable” does, and “offered to most of the general public” is open to various interpretations of what “most” means.<sup>284</sup> Such language does not further movie theater owners’ understanding of what kind of floorplan is now specifically required for their existing and future theaters. Indeed, the Ninth Circuit makes no ruling on whether the decision should be applied retroactively or prospectively. Judge Kleinfeld’s dissent accurately notes that these theater owners are faced with “impossible uncertainty as what they must do to comply with the law.”<sup>285</sup> Courts are willing to answer the “must,” but no one seems to want to explain the “how.”<sup>286</sup>

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282. Similarly, the Sixth Circuit held that the “lines of sight comparable” provision “clearly require[d] more points of similarity” than just an unobstructed view, and included viewing angles as one of those points. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 579 (6th Cir. 2003). In so ruling, the Sixth Circuit avoided having to decide how this could be achieved, and instead remanded the case back to the district court. *Id.*

283. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133.

284. *Id.* at 1136 (Kleinfeld, J., dissenting).

285. *Id.* The *Independent Living Resources* court stated that “courts are ill-equipped to evaluate such claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable.” *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 746 (D. Or. 1997). Many attribute this problem to the ADA’s failure to clearly define “readily achievable, the standard by which accommodations are to be judged.” See Carlson, *supra* note 44, at 905 (footnote and internal quotation marks omitted). Without such clarity, “businesses are forced to make their best efforts to comply, not knowing if their efforts will be ‘good enough.’” *Id.* at 905–06 (footnote omitted).

286. It should be noted that in *Cinemark USA, Inc.*, the government came close to addressing the “how.” The attorney for the DOJ told the Sixth Circuit that the DOJ would work with the defendant theaters “to come up with a reasonable approach.” *Cinemark USA, Inc.*, 348 F.3d at 582 n.10 (internal quotation marks omitted). The attorney also indicated that the DOJ would be satisfied by the placement of wheelchair seating in the first row of the stadium section. *Id.* However, these comments, though the court assumed the DOJ would stand by them, “come with ‘no warranties.’” Harris Ominsky, *Circuits Split over Wheelchair Seating at Movies*, THE LEGAL INTELLIGENCER, Jan. 12, 2004, at 8.

Finally, a jurisdictional problem arises. Many of the movie theater chains facing litigation operate theaters in a variety of different states. What happens to the theater chain with a place of business incorporated in California and theaters in Texas? Are the Texas theaters subject to the Ninth Circuit's decision? This issue was not decided in either *Lara* or *Oregon Paralyzed Veterans of America*, however it was addressed in *AMC Entertainment, Inc.* and *Cinemark USA, Inc.*<sup>287</sup>

In *Cinemark USA, Inc.*, the Sixth Circuit found that the "inconsistent legal obligations" resulting from the circuit split were not "insurmountable."<sup>288</sup> The *AMC* court stated that it could rule on *AMC*'s nationwide compliance with the ADA as long as the court had personal jurisdiction over *AMC*.<sup>289</sup> When *AMC* theaters argued that it would be subject to conflicting legal obligations from having to comply with both the Ninth and Fifth Circuit decisions, the court rejected the argument because "[t]he *Lara* decision imposed no legal obligation[s]."<sup>290</sup> It would thus appear that any conflict in jurisdiction would hinge on the personal jurisdiction of the movie theater chain.<sup>291</sup> If a theater chain is subject to the personal jurisdiction of both the Ninth and Fifth Circuits, the theater chain would be required to adhere to the more strict *Oregon Paralyzed Veterans of America* decision, which requires comparable viewing angles. While not "insurmountable," theaters would more often than not find themselves having to provide comparable viewing angles, thereby largely rendering *Lara*'s holding moot.

### B. *The Incongruous Definitions of Comparable*

The Ninth Circuit's definition of comparable, "within the range of [viewing] angles offered to the general public,"<sup>292</sup> is just another attempt to answer the major issue in dispute: the meaning of section 4.33.3's ambiguous phrase "lines of sight comparable to those for members of the general public." No clear majority definition has emerged.<sup>293</sup> Indeed, what "comparability" might require is a difficult

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287. See *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1115 (C.D. Cal. 2002); *Cinemark USA, Inc.*, 348 F.3d at 584.

288. *Cinemark USA*, 348 F.3d at 579 (internal quotation marks omitted).

289. *AMC Entm't*, 232 F. Supp. 2d at 1115.

290. *Id.*

291. *Id.*

292. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133.

293. See James Kurack, Comment, *Standing in Front of the Disabled: Judicial Uncertainty over Enhanced Sightlines in Sports Arenas*, 8 VILL. SPORTS & ENT. L.J. 161, 183 (2001). Compare *Or. Paralyzed Veterans of Am.*, 339 F.3d 1126, with *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000).

question "because of the variety of approaches available, the fact-intensive character of the issue, and the lack of adequate briefing."<sup>294</sup> Courts are split on the issue of whether comparable lines of sight should necessarily be provided over standing spectators in sports and entertainment auditoriums.<sup>295</sup> More significantly, courts are also split on the issue of whether comparability encompasses considerations relating to viewing angle, or whether it should be read to only apply to considerations relating to level of obstruction.<sup>296</sup>

It is generally agreed that "comparable" is used in section 4.33.3 in the sense of "similar" or "equivalent."<sup>297</sup> The question remains, however, as to what "comparable" means. In interpreting a statute or regulation, the courts must first look to its plain language.<sup>298</sup> The court must look to the statute or regulation as a whole, and assume that the promulgating agency intended that each term have meaning.<sup>299</sup> Using this plain language approach, the text of section 4.33.3 provides very little guidance. Looking to the broader context, it seems that since "the regulations were intended to provide guidance and it would have been child's play for the drafters to make clear that the 'lines of sight' requirement encompassed" both unobstructed views and viewing angles.<sup>300</sup> However, the drafters did not spell out the requirement as such, and conflicting interpretations result.<sup>301</sup>

For example, the DOJ uses "comparable" to refer to both unobstructed views and viewing angles.<sup>302</sup> According to the DOJ's interpretation, "wheelchair locations must be provided lines of sight . . . within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt."<sup>303</sup> In its 1999 Notice of Proposed Rulemaking, the Access Board refused to accept this interpretation outright,<sup>304</sup> but partially did so in its 2004 amendment to the ADAAG, where it required comparable viewing

294. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004).

295. *See Caruso v. Blockbuster-Sony Music Entm't Centre*, 193 F.3d 730 (3d Cir. 1999); *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997); *Indep. Living Res. v. Or. Arena Corp.*, 982 F.Supp. 698 (D. Or. 1997).

296. *See* cases cited *supra* note 9.

297. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1135 (Kleinfeld, J., dissenting) (citing *THE AMERICAN HERITAGE DICTIONARY* 300 (2d ed. 1982)).

298. *Lara*, 207 F.3d at 787 (citing *United States v. Raymer*, 876 F.2d 383, 389 (5th Cir. 1989)).

299. *Id.* at 787 (citing *Bailey v. United States*, 516 U.S. 137, 145 (1995)).

300. *Hoyts Cinemas*, 380 F.3d at 566.

301. *See* cases cited *supra* note 9.

302. *See supra* notes 91-99 and accompanying text.

303. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1130 (internal quotation marks omitted).

304. The Access Board said it was "considering whether to include specific requirements in the final rule that are consistent with the DOJ's interpretation of 4.33.3 to stadium-style movie theaters." 64 Fed. Reg. at 62,278 (Nov. 16, 1999).

angles in all theaters with capacities over 300, while not requiring any “vertical dispersal” or wheelchair seating in stadium sections of smaller theaters where the viewing angles are equivalent to “the average viewing angle provided in the facility.”<sup>305</sup> The Ninth Circuit’s decision validates the DOJ’s interpretation.<sup>306</sup> Given that the majority of seating in stadium-style movie theaters is in the stadium section and not the traditional section, the DOJ interpretation essentially requires that wheelchair patrons’ views must be as good as those of fifty percent of the seats.

If “comparable” is used in the sense of “similar” or “equivalent,”<sup>307</sup> then it would seem that an interpretation that requires viewing angles that are as good as fifty percent of the seats meets a reasonable definition of the word.<sup>308</sup> Yet, courts have refused to make that specific finding.<sup>309</sup> The regulation is clear in its requirement that lines of sight be comparable. In evaluating similarity, the question becomes whether viewing angles should qualify as lines of sight. Undoubtedly, providing wheelchair patrons with unobstructed views gives them “comparable” lines of sight and comports with the “equivalent” sense of the word as it is used.<sup>310</sup> All views in stadium-style theaters are designed to be free of obstructions.<sup>311</sup>

Providing viewing angles to wheelchair patrons that are “equivalent” with those of the general public in the stadium seats is difficult to achieve. First, section 4.33.3 is not as explicit about viewing angles as it is about physical obstructions.<sup>312</sup> Second, patrons’ viewing angles are different depending on the seat they are in. NATO has also weighed in on the issue and attempted to define “comparable.”<sup>313</sup> In 2000, in response to the Access Board’s notice, NATO argued that the “lines of sight comparable” provision of section 4.33.3 does not encompass viewing angles.<sup>314</sup>

305. *Hoyts Cinemas*, 380 F.3d at 565 (internal citations omitted).

306. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133.

307. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 575 (6th Cir. 2003).

308. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

309. In *Cinemark USA, Inc.*, the court refused to find that wheelchair patrons’ viewing angles must be equivalent to those of fifty percent of the audience, and remanded the case “to determine what approach might satisfy the viewing-angle requirement.” Ominsky, *supra* note 286, at 8.

310. Most courts agree that “line of sight” can be defined as unobstructed view. *Cinemark USA*, 348 F.3d at 575.

311. *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092, 1095 (C.D. Cal. 2002).

312. *Cinemark USA*, 348 F.3d at 576.

313. NATO is a nationwide organization that represents movie theater owners and operators and actively lobbies on their behalf. *AMC Entm’t*, 232 F. Supp. 2d at 1101.

314. *Id.* at 1102 (citation omitted).



However, the Access Board's 1999 Notice of Proposed Rulemaking does indicate that "lines of sight" has a qualitative aspect.<sup>315</sup> The Access Board noted that wheelchair patrons are given inferior sightlines when relegated to the first few rows of a theater's traditional section.<sup>316</sup> In its 2004 amendment to the ADAAG, the Access Board included specific requirements that are consistent with the DOJ's interpretation.<sup>317</sup> According to the Access Board, viewing angles must be "substantially equivalent to or better than those available to all other spectators" and "equivalent to, or better than, the average viewing angle provided in the facility."<sup>318</sup> Thus, it appears that section 4.33.3 and the definition of "comparable" does encompass both physical obstructions and viewing angles. However, until the DOJ revises its Title III regulations, adopts the Access Board's amended guidelines, and makes a viewing angle requirement explicit in the final rule, the ambiguity of the phrase most likely will be exploited and litigation will continue to result.<sup>319</sup>

### 1. *Construing the Ninth Circuit's Decision to Grant Wheelchair Patrons the Best Seat*

Critics of the Ninth Circuit's decision may argue that it effectively grants wheelchair patrons the "best seat in the house" to the detriment of others.<sup>320</sup> Pessimists, may even argue that obtaining this result is the ulterior motive of wheelchair-users in bringing suit against stadium-style movie theater chains. These arguments lack sufficient merit.

The DOJ's interpretation does not require that wheelchair patrons be given the "best seat in the house." The DOJ's interpretation, as construed by the government in its litigation efforts and supported by various courts, including those in the Ninth Circuit, suggests that sec-

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315. *Cinemark USA, Inc.*, 348 F.3d at 577.

316. *Id.* (citing 64 Fed. Reg. at 62,278).

317. *Hoys Cinemas*, 380 F.3d at 565 (citing 69 Fed. Reg. 44,084, 44,198 (July 23, 2004) (to be codified at 36 C.F.R. § 221)).

318. *Id.* (internal quotation marks omitted).

319. See McKibbin, *supra* note 109, at 854 (arguing that lawsuits will persist until the DOJ revises its regulations); see also Felicia H. Ellsworth, Comment, *The Worst Seats in the House: Stadium Style Movie Theaters and the Americans with Disabilities Act*, 71 U. CHI. L. REV. 1109, 1139 (2004) (arguing that the DOJ should revise its regulations in order to prevent continuing litigation).

320. In 2001, AMC's Hoffman Center in Alexandria, Virginia provided handicapped seats that were the "best in the house." *Id.* (emphasis omitted). These seats were "fully centered, half-way back, with no one on either side of them and plenty of room for companions." *Id.* Stadium seating enhanced everyone's movie-going experience, but those with disabilities benefited the most. *Id.*

tion 4.33.3 does not require that wheelchair seating be the best seats in the house, only that they cannot be the worst.<sup>321</sup> Wheelchair patrons are not seeking the proverbial “best seat,” they are seeking seats as good as most in the house.

There may be reason to believe the Ninth Circuit’s decision provides wheelchair patrons with more than full and *equal* enjoyment. The DOJ’s interpretation purports to grant wheelchair patrons viewing angles comparable to those of non-disabled patrons in the stadium section. Since most theaters’ stadium sections contain more seats than those in the traditional section,<sup>322</sup> the DOJ interpretation, which the Ninth Circuit supports, essentially requires that wheelchair users be given stadium seats. Such a requirement appears to exceed something “comparable” and more accurately enters the realm of “favorable.” Under the Ninth Circuit’s decision, wheelchair users will automatically get stadium seats no matter what time they arrive to the theater. Inevitably, wheelchair patrons will be given better seats than some non-disabled patrons. This could result in the unnecessary broadening of Title III’s purpose to provide “full and equal enjoyment.”<sup>323</sup>

Wheelchair users deserve an option. They should be given the option of sitting in the traditional section or the stadium section. Traditional sections usually have worse sightlines than the stadium sections, and the Ninth Circuit has a point in worrying that wheelchair patrons

321. *AMC Entm’t*, 232 F. Supp. 2d at 1112. Courts have not been forthright in saying the seats in the front rows and access aisle are the worst seats in the house. However, it has been noted that the “seats in the middle and rear of the theater offer the best viewing angle, while the seats in the front offer the worst.” *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 87–88 (D. Mass. 2003), *vacated by* 380 F.3d 558 (1st Cir. 2004). Furthermore, wheelchair seating may be placed in the stadium section’s last rows if appropriately accessible and if the viewing angles there are “not the worst available.” *Id.* at 88.

322. In Cinemark’s theaters, the stadium section contained over eighty percent of the theater’s general seating. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 572 (6th Cir. 2003). Roughly seventy percent of its patrons sit in the stadium section. *See Ominsky, supra* note 286, at 8.

323. Congress’s stated purpose in enacting the ADA was twofold: (1) “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;” and (2) “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1)–(2) (2000). *See also* Comment, *supra* note 69, at 729. The Ninth Circuit’s decision may have satisfied disability rights advocates, but “its sightlines interpretation is problematic and fails to recognize important social goals of the ADA,” like integration. *Id.* at 730. The court’s sightlines interpretation comports with the plain meaning of section 4.33.3 but it “cannot ‘be translated into a floorplan,’” and it is “difficult to imagine a holding that could match the exacting specificity of other ADA regulations.” *Id.* (quoting *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1137 (9th Cir. 2003) (Kleinfeld, J., dissenting)).

would be subject to a “wheelchair ghetto” if denied a choice in seating.<sup>324</sup>

On the other hand, the “wheelchair ghetto” worries seem a bit irrational for larger theaters considering that wheelchair patrons are already protected by section 4.33.3’s requirement that wheelchair spaces be placed in more than one location when a theater’s seating capacity exceeds three hundred. Each location must be an “integral part” of the seating arrangement and provide the required comparable lines of sight.<sup>325</sup> This requirement eliminates the possibility of a “wheelchair ghetto” in theaters with capacities over three hundred,<sup>326</sup> but it does nothing to ensure that wheelchair patrons have a choice.

## 2. *Preferences Play a Large Role in Determining Whether a Particular Viewing Angle Is “Comparable”*

Wheelchair seating must include “lines of sight comparable to those for members of the general public.”<sup>327</sup> When wheelchair patrons are seated in the traditional section or access aisle near or next to other non-disabled patrons, they are seated among the general public.

Yet, wheelchair users argue that since a majority of patrons usually only go to traditional seats in the front of the theater when the stadium section is full, they are deprived of “lines of sight comparable to those of the general public.”<sup>328</sup> Section 4.33.3 on its face, however, makes no mention of requiring “lines of sight comparable” to a *majority* of the general public.<sup>329</sup> Movie theater patrons may have a tendency to sit in the middle or rear of the stadium section, but this tendency is not conclusive. Every seat in a movie theater, in the traditional or the stadium section, has a different viewing angle, either horizontally or vertically or both.<sup>330</sup> While “many (perhaps most)

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324. See *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

325. *Id.*

326. Indeed, Judge Kleinfeld called the concern “a chimera . . . . Under the existing regulations, there cannot be a wheelchair ghetto out of the way, behind a post, or off to the side.” *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

327. See 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

328. The plaintiff in *Hoyts Cinemas Corp.* relied on an expert’s report and a “study” consisting of videos of movie-going audiences choosing their seats. The court found: “Even in a wholly traditional theater, as anyone who has ever been to the movies knows, patrons typically tend to avoid the front rows of a theater until all the middle and back rows are filled, and most audiences initially congregate in the middle seats.” *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 81 (D. Mass. 2003), *vacated by* 380 F.3d 558 (1st Cir. 2004).

329. The DOJ interpretation of section 4.33.3 does require, however, that wheelchair locations be given “lines of sight comparable” to those offered to “most” of the general public. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1130.

330. “As a matter of geometry a line of sight will not be identical to any particular other seat.” *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1136 (Kleinfeld, J., dissenting).

patrons, in many (perhaps most) theaters, might prefer seating in the stadium section . . . it is hardly obvious that this would be true in every stadium theater regardless of configuration.”<sup>331</sup>

People’s preferences are highly subjective and “unusual,”<sup>332</sup> and can easily differ from one person to the next. This is relevant considering the fact that viewing angles are different from every seat in the house. Some people like to sit in the very back of the theater to enjoy a sense of separation. Some people like to sit in the very front row just to be as close to the screen as they can and be completely surrounded by the images. Some like to sit at the end of the aisles because their legs get cramped during a lengthy movie, or they are expecting an important cell phone call. Indeed, in *United States v. Hoyts Cinemas Corp.*, the First Circuit recognized “evidence that viewers in particular theaters found some seats in the [traditional section] or in the access aisle equally attractive to some seats in the stadium, and that in others wheelchair spaces in the slope had quite good angles.”<sup>333</sup>

Judge Kleinfeld, in his dissent, said there was no legitimate way the lines of sight, as applied to viewing angles, could be “comparable” to all of the aforementioned preferences.<sup>334</sup> Lines of sight cannot be comparable to such subjective preferences, “without requiring the scattering of wheelchair seating that the 300-seat provision [of section 4.33.3] expressly avoids requiring in smaller theaters.”<sup>335</sup> There also remains the question of whether the viewing experience one has in a wheelchair, no matter the location, can ever be “comparable” to the viewing experience one has outside of a wheelchair.<sup>336</sup>

For those members of the general public who prefer to sit in the traditional section near the front of the theater, wheelchair patrons do share a “comparable” line of sight.<sup>337</sup> Furthermore, theaters do not

331. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 571 (1st Cir. 2004).

332. *Id.* at 567.

333. *Hoyts Cinemas*, 380 F.3d at 571.

334. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1126 (Kleinfeld, J., dissenting).

335. *Id.*

336. In ruling against AMC, the judge cited one patron “who complained of ‘severe neck and eye strain’ after watching a particular movie.” Jonathan V. Last, *ADA Goes to the Movies*, THE WEEKLY STANDARD, Jan. 24, 2003, at 2, at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/152ynehd.asp>. This patron used a joystick-controlled wheelchair and had to read lips to overcome a hearing impairment. *Id.* (the court posed the question, “How . . . could AMC ever have provided this woman ‘a movie-going experience comparable to that of other patrons?’”).

337. *Hoyts Cinemas*, 380 F.3d at 570. There was evidence that some viewers found seats in the traditional section or access aisle “equally attractive” to those seats in the stadium section. *Id.* at 571.

charge patrons any differently for the seat they choose. Whether one decides to sit in the dead center of the stadium section where he or she believes the viewing angle is the best or the sound is optimal,<sup>338</sup> or whether one sits in the very front row of the theater, where the screen almost threatens to eat him or her alive, there is no difference in ticket price.<sup>339</sup> Since theaters do not charge more or less to sit in front, in back, or in the center, seating in the front cannot be considered undesirable per se.<sup>340</sup>

The subjective analysis that goes into one moviegoer's preference for a certain viewing angle makes it almost impossible to reach a uniform consensus on what lines of sight are "comparable" to the general public.<sup>341</sup> In *Cinemark USA, Inc.*, the court refused to make a finding that the viewing angle had to be equivalent to that of fifty percent of the theater patrons.<sup>342</sup> Thus, it is challenging to give effect to the DOJ's interpretation that section 4.33.3 requires the language of "lines of sight comparable" to apply to *most* movie patrons' viewing angles when the regulation itself only requires "lines of sight comparable" to those of the general public. Furthermore, wheelchair seating in stadium sections need not be provided in every theater. The First Circuit stated that "narrower angles are surely better, in any meaningful sense, only up to a point."<sup>343</sup> Evidence suggests a comfortable vertical viewing angle ranges from thirty to thirty-five degrees or less; where this comfort is provided in traditional sections, theaters "arguably provide comfort 'comparable' to stadium seats even if the [traditional section seats] [have] flatter angles."<sup>344</sup>

### C. *Is the DOJ's Interpretation Entitled to Deference?*

Another issue raised in *Oregon Paralyzed Veterans of America*, and many other cases addressing the same litigated subject matter, is whether it is unreasonable for the DOJ to interpret "lines of sight comparable" to include both physical obstructions and viewing an-

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338. One commentator has stated that the best place to sit in terms of the optimal sound experience is "about two thirds of the distance from the screen to the back of the theater." Jeff Tyson, *How Movie Screens Work*, at <http://stuflo.howstuffworks.com/movie-screen2.htm> (last visited Jan. 23, 2005).

339. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1136 (Kleinfeld, J., dissenting).

340. *See id.*

341. Imposing a viewing angle requirement requires district courts to "interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers." *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 789 (5th Cir. 2000).

342. *See Ominsky, supra* note 286, at 8.

343. *Hoyts Cinemas*, 380 F.3d at 571.

344. *Id.*

gles.<sup>345</sup> It is generally recognized that courts must defer to the interpretation of a regulation by the agency charged with enforcing that regulation unless that agency's interpretation is "'plainly erroneous or inconsistent with' the regulation."<sup>346</sup> But if the meaning of the regulatory language is ambiguous, the agency's interpretation of the regulation only controls if it is reasonable.<sup>347</sup>

Whether an agency's interpretation is a "fair and considered judgment" depends on whether it is inconsistent with the regulation itself or with the agency's previous positions.<sup>348</sup> At first glance, it would appear that the DOJ's interpretation of section 4.33.3, as it pertains to viewing angles, is inconsistent with previous positions. Looking to the legislative record for guidance on the "integral part" requirement of section 4.33.3, the DOJ's Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities "explained integration of wheelchairs not in terms of having viewing angles better than 50% of the seats in an assembly area, but in terms of wheelchair patrons being able to sit near family and friends."<sup>349</sup> The Ninth Circuit did not address the inconsistency with the regulation or with the DOJ's previous positions.<sup>350</sup> It jumped straight to the reasonableness analysis. Thus, there is no inconsistency to the DOJ's interpretation.

The regulatory language of section 4.33.3 is ambiguous, however, and the DOJ's interpretation must be reasonable to be entitled to deference.<sup>351</sup> Moreover, "[d]eference to the agency's view does not mean abdication."<sup>352</sup> Two additional issues arise under the reasonableness determination: (1) whether the "viewing angle" scenario was expressly anticipated at the time the regulation issued; and (2) whether section 4.33.3 is the DOJ's regulation or the Access Board's regulation.

345. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1132.

346. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 89 (D. Mass. 2003), vacated by 380 F.3d 558 (1st Cir. 2004) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

347. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1131 (citing *Lal v. Immigration & Naturalization Serv.*, 255 F.3d 998, 1004 (9th Cir. 2001)).

348. *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1113 (C.D. Cal. 2002) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (internal quotation marks omitted)).

349. *United States v. Cinemark USA, Inc.*, No. 1-99-CV-705, 2001 U.S. Dist. LEXIS 24418, at \*22-23 (N.D. Ohio Nov. 19, 2001).

350. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1132.

351. *Id.*

352. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004).

1. *Whether the "Viewing Angle" Scenario Was Expressly Anticipated at the Time the Regulation Was Issued*

The "viewing angle" scenario was considered in *Lara*, where the Fifth Circuit held the DOJ interpretation was unreasonable because questions of "viewing angle" did not arise until after the DOJ issued section 4.33.3.<sup>353</sup> It also cited the lack of evidence indicating the Access Board's intent to have section 4.33.3 apply to viewing angles and the Access Board's 1999 Notice of Proposed Rulemaking, in which the Board stated it had not yet decided whether to adopt the DOJ's position.<sup>354</sup> Both the Fifth Circuit in *Lara* and Judge Kleinfeld's dissent in *Oregon Paralyzed Veterans of America* refer to other existing regulations at the time of promulgation in order to breathe meaning into the ambiguous language. The Fifth Circuit said the phrase "lines of sight" meant unobstructed view when used in other contexts.<sup>355</sup> Judge Kleinfeld's dissent mentioned the "great precision" with which the "accessibility guidelines" surrounding section 4.33.3 were written.<sup>356</sup> Thus, because viewing angles were not expressly anticipated when section 4.33.3 was issued, it can be argued that courts should not defer to the DOJ's interpretation.

The Ninth Circuit declined to accept this reasoning.<sup>357</sup> It agreed that stadium-style theaters were not in existence when section 4.33.3 was passed,<sup>358</sup> but it said the DOJ's failure to consider the question of "viewing angles" in stadium-style theaters at the time of promulgation was "not dispositive."<sup>359</sup> The Ninth Circuit said that a broadly drafted regulation, with a broad purpose, can be applied to a "particular factual scenario not expressly anticipated at the time the regulation was promulgated."<sup>360</sup> Given the fact that the Supreme Court recently appeared to favor administrative interpretations over the usual rules of

353. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788 (5th Cir. 2000). The court referenced the DOJ's 1994 Technical Assistance Manual as evidence. *Id.* The 1994 DOJ Manual explicitly required views over standing spectators, but did not address the issue of viewing angles. *Id.*

354. *Id.* at 789. See 64 Fed. Reg. 60,848, 62,278 (Nov. 16, 1999).

355. See *Lara*, 207 F.3d at 788-89; *supra* note 135 and accompanying text.

356. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1134 (Kleinfeld, J., dissenting). For example, telephone cord length must be at least twenty-nine inches (735 mm). *Id.* (citing 28 C.F.R. pt. 36 app A., § 4.31.8 (2003)). Knee clearance at tables and counters for those in wheelchair seating must be at least twenty-seven inches high (685 mm), thirty inches wide (760 mm), and nineteen inches deep (485 mm). 28 C.F.R. Pt. 36, app. a, § 4.32.3 (2003). As Judge Kleinfeld stated, "Where a regulation tells movie architects and owners to the millimeter how they must construct knee space, the use of the vague term 'comparable' must be looser by intent." *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1135 (Kleinfeld, J., dissenting).

357. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1132.

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

359. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1132-33.

360. *Id.* (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)).

statutory construction and the plain meaning doctrine, it seems the Ninth Circuit has the stronger position on the “expressly anticipated at the time of promulgation” argument.<sup>361</sup>

## 2. *Whose Regulation Is It?*

The second issue arising under the reasonableness determination is whether section 4.33.3 is the DOJ’s regulation or the Access Board’s regulation. This issue was not addressed by the Ninth Circuit in *Oregon Paralyzed Veterans of America*. In other cases however, movie theater owners have argued that the DOJ’s interpretation is “not worthy of deference because [section] 4.33.3 is not the DOJ’s regulation.”<sup>362</sup> The Access Board, they argue, was the agency that actually drafted the regulation, albeit as a proposed guideline.<sup>363</sup> Thus, the Access Board controlled the language of both the guidelines and the regulation.<sup>364</sup> The United States Court of Appeals for the District of Columbia Circuit rejected this argument, saying that once the Access Board’s proposed guidelines were released by the DOJ as its own regulation, it became the DOJ’s responsibility.<sup>365</sup>

The United States Court of Appeals for the Third Circuit disagreed with the D.C. Circuit’s conclusion.<sup>366</sup> The Third Circuit held that the DOJ “implicitly adopted” the Access Board’s analysis of section 4.33.3 based on these five factors:

- 1) the DOJ referred all comments to the [Access] Board; 2) the DOJ relied on the [Access] Board to make adequate changes based on those comments; 3) the [Access] Board specifically changed the language of [section] 4.33.3 in response to comments and explained [the] change in its commentary; 4) the DOJ was a “member of the Board” and “participated actively . . . in preparation of both the proposed and final versions of the [guidelines];” and 5) the DOJ’s

361. In 2003, the Supreme Court held that while administrative interpretations are “not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift for the sake of reading ‘other legal process’ in abstract breadth.” *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133 n.9 (quoting *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003)).

362. *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092, 1113 (C.D. Cal. 2002).

363. *Id.*

364. *See Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997).

365. *Id.* Deference is based on an agency’s role as the regulation’s sponsor and not on the agency’s drafting expertise. *Id.* The court recognized that the DOJ had “no administrative adjudicatory authority . . . to interpret its regulation,” but nevertheless held that Congress delegated to the DOJ “the authority to flesh out the statutory framework by issuance of its regulations.” *Id.* Thus, the DOJ has a legal and policymaking authority that equates with “the adjudicatory authority of other statutory schemes.” *Id.* The United States District Court for the Central District of California followed this reasoning. *See AMC Entm’t*, 232 F. Supp. 2d at 1113.

366. *See Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 193 F.3d 730, 736 (3d Cir. 1999).



commentary stated that the final guidelines promulgated by the Board adequately addressed all comments.<sup>367</sup>

In addition, one of the conventional reasons for deference is expertise.<sup>368</sup> Because the Access Board is the congressionally appointed expert behind the ADAAG, this justifies giving "some weight to the views of the Board itself."<sup>369</sup> Thus, section 4.33.3 is fundamentally the Access Board's regulation even though the DOJ has assumed responsibility for it. Consequently, any reasonable interpretation of section 4.33.3 would seem to take into account the Access Board's views, and deference should not be given to the DOJ's interpretation unless it comports with the Access Board's views.

Even when courts have rejected the argument that section 4.33.3 is the Access Board's regulation, they have cited the Access Board's comments and its 1999 Notice of Proposed Rulemaking as support for the conclusions that "viewing angles" apply and the DOJ's interpretation is reasonable.<sup>370</sup> For example, the United States District Court for the Central District of California rejected the argument that the DOJ's interpretation was not entitled to deference because it was not the DOJ's regulation.<sup>371</sup> In holding that "line of sight" refers both to physical obstructions and viewing angles, the court "recognize[d] the importance of the language in the Notice of Proposed Rulemaking."<sup>372</sup> In another, more recent example, the United States Court of Appeals for the First Circuit stated that the Access Board's 2004 amendment to the ADAAG was "helpful" and went "a long way to determining for the future the extremely difficult question of how much 'comparability' is required for new construction."<sup>373</sup> Thus, section 4.33.3 can legitimately be construed to be the regulation of both the Access Board and the DOJ.<sup>374</sup> While Congress charged the DOJ with the responsibility of adopting regulations to implement Title III of the ADA, it also charged the Access Board with "establish[ing]

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367. *Id.* (citation omitted). Thus, the Third Circuit did not accept the DOJ's interpretation. *Id.* at 737.

368. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004).

369. *Id.*

370. Excluding *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), see cases cited *supra* note 9.

371. *AMC Entm't*, 232 F. Supp. 2d at 1113.

372. *Id.* at 1110-11.

373. *Hoyts Cinemas*, 380 F.3d at 575.

374. This seems to satisfy the posture articulated in *Colby v. J.C. Penney Co.* In *Colby*, the Seventh Circuit stated, "A posture somewhere in between some deference and complete deference is proper when cases in different circuits challenge the same practice of the same defendant." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987).

and maintain[ing] minimum guidelines and requirements for the standards issued pursuant to' Title III."<sup>375</sup>

#### D. Access Board's Recognition of the Problem

In its 1999 Notice of Proposed Rulemaking, the Access Board directly addressed the DOJ's interpretation, and the issue of "viewing angles" in stadium-style theaters with respect to the requirements of section 4.33.3.<sup>376</sup> When the Access Board issued its proposed guidelines in July of 1991, the DOJ promulgated section 4.33.3 on the very same day, and worded it identically to the Access Board's guidelines.<sup>377</sup> Since the Access Board was the original drafter of the regulation, it presumably has superior knowledge as to what was intended by the language.

In July 2004, the Access Board finally issued an amendment to the ADAAG.<sup>378</sup> The amendment "requires that in assembly areas of more than 300 seats, wheelchair spaces shall be dispersed and shall provide wheelchair users a choice 'of seating locations and viewing angles that are substantially equivalent to, or better than,' those 'available to all other spectators.'"<sup>379</sup> No vertical dispersal is required in smaller theaters, however, where the wheelchair seating provides viewing angles "equivalent to, or better than, the average viewing angle provided in the facility."<sup>380</sup> The Board recognized that although most stadium-style theaters offer sight lines to the screen that are generally superior to those in traditional-style theaters, not all traditional sections of stadium-style theaters lack viewing angle equivalence.<sup>381</sup>

The Access Board realized that smaller stadium-style theaters, those with capacities less than three hundred, posed a problem for wheelchair patrons,<sup>382</sup> but it did not rule that wheelchair locations in stadium seating are always required. Although the Access Board agrees with the DOJ that section 4.33.3 encompasses viewing angles, it does a better job of balancing the competing interests. On one hand, it is desirable to afford wheelchair patrons improved sight lines. On

375. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1129 (citing 29 U.S.C. § 792(b)(3)(B) (2000)).

376. See 64 Fed. Reg. at 62,278 (Nov. 16, 1999).

377. *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 734-35 (3d Cir. 1999).

378. *Hoyts Cinemas*, 380 F.3d at 565.

379. *Id.* (quoting 69 Fed. Reg. at 44,198).

380. *Id.* (quoting 69 Fed. Reg. at 44,199).

381. *Id.*

382. When dispersion of wheelchair spaces is not required, for example, in smaller stadium-style theaters, "the placement of wheelchair spaces in relation to other seating acquires greater significance because wheelchair users are not offered a choice of viewing angles." 64 Fed. Reg. at 62,278.

the other hand, there is the concern of design professionals, who “have expressed some uncertainty about how to measure their compliance.”<sup>383</sup> Where a theater’s traditional section offers equivalent viewing angles to those in the stadium section, there is no need to place wheelchair locations in the stadium section.<sup>384</sup> Thus, there is merit to the argument that the DOJ’s proposed applicability of section 4.33.3 (requiring that wheelchair locations always be provided in stadiums sections) is not embodied in the Access Board’s amendment to its guidelines.<sup>385</sup>

The DOJ’s interpretation matters most to the courts.<sup>386</sup> But the DOJ’s interpretation, as it stands, offers vague guidance to design professionals, architects, and movie theater owners as to how they must comply with the “viewing angle” requirement. It is one thing to require wheelchair locations with viewing angles within the range of fifty percent of the house; it is another thing to actually achieve it.<sup>387</sup> With the Ninth Circuit’s decision to defer to the DOJ interpretation, movie theaters merely know that they are in violation of the ADA and must somehow correct that.

In promulgating section 4.33.3, “the DOJ implicitly adopted the Access Board’s analysis.”<sup>388</sup> Why not involve the Access Board and its amended guidelines in refashioning section 4.33.3 or adopting a new regulation now?<sup>389</sup> Then, the ADA compliance requirements will be “clear, precise and prospective . . . [and] . . . obtained after a fair process.”<sup>390</sup> Architects will know how they must design a movie theater before building it, and owners of existing theaters will know what types of reconstruction to perform. The First Circuit stated that it would not be difficult to develop a mechanical standard of comparability and apply it to the viewing angles in individual movie thea-

383. *Id.* at 62,277.

384. *Hoyts Cinemas*, 380 F.3d at 565 (citing 69 Fed. Reg. at 44,198).

385. See McKibbin, *supra* note 109, at 853 (stating that the Board’s amendment seemed to “give credence to the position that the DOJ’s litigating position was not supported by the old ADAAG requirements”). The Ninth Circuit did not address the Access Board’s role in the litigation at hand, but Judge Kleinfeld’s dissent did. See *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133–37 (Kleinfeld, J., dissenting).

386. See *supra* note 100 and accompanying text.

387. This may explain why the Sixth Circuit was so reluctant and unwilling to make a finding that the viewing angles must be equivalent to those of fifty percent of theater patrons.

388. *Caruso*, 193 F.3d at 736; see *supra* note 377 and accompanying text.

389. The DOJ appears to be considering this. In January 2005, it plans to start revising its Title III regulations and adopting the Access Board’s amended guidelines. *Hoyts Cinema*, 380 F.3d at 565 n.6 (citing Unified Agenda, 69 Fed. Reg. 37,734, 37,749 (June 28, 2004)).

390. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1134 (Kleinfeld, J., dissenting) (arguing that the Access Board process should be left alone).

ters.<sup>391</sup> More importantly, doing so will help guide the lower courts in determining the extent of the viewing angle requirement.<sup>392</sup>

Instead of simply offering an interpretation, the DOJ should use one of the following two options. First, it could amend section 4.33.3. The First Circuit stated that where “the interpretation has the practical effect of altering the regulation, a formal amendment—almost certainly prospective and after notice and comment—is the proper course.”<sup>393</sup> The second option would be to get rid of section 4.33.3 and pass a new rule.<sup>394</sup> In its amended guidelines, the Access Board “deleted section 4.33.3 entirely” and created a section 221.2.3 instead.<sup>395</sup> Further, the DOJ’s “proffered interpretation ha[s] received short shrift in the courts.”<sup>396</sup> The First Circuit singled out the DOJ’s shortcomings and stated that “[t]here is no doubt that [section] 4.33.3 is vague as to whether it embraces angles” and “that the [DOJ] has been slow in providing more precise guidance by regulation.”<sup>397</sup> The DOJ first publicly adopted its current interpretation of section 4.33.3 in 1998.<sup>398</sup> No new rule has passed since then, despite the fact that stadium seating in movie theaters has existed for nine years now, and the DOJ has been well aware that it has to make its regulations clearer.<sup>399</sup> The DOJ should work together with the Access Board and utilize its rulemaking capacity, instead of bringing lawsuits against theater chains.<sup>400</sup>

391. *Hoyts Cinemas*, 380 F.3d at 572.

392. The Ninth Circuit remanded and instructed the district court to grant the plaintiffs’ motion for summary judgment. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133. The Sixth Circuit remanded to determine exactly how similar lines of sight had to be for wheelchair patrons. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 579 (6th Cir. 2003). The First Circuit felt “compelled” to remand. *Hoyts Cinemas*, 380 F.3d at 575.

393. *Id.* at 569 (footnote omitted).

394. This is within the DOJ’s discretion because if the DOJ has the option to choose whether to proceed by general rule or individual ad hoc litigation it can also likely proceed by amending the general rule. *Cinemark USA, Inc.*, 348 F.3d at 580.

395. McKibbin, *supra* note 109, at 850.

396. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 92 (D. Mass. 2003), *vacated by* 380 F.3d 558 (1st Cir. 2004).

397. *Hoyts Cinemas*, 380 F.3d at 573.

398. *Hoyts Cinemas*, 256 F. Supp. 2d at 92.

399. *Id.*

400. See Ellsworth, *supra* note 319, at 1123, 1137–39 (arguing that the DOJ should clarify section 4.33.3 through “notice and comment rulemaking”); McKibbin, *supra* note 109, at 854 (arguing that wheelchair patrons will not have better sightlines until the DOJ implements new regulations).

*E. The Dangers of Retroactive Regulations*

The Ninth Circuit's decision leaves the door open for the "viewing angle" requirement to be applied retroactively to existing movie theaters. Due process, however, requires that enactments be clear enough to give movie theaters "fair warning of what is prohibited."<sup>401</sup> By deferring to the DOJ's interpretation, the Ninth Circuit risks leaving architects and theater owners in a state of confusion.<sup>402</sup> If retroactively applied, thousands of movie theater owners "will discover that they are out of compliance with the law, and must [now] destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time."<sup>403</sup> In other words, the DOJ is presenting a new interpretation of section 4.33.3 by invalidating prior approvals given under DOJ-certified compliance regulations at the time.<sup>404</sup>

Theaters argue that the "lines of sight comparable" provision of section 4.33.3 is too vague to provide them with the fair warning required by due process, and thus, the government should be estopped from arguing the DOJ's interpretation.<sup>405</sup> The DOJ argues that it has only advocated an interpretation of the ambiguous term "comparable."<sup>406</sup> However, in construction, theaters have often relied on approvals under state compliance codes, which the DOJ has certified as "meeting or exceeding" the ADA's requirements.<sup>407</sup> The fact that theaters may have known their wheelchair seating locations provided unfavorable viewing angles is not dispositive because the ADA requires comparability, not quality.<sup>408</sup> The First Circuit even stated that theaters could, "from a narrow standpoint," argue that the federal government did not give them notice of its current interpretation until 1998.<sup>409</sup> Furthermore, one scholarly treatise states that "[a]n agency is not al-

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401. *United States v. AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1114 (C.D. Cal. 2002) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

402. *See supra* note 285 and accompanying text.

403. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

404. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 580-83 (6th Cir. 2003).

405. The Sixth Circuit stated that "[d]ue process concerns may warrant denial of enforcement of an agency determination when conduct previously approved by a regulatory agency is retroactively branded as statutory violation." *Id.* at 581.

406. The United States District Court for the Central District of California found that the lack of conflicting interpretations coupled with the reasonableness of the DOJ's interpretation led to no violation of due process. *AMC Entm't*, 232 F. Supp. 2d at 1114. The court ruled that AMC should have understood that section 4.33.3 required comparable viewing angles for wheelchair patrons in stadium-style theaters. *Id.*

407. *Cinemark USA, Inc.*, 348 F.3d at 581 (internal quotation marks omitted).

408. *See Ellsworth, supra* note 319, at 1133-34.

409. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 573 (1st Cir. 2004).

lowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning.”<sup>410</sup>

Such retroactive applications of the rule risk violating the Administrative Procedure Act (APA).<sup>411</sup> Without the assurance of proper notice the Act gives, retroactive application has the potential to punish theater owners who have incurred the enormous expense of designing and constructing movie theaters under the false impression that they were in compliance with the requirements of the ADA, and specifically, section 4.33.3. In *Oregon Paralyzed Veterans of America*, defendant Regal Cinemas alleged that all six of its theaters in question were inspected and complied with the applicable local regulations of the time.<sup>412</sup> If Regal relied on such approvals, that fact would appear to support an APA estoppel argument.<sup>413</sup>

Yet, neither the Ninth nor the Sixth Circuit has held that a due process violation occurred under the APA.<sup>414</sup> Even if no due process violation is found, the Ninth Circuit should follow the Sixth Circuit’s lead and consider granting prospective relief.<sup>415</sup> On remand, the district court should be able to consider the prior advice and representations reasonably relied on by the theaters.<sup>416</sup> On the other hand, if the DOJ decides to formally amend section 4.33.3, that amendment should also govern prospectively.<sup>417</sup>

410. *Caruso v. Blockbuster-Sony Music Entm’t Centre*, 193 F.3d 730, 737 (3d Cir. 1999) (citing 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 283 (1994) (internal quotation marks omitted)).

411. The APA prevents new rules of law from being adopted without giving proper notice. See 5 U.S.C. §§ 552, 553 (2000).

412. Appellees’ Brief at 5, *Or. Paralyzed Veterans of Am.* (No. 01-135554), available at 2002 WL 32154039. The approvals “repeatedly confirmed Regal’s compliance with the Oregon Uniform Building Code,” which contained requirements similar to section 4.33.3. *Id.* In addition, Regal’s movie theaters complied with the ADAAG requirements, including “placement, width, height, and depth of doorways, aisleway and ramp access, toilets, telephones, water fountains, emergency equipment, ticket and concession counters, audio enhancements, parking, outside access,” and many more. *Id.* at 7.

413. See *United States v. Cinemark USA, Inc.*, No. 1:99-CV-705, 2001 U.S. Dist. LEXIS 24418 at \*17 (N.D. Ohio Nov. 19, 2001).

414. For the Sixth Circuit’s decision, see *Cinemark USA*, 348 F.3d at 580–83. The Ninth Circuit decision does not even address the issue of due process under the APA.

415. The Sixth Circuit held that Cinemark’s reliance on the Texas Accessibility Standards and “the government’s statements with respect to the state building code certification process weigh[ed] strongly in favor of” granting prospective relief. *Cinemark USA*, 348 F.3d at 581. The court does not say that relief must be prospective, only that it will usually be appropriate given these facts. *Id.*

416. *Cinemark USA*, 348 F.3d at 582. Reliance on state or local ordinances constitutes rebuttable, not incontrovertible, evidence. *Id.* at 581–82. The presumption favoring the builder may be overcome. *Id.* at 582.

417. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 569 (1st Cir. 2004).

The First Circuit held that retroactive application is unfair depending on the obligations “ultimately imposed” on the theaters,<sup>418</sup> and retrofitting an existing facility to new requirements presents numerous challenges that can be construed as unfair. For instance, retrofitting a theater costs much more than designing a new theater.<sup>419</sup> And in existing theaters, it is more difficult to insert new constructions into the existing infrastructure, “especially in a steel-frame building.”<sup>420</sup> In retrofitting, “[e]ven the minutest change (e.g., laying electrical lines) might entail the complete revamping of the entire theater.”<sup>421</sup> Thus, even though the Ninth Circuit’s decision may be applied retroactively, the dangers are too great, and the “viewing angle” requirement should only be imposed on new theaters constructed or refurbished within the Ninth Circuit.

## V. IMPACT

This section discusses the likely impact of the decision in *Oregon Paralyzed Veterans of America*. It begins with a discussion on how the law will develop from this opinion, including the effect on movie theater owners, architects, and theater patrons in the impacted states. It next reviews the various proposed solutions to the imposed viewing angle requirement in stadium-style theaters. Finally, this section proposes a resolution to apply the Ninth Circuit decision prospectively and wait for the DOJ and Access Board to revise section 4.33.3 or adopt a new regulation before imposing a viewing angle requirement on existing theaters.

### A. *How Will the Law Develop after Oregon Paralyzed Veterans of America?*

The Ninth Circuit’s decision in *Oregon Paralyzed Veterans of America* will have an extensive effect on how Title III of the ADA is

418. *Id.* at 574.

419. David W. Dunlap, *Architecture in the Age of Accessibility*, N.Y. TIMES, June 1, 1997, § 9, at 4 (quoting John L. Wodatch, chief of the DOJ’s disability rights section). Dunlap calls retrofitting a “difficult business.” *Id.*

420. *Id.* (quoting William B. Tabler, Jr.) (internal quotation marks omitted). The difficulty derives from retrofitting what may not necessarily be “readily achievable.” Title III of the ADA provides that discrimination includes: “(iv) a failure to remove architectural barriers and communication barriers that are structural in nature . . . in existing facilities . . . where such removal is *readily achievable*.” 42 U.S.C. § 12182(b)(2)(A)(iv) (2000) (emphasis added). The Code of Federal Regulations (CFR) defines “readily achievable” as easily achievable, with little difficulty or expense. 28 C.F.R. § 36.104 (2003). The CFR also sets out several factors that determine whether an action is “readily achievable.” Those factors include: (1) nature and cost of the action needed; (2) overall financial resources of the site involved; and (3) overall financial resources and size of any parent corporation (if applicable). *Id.*

421. *Hoys Cinemas*, 380 F.3d at 574.

construed in the future. Since the Supreme Court refused to hear Regal's appeal,<sup>422</sup> the decision currently applies to nine Western states.<sup>423</sup> Theater owners in these states are now "vulnerable to challenges."<sup>424</sup> The whole Ninth Circuit is "ripe for new lawsuits."<sup>425</sup> The decision is ambiguous regarding whether section 4.33.3's viewing angle requirement will be applied retroactively, but some have speculated that strict compliance will only be required in new theaters.<sup>426</sup>

Retroactive application is entirely possible, if not probable, given the ambiguity in the Ninth Circuit's decision, resulting in costly construction and possibly, refurbishment of existing theaters.<sup>427</sup> Assuming a retroactive application of the holding, existing movie theaters within the Ninth Circuit will have to provide stadium seating, with "comparable" viewing angles, to wheelchair patrons in order to comply with the newly interpreted requirements of section 4.33.3.<sup>428</sup> Individual movie theaters with capacities of three hundred or more, however, will probably escape any construction or refurbishment because they are already required to disperse wheelchair seating and place seats in the stadium section.<sup>429</sup> Thus, any required construction or refurbishment will most prominently impact smaller movie theaters. As many as 18,000 theaters nationwide now face possible alterations in their seating.<sup>430</sup>

These movie theaters already have to meet other wheelchair area requirements that are connected and give context to the "lines of sight comparable" provision.<sup>431</sup> Wheelchair seating areas must "adjoin an

422. *Or. Paralyzed Veterans of Am.*, 339 F.3d 1126, cert. denied, 124 S. Ct. 2903 (2004).

423. The Ninth Circuit's reach includes all stadium-style theatres in California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam, and the Northern Mariana Islands. See United States Court for the Ninth Circuit, at <http://www.ce9.uscourts.gov> (last visited Jan. 23, 2005).

424. *Beyond the Letter of the ADA*, THE OREGONIAN, July 3, 2004, at D6.

425. Ashbel S. Green, *Movie-Theater Decision Supports Lawsuit Brought by 3 Disabled Oregon Residents*, THE OREGONIAN, July 1, 2004, at C1 (quoting Kathleen L. Wilde, legal director of the Oregon Advocacy Center) (internal quotation marks omitted).

426. Bob Egelko, *Wheelchair Users Win Court Ruling; Theaters Must Offer Equal Seating*, S.F. CHRON., Aug. 14, 2003, at A17.

427. Indeed, one of the attorneys involved in the case agreed with Judge Kleinfeld that retroactive application of the rule will be required. See Watson, *supra* note 6, at 1 (quoting Kathleen L. Wilde, of the Oregon Advocacy Center in Portland). Kathleen L. Wilde, who represented the plaintiffs, said the Ninth Circuit's decision "means retrofit." *Id.* (internal quotation marks omitted).

428. See *Or. Paralyzed Veterans of Am.*, 339 F.3d 1126.

429. See *supra* note 47 and accompanying text.

430. Chris Cobbs, *Battle over Movie Seating May Be Settled*, ORLANDO SENTINEL, June 29, 2004, at C1.

431. The key features of accessible stadiums are as follows: at least one percent of the seating must be wheelchair seating locations, with each location being an open, level space capable of



accessible route,” be an integral part of the fixed seating plan, and be adjacent to companion seating.<sup>432</sup> These three wheelchair area requirements could complicate the construction and refurbishment process because they must coexist with the viewing angle requirement. For some theaters, this may prove to be structurally impractical.<sup>433</sup> If so, it is possible that failure to adhere to section 4.33.3 will be excused.<sup>434</sup> The combination of all these requirements will inevitably lead to a new, and perhaps different design for the stadium section. At this point, it is unclear if a new and different design for stadium sections will provide the same advantages to non-disabled patrons that the current design does.<sup>435</sup> After all, “[d]esigning a theater that meets every rule is no small trick.”<sup>436</sup>

Another possible result of the Ninth Circuit’s decision is a waste of time, effort, and money.<sup>437</sup> The court gives no indication as to what may be the least expensive design. The only instruction it gives movie theaters is “to require a viewing angle for wheelchair seating *within the range of angles* offered to the general public.”<sup>438</sup> There is a possibility that movie theaters will spend substantial amounts of money,<sup>439</sup> time, and resources in trying to comply with the ADA, without any guarantee that the constructions or refurbishments they perform will,

accommodating one person and having a smooth, stable, and slip-resistant surface. 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003). Accessible seating must be an integral part of the seating plan in order to prevent wheelchair patrons from being isolated from others. *Id.* Companion seats must be provided next to each wheelchair seat, and wheelchair seating locations must be on an accessible route that provides access from parking and transportation areas and connects to all public areas. *Id.* An online version of these requirements is available at <http://www.usdoj.gov/crt/ada/stadium.txt> (last visited Jan. 23, 2005).

432. 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

433. See *supra* notes 420–421 and accompanying text.

434. The only way a public accommodation can “justify its failure to provide access” in accordance with the requirements of the ADAAG “is by showing structural impracticability.” *Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 193 F.3d 730, 740 (3d Cir. 1999).

435. For a sample of the current stadium design’s advantages, see *supra* notes 39–42 and accompanying text.

436. *Beyond the Letter of the ADA*, THE OREGONIAN, July 3, 2004, at D6.

437. In *Lara*, the district court made it quite clear that it was aware of the costs of retrofitting an existing stadium-style movie theater when it required all eighteen of Cinemark’s theaters to be retrofitted. See *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H, 1999 WL 305108, at \*2 (W.D. Tex. Feb. 4, 1999), *rev’d on other grounds*, 207 F.3d 783 (5th Cir. 2000). Retrofitting requires each theater auditorium to shut down during the process. *Id.* This results in “some permanent loss of seating capacity,” which in turn leads to a potential loss in revenue. *Id.* For an example of estimated costs of retrofitting, see *supra* note 279.

438. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1133 (emphasis added).

439. AMC Theaters may spend up to twenty-one million dollars on the retrofitting of twelve stadium-style theaters in order to bring them into compliance with the viewing angle requirement. *AMC Settlement Severs Line-of-Sight from Barrier Issue*, 27 DISABILITY COMPLIANCE BULLETIN (Jan. 23, 2004).

in fact, bring them into compliance.<sup>440</sup> The Ninth Circuit's ruling could mean that thousands of movie theaters "must now be destroyed or expensively retrofitted."<sup>441</sup> The government contends that it is being reasonable. Indeed, at oral argument in *Cinemark USA, Inc.*, the attorney from the DOJ said, "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."<sup>442</sup>

Nevertheless, renovations of some sort will inevitably result.<sup>443</sup> With theaters spending millions on renovations and suffering devastating costs in return,<sup>444</sup> moviegoers themselves could also be adversely impacted. In a brief in support of Regal's appeal of the Ninth Circuit decision, NATO stated that "refitting movie theaters probably would cost hundreds of millions of dollars."<sup>445</sup> The exhibition industry already has its share of costly repairs. Older, traditional slanted-floor theaters are being converted into theaters with stadium seating for a price of \$75,000–\$100,000 per screen.<sup>446</sup> Sloped-floor theaters are now considered an obsolete asset, when they practically could have been "viable for another decade."<sup>447</sup> From 1996 to 1999, the five major theater chains spent more than \$4 billion building new stadium-style theaters in order to keep up with the popular trend.<sup>448</sup> Meanwhile, the cost of general operations is increasing. Movie theaters spend roughly \$4,200 a week on the operational costs associated with showing a film, such as keeping lights turned on and video games running, and as the minimum wage continues to rise, so do the payroll

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440. See Ellsworth, *supra* note 319, at 1137 (arguing that clarifying the meaning of section 4.33.3 "would save a great deal of time, money, and judicial resources").

441. Laurie Asseo, *High Court Interested in Theater's ADA Case*, THE DENVER POST (Jan. 13, 2004), available at <http://www.denverpost.com/Stories/0,1413,36%257E56%257E1887080,00.html> (quoting lawyers for Regal Cinemas, Inc.) (internal quotation marks omitted).

442. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 582 n.10 (6th Cir. 2003) (internal quotation marks omitted). The DOJ said it would "work with the defendants to come up with a reasonable approach." *Id.* (internal quotation marks omitted).

443. Regal argued that "[i]f this decision is permitted to stand, not one public facility is safe from post-construction second-guessing or ruinous retrofitting liabilities." Christine M. Garton, *Disabled Moviegoers Fight Stadium Seating*, LEGAL TIMES, June 14, 2004, at 8 (citation omitted) (internal quotation marks omitted).

444. See Asseo, *supra* note 441.

445. *Id.*

446. Jennifer Wirth, *Renovated Theater Reopens*, FLA. TODAY, available at <http://ccs.flatoday.com/fe/Events/eventsstoryA6493A.htm> (last visited Nov. 3, 2004); see also Michael L. Campbell, *The State of Our Art*, available at <http://www.boxoff.com/jan99story4.html> (last visited Nov. 3, 2004).

447. Jill Goldsmith, *Hollywood Vexed by Plex Success*, VARIETY, May 17–23, 2004, at 67.

448. *Id.*

costs.<sup>449</sup> The exhibition industry gambles \$15 million to \$25 million on a single megaplex, and the “growing movement to make stadium seating more accessible . . . could result in even higher initial investments by exhibitors for new theaters.”<sup>450</sup> There is pressure from the movie studios to relinquish “a bigger piece of the box office pie.”<sup>451</sup> In addition, the stock of the three largest theater companies in the industry has fallen seventy to eighty percent in recent years.<sup>452</sup> This is due to the excitement over stadium-style theaters having reached its peak and the saturation of competition in the marketplace.<sup>453</sup> Theater chains are saying redesign efforts “will raise ticket prices and possibly obstruct the views of patrons who [do not] have disabilities.”<sup>454</sup> Or in the worst case scenario, it might even “put an end to stadium theaters completely” if renovations cannot be completed cost effectively.<sup>455</sup>

Meanwhile, movie theaters within the Fifth Circuit are immune to any of these potential tribulations. The Ninth Circuit’s decision has led to a circuit split, which has thrown stadium seating into “chaos.”<sup>456</sup> The Fifth Circuit’s ruling in *Lara* that movie theaters need only provide unobstructed views has been challenged by the Ninth Circuit, and many other courts across the country have since deferred to the DOJ’s interpretation of section 4.33.3.<sup>457</sup> In addition to the jurisdictional issues the Ninth Circuit’s decision raises,<sup>458</sup> there is now an absence of uniform federal regulation on the subject. Furthermore, more theater companies may decide to focus future construction efforts outside the reach of the Ninth, Sixth, or First Circuits. The *Oregon Paralyzed Veterans of America* case has “great practical importance as companies contemplating building or operating theaters in states not covered by one of these courts, and design professionals advising them, must consider whether they want to risk litigation by building a theater that

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449. Melanie Bysouth, *Cost of Tickets on the Rise, But You Get What You Pay For*, DAILY TITAN INTERACTIVE, available at [http://dailytitan.fullerton.edu/issues/spring\\_01/03\\_16/opinion/03\\_16\\_bysouth.html](http://dailytitan.fullerton.edu/issues/spring_01/03_16/opinion/03_16_bysouth.html) (last visited Jan. 10, 2005).

450. Campbell, *supra* note 446. This is up from the three to five million dollars the industry used to spend. *Id.*

451. *Id.* However, exhibitors are beginning to gain a better negotiating position due to rocketing film costs and the studios’ shouldering of most of the risk. See Goldsmith, *supra* note 447, at 1.

452. Warren Gump, *Stadium Theaters = Massive Losses*, THE MOTLEY FOOL (July 13, 2000), at <http://www.fool.com/Server/FoolPrint.asp?File=/news/foth/2000/foth000713.htm>.

453. *Id.*

454. Susan M. LoTempio, *Seating Takes Fun Out of Going to Movie*, iCAN (Mar. 12, 2001), at <http://www.icanonline.net/news/fullpage.cfm/articleid/88F857BF-27D2-4150-8472D0B057500>.

455. *Id.*

456. Thiruvengadam, *supra* note 270, at 6D.

457. See *supra* notes 138–194 and accompanying text.

458. See *supra* notes 289–290 and accompanying text.

does not provide wheelchair users” with comparable viewing angles.<sup>459</sup>

Because of this circuit split, the issue of whether section 4.33.3 imposes a viewing angle requirement on movie theaters seemed likely to move to the Supreme Court,<sup>460</sup> even though in earlier district court cases on this same issue, the Supreme Court denied petitions for certiorari.<sup>461</sup> On June 24, 2004, the Supreme Court held a private conference to consider whether to grant review to Regal Cinemas.<sup>462</sup> Four days later, at the urging of the George W. Bush administration, the Supreme Court denied review and refused to consider whether disabled moviegoers must be given better seats.<sup>463</sup> One of the factors leading to this denial may have been Solicitor General Theodore Olson’s comments to the Justices that plans are in effect to revise the government guidelines, clear up confusion, and ensure that theater designs provide wheelchair patrons with seating away from the sidelines.<sup>464</sup> Settlement seems much more likely now that Regal exhausted its avenues to appeal.<sup>465</sup> Kathleen L. Wilde, attorney for the Oregon Advocacy Center, has said that they are “open to a settlement,” and theater owners also appear willing to find a common ground since they face “hundreds of millions of dollars” in costs if a compromise is not reached.<sup>466</sup>

### B. *Assessment of Various Proposed Solutions*

This section presents a summary of various proposed solutions to the viewing angle issue in stadium-style theaters: (1) place wheelchair seats in the far back of the stadium section of the theater; (2) place wheelchair seats in the center of the stadium section; (3) place wheelchair seats at the ends of stadium section rows with access via a ramp

459. Lawrence B. Hagel, *Court Rules on Stadium-Style Movie Theaters*, PARAPLEGIA NEWS, Nov. 1, 2003, at 53.

460. See Watson, *supra* note 6, at 1. Greg Hurley, attorney for NATO, had speculated that there was a “good chance” that the case would wind up before the Supreme Court because of the circuit split. *Id.*

461. *Stadium-Style Movie Theaters That Have Wheelchair Seating Only Front Rows Violate Americans with Disabilities Act*, Federal District Court in California Rules in Case Filed by Justice Department Against AMC, ENT. L. REP. 17, Apr. 2003.

462. Garton, *supra* note 443, at 8.

463. The Supreme Court denied certiorari on Monday, June 28, 2004. Or. Paralyzed Veterans of Am. v. Regal Cinemas, 339 F.3d 1126 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2903 (2004).

464. Cobbs, *supra* note 430.

465. Nicole Sperling, *Justices Refuse Access Case: No More Appeals for Theater Owners*, THE HOLLYWOOD REPORTER, June 29–July 5, 2004, at 3 (citation omitted) (internal quotation marks omitted). See also Cobbs, *supra* note 430.

466. Cobbs, *supra* note 430 (internal quotation marks omitted).

instead of stairs; and (4) remove the traditional section altogether and split the theater into two separate stadium sections.

1. *Placing Wheelchair Seats in the Far Back of the Theater's Stadium Section*

To satisfy the requirements endorsed by the Ninth Circuit, one proposed solution is to place wheelchair seating in the far back of the theater's stadium section. However, for movie theater owners, placement of wheelchair seating in the back row of an auditorium could potentially cause a number of other problems. Giving wheelchair patrons access to that last row is problematic. Access is currently achieved through the use of elevators.<sup>467</sup> But elevators are normally only used in theaters with capacities of three hundred or more.<sup>468</sup> For those smaller theaters with capacities of less than three hundred, elevators would have to be installed, as they are not likely to be currently incorporated into the theater layout and design. This leads to considerable expense and impracticality. Since there are about ten thousand individual theaters with stadium seating, “[i]t would cost \$100,000 to install elevators in each of those or \$50,000 each for wheelchair lifts.”<sup>469</sup>

Existing theaters may find it impractical to provide elevator access to each of its auditoriums. This is especially problematic for theaters with a particularly large number of screens.<sup>470</sup> Sixteen-screen theaters, for example, would theoretically have to provide sixteen elevators in the building. Existing theater buildings are probably not equipped or properly designed to handle such a substantial number of elevators in their current structures.<sup>471</sup> To accommodate such elevator access, existing theaters will likely have to undergo demolition and complete reconstruction.<sup>472</sup> While new theaters will not face the

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467. In *Cinemark USA*, Cinemark argued that it would be a “major and expensive effort” to rework its seating areas, built on concrete, because a ramp or elevator would be needed to reach the elevated level. Ominsky, *supra* note 286, at 8–9.

468. For example, in Cinemark's theaters that seated 300 or more, the wheelchair locations in the rear were accessed by elevator. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 572 (6th Cir. 2003).

469. Associated Press, *Supreme Court Refuses Movie-Seating Case* (June 28, 2004), available at <http://listserv.uic.edu/htbin/wa?A2=ind0406&L=greatlakes&T=0&H=1&O=D&F=&S=&P=4986> (last visited Jan. 23, 2005).

470. According to NATO, most theaters with stadium seating are large multiplexes. *Id.*

471. In its appeal, Regal Cinemas argued that the Ninth Circuit's decision would impose devastating costs on the companies whose thousands of stadium-style theaters were built with stair access in mind. Asseo, *supra* note 441. The fact that these theaters' seats can only be reached by climbing stairs indicates that they are not elevator equipped, and the costs involved suggest the theaters are not properly designed to incorporate elevators either.

472. See *supra* notes 420–421 and accompanying text.

problems associated with reconstruction, creating a design that incorporates a substantial number of elevators may prove to be structurally and financially impossible.<sup>473</sup> Furthermore, there are the added, continuing expenses associated with maintaining the working use of the elevators. No movie theater would likely stay in business, as it is doubtful that the amount earned from every concession sale could adequately cover such costs.<sup>474</sup>

## 2. *Placing Wheelchair Seats in the Center of the Stadium Section*

A second proposed solution is to provide wheelchair seating in the direct center of the stadium section. This solution almost guarantees a ringing endorsement from wheelchair patrons and most certainly satisfies the Ninth Circuit's validation of the DOJ's interpretation of section 4.33.3.<sup>475</sup> Seats in the center of the stadium section are, in all likelihood, considered the best seats in the house.<sup>476</sup>

There are several complications that arise from affording wheelchair patrons these "best seats in the house." Reserving such a prime patch of seats only for wheelchair access would monopolize a sizeable area of stadium room, substantially decreasing the seating capacity in stadium-style theaters.<sup>477</sup>

More importantly, wheelchair seating in the center of the theater could constitute a substantial threat to the health and safety of every patron in the theater, including those in wheelchairs. ADA compliance is "no longer obligatory" in the event of a "direct threat" to the health and safety of others.<sup>478</sup> Wheelchair seating in the center of the

473. See Associated Press, *supra* note 469.

474. Theater exhibitors only take roughly fifty percent of a film's box office take. See Carl DiOrto, *B.O. Doesn't Tell 'Samurai' Tale*, VARIETY, Jan. 19–25, 2004, at 6.

475. Steven Fellman, attorney for NATO, stated that "any place in the middle third is pretty good." Cobbs, *supra* note 430 (interal quotation marks omitted).

476. See *supra* note 338 and accompanying text.

477. One possible solution to this reduction in stadium seating for the non-disabled would be to create conventional seats that can also be folded up and put away to make room for wheelchairs when necessary. This same technology, used in Baltimore's baseball stadium, can theoretically be used effectively in movie theaters. See Carlson, *supra* note 44 at, 913–14 n.106 (discussing Robert P. Bennett, *ADA Goes to the Movies*, PARAPLEGIA NEWS, Apr. 1994, at 53). Section 4.33.3 allows for "[r]eadily removable seats." 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003). However, this option largely pertains to sports arenas and the placement of such removable seats in already existing wheelchair spaces. Putting removable seats in stadium-style movie theaters' existing wheelchair spaces (which are located in the traditional section or along the access aisle) would not solve the viewing angle problem. Furthermore, were the concept applied to seats in the stadium section, the safety issues remain the same, regardless of whether the conventional seats can be folded out of the way.

478. *Fielder v. Am. Multi-Cinema, Inc.*, 871 F. Supp. 35, 39 (D.C. Cir. 1994) (citing 42 U.S.C. § 12182(b)(3) (2000); 28 C.F.R. § 36.208(a)). Direct threats are defined as "significant risk[s] to the health or safety of others that cannot be eliminated by a modification of policies, practices,

stadium section could prove hazardous in the event of a fire, bomb threat, or other emergency. Both the wheelchair patron and the others surrounding him or her could find their safety threatened in trying to maneuver around other seats and the wheelchair itself in trying to exit the theater.<sup>479</sup> Thus, for safety reasons,<sup>480</sup> wheelchair seating in the center of the stadium section does not prove to be an entirely desirable option either.

### 3. *Placing Wheelchair Seats at the Ends of Stadium Section Rows*

A third proposed solution is to place wheelchair seats on the ends of stadium section rows, and provide access to those seats through the use of a ramp rather than stairs. It has been suggested that the Ninth Circuit's decision may require theaters "to install wheelchair ramps to [the] upper-level stadium sections."<sup>481</sup> Again, this solution will likely comport with the DOJ's interpretation of section 4.33.3 and prove popular with wheelchair patrons. Although seats at the end of the stadium rows on the aisle are not quite the "best seats in the house," they nevertheless provide the desired viewing angles.<sup>482</sup>

The most logical way to provide wheelchair access to seats in the stadium section of a theater, whether at the end or the center of the row, is to remove some of the stairways and install ramps.<sup>483</sup> The ADAAG provides strict guidance on ramp implementation in public accommodations. Ramps should have the least slope possible, and the maximum slope ratio of any ramp's rise to run in new construction is 1:12.<sup>484</sup> A 1:12 ratio results in an approximate grade of 8.33 percent.<sup>485</sup> The maximum rise for any run is thirty inches.<sup>486</sup> In *Oregon*

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or procedures, or by the provision of auxiliary aids or services." *Id.* (internal quotation marks omitted) (citing 42 U.S.C. § 12182(b)(3); 28 CFR § 36.208(b)).

479. The United States District Court for the District of Columbia found persuasive the argument that "the presence of a wheelchair and its occupant in the midst of able-bodied patrons in fear for their own safety could impede a mass exodus of the theater" when an emergency arises. *Fiedler*, 871 F. Supp. at 39.

480. Whether wheelchairs pose significant risks to other moviegoers calls for an "individualized assessment" of the wheelchair patron's physical limitations and location in the theater. *Id.* at 40. (internal quotation marks omitted).

481. Egelko, *supra* note 426.

482. Even though on the end, these seats are still in the stadium section, which DOJ counsel said "dramatically improve[s] the experiences for people in wheelchairs." *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 583 n.10 (6th Cir. 2003) (internal quotation marks omitted).

483. Because many nondisabled patrons may find it easier to walk on stairs, "[r]amps should be employed in addition to (rather than in place of) stairs." Ramps and Accessible Thresholds (May 1997), available at <http://www.abledata.com/text2/ramps.htm>. [hereinafter Ramps].

484. 28 C.F.R. pt. 36, app. A, §§ 4.8.1-4.8.2 (2000).

485. *United States v. AMC Entm't, Inc.*, 245 F. Supp. 2d 1092, 1101 (C.D. Cal. 2002) (granting a motion of summary judgment for the government based on a report that the ramps in question exceeded 8.33 percent, and thus violated the ADAAG).

*Paralyzed Veterans of America*, each row in the stadium section was raised fifteen to eighteen inches “above the one in front of it.”<sup>487</sup> It is not clear from the facts of the case whether this fifteen to eighteen inch raise complies with the thirty-inch maximum rise for any run requirement or results in a slope grade of 8.33 percent or less. The court did not address these concerns.

In addition to having to meet the ADAAG requirements, ramps may pose their own safety issues and considerations.<sup>488</sup> A ramp may adequately serve a wheelchair patron, but may pose significant problems for non-disabled patrons. For example, if the ramp in a stadium section is too steep, it could prove dangerous for elderly patrons, whose balance and coordination may not be of the requisite level needed to safely traverse the ramp.<sup>489</sup>

Also, one should take into account the inevitable spilling of beverages and other substances that occurs during a movie.<sup>490</sup> Moviegoers may be prone to slip and fall on the ramps under such conditions in their attempt to rush and use the bathroom during the movie, or simply while exiting at the conclusion of the film. Carpeting of the ramp could avoid the danger of spilling, but some types of carpeting present ease of wheelchair use problems.<sup>491</sup>

#### 4. *Eliminating the Traditional Section and Splitting the Theater into Two Stadium Sections*

Perhaps the best solution to incorporating the viewing angle requirement is to eliminate the traditional section altogether and split the theater into two different stadium sections, one upper and one lower.<sup>492</sup> Some newly constructed theaters have already incorporated

486. 28 C.F.R. pt. 36, app. A, §§ 4.8.1–4.8.2 (2000).

487. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1127.

488. Improperly designed ramps can present safety hazards, including “too steep an incline, an uneven platform which may cause tipping of a wheelchair, unsupported plans which may buckle under a user’s weight, and unanchored planks, platforms or tracks which may ‘fall off’ the step.” Ramps, *supra* note 483.

489. For safety reasons, theaters want to use ramps in addition to stairs, not instead of them.

490. Properly installed ramps are “stable, firm and slip-resistant.” Ramps, *supra* note 483 (internal quotation marks omitted).

491. Carpeting is covered under ADAAG regulation 4.5.3., which covers “the pile thicknesses allowed and fastening considerations.” *Id.* Carpeting surfaces make wheelchair operation more difficult because, in some cases, they require “more energy output for manual wheelchair users and greater stress on the batteries and machinery of power wheelchairs or scooters.” *Id.*

492. Kathleen L. Wilde, legal director of the Oregon Advocacy Center, has said that “a newer, better design puts the entrance in the middle of the theater.” Green, *supra* note 425. Splitting the stadium sections in two accomplishes this goal.



this design.<sup>493</sup> Those that have will probably avoid compliance problems.<sup>494</sup> These types of theaters continue to place wheelchair seating in the access aisle; however, the main difference when the stadium section is split into two parts is that the access aisle is more level with the center of the screen, thereby affording smaller vertical viewing angles.<sup>495</sup> Both the upper and lower stadium sections are accessed via stairs.

This solution has only two real disadvantages. One is that the patrons in the very front rows of the lower stadium section still have very sharp viewing angles, similar to, if not exactly like those in a traditional section. However, this does not negatively affect wheelchair patrons because wheelchair seating is located in the access aisle, between the lower and upper stadium sections. The effect on other non-disabled patrons is not as severe either because there are still plenty of seats available in the upper stadium section.<sup>496</sup> The second disadvantage is that this solution is only really feasible in newly constructed theaters. Existing theaters will have to undergo major renovations and reconstructions at considerable expense if they want to take advantage of this option.

On the other hand, the advantages to splitting the stadium section into two parts are numerous.<sup>497</sup> First, wheelchair patrons are afforded viewing angles that are *comparable*, in every sense of the word, to those of the general public. Second, the notion of a “wheelchair ghetto” is far removed because wheelchair patrons are made a more integral part of the viewing audience, considering that they are sandwiched between two stadium sections.<sup>498</sup> The effect is to feel as if one is actually in a stadium seat.<sup>499</sup> Third, the problems associated with

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493. The newly constructed AMC River East 21 Theaters in downtown Chicago have this design in several of the larger theaters.

494. Cobbs, *supra* note 430.

495. In theaters with both a traditional section and a stadium section, the access aisle is located on a sloped floor and behind the traditional section. Patrons in either the traditional section or access aisle have to look up to the screen instead of directly in front of them, thus creating much higher viewing angles.

496. These patrons may have to plan in advance to get to the theater early because otherwise they will not have access to the upper stadium section seats.

497. At an IMAX theater in Houston, Texas, Julia Hollenbeck, a wheelchair patron, had this to say about the arrangement, “You have the best seat in the house. It’s fantastic. You don’t have anyone staring at you. It’s comfortable, it’s pleasant, you can swing in and out easily . . . If the other theaters would do it, I’d go all the time.” Nicole Bondi, *Wheelchair Users Criticize Theater Seating*, iCAN (Mar. 8, 2001) (internal quotation marks omitted), available at <http://www.icanonline.net/news/fullpage.cfm?articleid=6A9F5B3C-19C3-44B4-90E6AEB1995AFF59>.

498. See *supra* note 44.

499. See Comment, *supra* note 69, at 729 (arguing that future courts could avoid administrative rulemaking by adopting the DOJ’s interpretation of the integration requirement found in

ramps, or the dangers that may result from the placement of wheelchairs in the middle of the theater in an emergency are nonexistent. Finally, while satisfying the viewing angle requirement, this solution also satisfies the access and emergency exit, integral part of a fixed seating plan, and adjacency to companion seating requirements.<sup>500</sup> Thus, the best proposed solution to the problem of complying with the Ninth Circuit's decision, if only applied prospectively and not retroactively, is for newly constructed movie theaters now and in the future to get rid of the traditional section in their designs and split the stadium section in half.

*C. Proposed Resolution: Apply the Ninth Circuit Decision Prospectively and Amend Section 4.33.3 or Adopt a New Rule before Imposing a Viewing Angle Requirement on Existing Theaters*

In his dissent, Judge Kleinfeld said: "Regulating movie theater architecture . . . by vague judicial fiat is unjust."<sup>501</sup> The Ninth Circuit threatens to instigate such an injustice by deferring to the DOJ's interpretation of section 4.33.3 and applying it retroactively. In publishing final regulations that implement Title III of the ADA, the DOJ incorporated the Access Board's ADAAG without change.<sup>502</sup> While Congress may have charged the DOJ with enforcing Title III and promulgating regulations, the DOJ was also required to adopt regulations that meet the minimum guidelines and requirements issued by the Access Board.<sup>503</sup> Thus, because the Access Board has already amended its own guidelines, the DOJ should follow suit and formally amend its regulation to meet these new requirements.

Section 4.33.3 incorporates ambiguous language that has been subject to substantial amounts of litigation.<sup>504</sup> District courts are split, circuits are split, the Supreme Court refuses to get involved, and the

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section 4.33.3 instead of the sightlines requirement). Integration of stadium seating "affirm[s] the civil rights model of integration on which the ADA is based." *Id.* at 731. Basing a ruling on the integration requirement instead of the sightlines requirement would arguably prove beneficial because: (1) "the integration [requirement] is not burdened by the administrative history concerns of the sightlines dispute;" and (2) "the integration requirement obviates the need for courts to draft technical, hyperspecific seating rules." *Id.* at 731-32. Furthermore, a ruling based on integration would better accomplish the intent of Congress: to "advanc[e] the debate over disability discrimination from a physical, medical one to" one focused on segregation and its social consequences. *Id.* at 734.

500. See 28 C.F.R. pt. 36, app. A, § 4.33.3 (2003).

501. *Or. Paralyzed Veterans of Am.*, 339 F.3d at 1134 (Kleinfeld, J., dissenting).

502. 28 C.F.R. § 36.406 (2003).

503. See 42 U.S.C. § 12204 (2000).

504. See cases cited *supra* note 9.

Access Board and the DOJ are in disagreement over whether wheelchair locations are always required in stadium sections.<sup>505</sup> Instead of continually bringing lawsuits against movie theater chains over an issue that has been around for nine years,<sup>506</sup> the DOJ and Access Board should work together to revise the regulations and make them clearer. Six years have passed since the DOJ put its current interpretation of section 4.33.3 into effect,<sup>507</sup> and “[i]t is unsettling that the government has not talked with the industry to set standards for this.”<sup>508</sup> In promoting its interpretation, the DOJ’s initiation of “a calculated litigation campaign in lieu of rulemaking” constitutes an abuse of its authority.<sup>509</sup> The proper course is to adopt “a formal amendment—almost certainly prospective and after notice and comment.”<sup>510</sup> Despite the Supreme Court’s denial of certiorari, the outlook is somewhat bright: Solicitor General Theodore Olson said that the government guidelines “will soon be revised” and “will clear up confusion.”<sup>511</sup> Indeed, the DOJ has announced such plans for January 2005, including adoption of the Access Board’s amended guidelines.<sup>512</sup>

As the Ninth Circuit decision currently stands, it should only apply on a prospective basis due to the high costs of renovation and the confusion surrounding adequate compliance.<sup>513</sup> The soon-to-be-revised Title III regulations should require that all theaters provide wheelchair patrons with viewing angles comparable to those in the stadium section and, at the same time, supply a theater floor plan detailing the exact method of compliance. The separation of theaters into both a “stadium” section and a “traditional” section needs to be eliminated. Wheelchair patrons and movie theater owners deserve nothing less.

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505. See *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 565 (1st Cir. 2004) (citing 69 Fed. Reg. at 44,198).

506. See *Hoyts Cinemas*, 256 F. Supp. 2d at 92–93.

507. *Id.* at 92 (emphasis omitted).

508. Thiruvengadam, *supra* note 270 (quoting Steven Fellman, attorney for NATO) (internal quotation marks omitted).

509. Ellsworth, *supra* note 319, at 1139.

510. *Hoyts Cinemas*, 380 F.3d at 569.

511. Associated Press, *supra* note 469.

512. *Hoyts Cinemas*, 380 F.3d at 565 n.6 (citing Unified Agenda, 69 Fed. Reg. 37,734, 37,749 (June 28, 2004)).

513. The industry cannot afford to rebuild the 18,000 theaters that the Ninth Circuit’s decision affects as it could cost “hundreds of millions of dollars.” Cobbs, *supra* note 430.

## VI. CONCLUSION

Section 4.33.3 has resulted in substantial litigation over the years because it is an ambiguous regulation in light of the development of stadium seating in movie theaters.<sup>514</sup> Both the DOJ and the Ninth Circuit believe that the phrase “lines of sight comparable” now encompasses viewing angles, something it did not at the time of promulgation.<sup>515</sup> The Fifth Circuit disagrees,<sup>516</sup> the Access Board’s amendments to the ADAAG have yet to be adopted,<sup>517</sup> and the Supreme Court has refused to consider the issue.<sup>518</sup> Wheelchair patrons are certainly entitled to the “full and equal enjoyment”<sup>519</sup> of the advantages of stadium seating, but architects and movie theater owners should not be “penalized” for having complied with the regulations as they were interpreted at the time of construction of their stadium-style theaters.<sup>520</sup> The costs associated with retrofitting are too high to proceed without clear and specific guidance.<sup>521</sup> Instead of continuing to support an interpretation of an ambiguous phrase, and attempting to engage in retroactive regulation, the DOJ should refrain from future litigation and involve the Access Board in either revising section 4.33.3 or adopting a new regulation.<sup>522</sup> The Ninth Circuit decision should only be applied prospectively, and existing theaters should be relieved of any viewing angle requirements until the regulation is revised.

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514. See *supra* notes 292–326 and accompanying text.

515. See, e.g., *Or. Paralyzed Veterans of Am.*, 339 F.3d 1126. See *supra* notes 252–258 and accompanying text.

516. See, e.g., *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000). See *supra* notes 125–137 and accompanying text.

517. See, e.g., *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 565 (1st Cir. 2004) (citing 69 Fed. Reg. at 44,198). See *supra* notes 105–113 and accompanying text.

518. See, e.g., *Associated Press*, *supra* note 469.

519. Section 302(a) of Title III of the ADA provides individuals full and equal enjoyment of public accommodations, and section 302(b) states: goods, services, and facilities must “be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.” 42 U.S.C. § 12182(a)–(b)(1)(B) (2000).

520. See *supra* notes 401–421 and accompanying text. See, e.g., *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 576, 581 (6th Cir. 2003).

521. See *supra* notes 437–455 and accompanying text.

522. See *supra* notes 501–513 and accompanying text.

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