The ADA Takes On the Movie Industry: Do the Disabled Have a Right to the Best Seats in the House?

By Laura K. McKibbin*

STADIUM-STYLE MOVIE theaters have revolutionized the movie-going experience. Cushioned rocker seats with high seatbacks that recline, cup holder armrests, ample legroom, and marvelous lines of sight: the simple innovation of putting each row of seats on its own tier has made stadium-style theaters the most comfortable way to view a movie outside of one's own home. American Multi-Cinema Entertainment Inc. ("AMC"), the first group to establish stadium-style seating in its theaters, has described such stadium seating in its publicity materials as "'virtually suspend[ing] the moviegoer in front of [a] wall-to-wall screen.'" The audience is thus "'totally enveloped'" in the film "'because of the enhanced sight and sound presentation'" and unobstructed views of the screen. This design guarantees that "'all seats'" are the "'best in the house'"—that is, unless you are a wheelchair user.

Unfortunately, most of the time these ideal stadium section seats are not made available to wheelchair using patrons. While most theat-

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3. AMC Entm't, 232 F. Supp. 2d at 1095 (quoting AMC publicity materials).

4. Id.

5. See id. at 1096. In 2002, only 23.8% of AMC's stadium-style theater auditoriums had wheelchair seating located within the stadium seating section; wheelchair seating was located in the very front row in 17.6% of auditoriums. Id.; see also Or. Paralyzed Veterans v.
ter patrons are able to climb to the seats of their choice, wheelchair users are shuffled into the undesirable seats at the front of the house.\(^6\) It is generally accepted that watching a three-hour movie sitting a few feet from the screen is a decidedly uncomfortable experience. Sadly, in many theaters, wheelchair users have no other choice.\(^7\) This situation has spawned lawsuits against theaters across the country, with wheelchair patrons, as well as the government, alleging that this seating arrangement violates the Americans with Disabilities Act\(^8\) ("ADA" or "the Act").

As one observer noted, "the specter of an entire class of historically disadvantaged people relegated to the worst seats in the theater is . . . troubling because only forty years ago, African-American moviegoers were regularly confined to 'colored balconies,' unable to join the majority of patrons in the theater's most desirable seats."\(^9\) While segregation of the races is often based on animus and segregation of the disabled is usually based on economics and the difficulties of making accommodations for the physically impaired, Congress nevertheless passed the ADA to alleviate just such discrimination.\(^10\)

Ambiguities in the ADA's regulations, however, breed conflict. Theater owners rightfully concerned with "the bottom line" will continue to be less than fully accommodating to their patrons in wheelchairs until they are told exactly how to design a theater that will satisfy the ADA's requirements. In order to meet the needs of people with disabilities, the current ADA regulations must be revised to provide clear guidelines that can be applied during the design, construction, and alteration of buildings and facilities covered by the ADA. So long as the regulations are open to interpretation, lawsuits between theater owners and the disabled will continue.

Part I of this Comment examines the purposes and origins of the ADA's Title III. Part II discusses the controversy surrounding section 4.33.3 of the ADA Accessibility Guidelines,\(^11\) which requires that owners of theaters and other assembly areas provide wheelchair users with

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7. See id.
10. See id.
“comparable lines of sight.” Specifically, it analyzes the Department of Justice’s (“DOJ”) interpretation of the meaning of the phrase and the court cases waged against theater owners for alleged section 4.33.3 violations. Part III discusses the impact of the resulting circuit court split. Part IV looks to the newly revised ADA Accessibility Guidelines as a welcome solution to the ambiguity of the current code. The analysis ends with a determination that the DOJ should adopt the new guidelines as its own standard, only after clarifying certain continued ambiguities in the revised guidelines to prevent further litigation over stadium-style theater architecture.

I. Background

A. The Americans with Disabilities Act

In 1986, the first nationwide poll of people with disabilities (the “Harris Survey”) revealed that Americans with disabilities were an extremely isolated segment of the population. Their lifestyle, particularly the extent of non-participation of individuals with disabilities in social and recreational activities, was alarming. For example, the poll revealed that nearly two-thirds of all disabled Americans had not attended a movie in the previous year, as compared to only 22% of all adult Americans—a 44% gap. Similarly, 75% of all disabled persons interviewed had not seen a live theater or musical performance in the past year while only about 40% of all adult Americans had not done so. Moreover, two-thirds of all disabled persons had not attended a sporting event in the past year, compared to only half of all adult Americans.

In 1990, the United States Congress adopted the ADA to protect the fifty-four million Americans with disabilities from discrimina-

13. See id. at 553-55.
14. Id. at 554.
15. Id.
16. Id.
tion and isolation. Recognizing that the disabled were an entire class of historically disadvantaged people, the ADA's writers explicitly modeled the new legislation after the Civil Rights Act of 1964. Embracing the civil rights model cast the claims of people with disabilities in the form of guaranteed rights and gave them a government initiative to rely on when voicing their complaints. One of the first law review articles on the subject hailed the ADA as a “great leap forward in the civil rights movement.” When President George H. W. Bush signed the Act into law on July 26, 1990, he declared, “It will ensure that people with disabilities are given the basic guarantees of ... independence, freedom of choice, control of their lives, and the opportunity to blend fully and equally into the rich mosaic of the American mainstream . . . Let the shameful wall of exclusion finally come tumbling down.”

Despite the landmark legislation, the struggle to close the gap between people with and without disabilities is hardly over—the most recent Harris Survey shows that still only 36.2% of adults with disabilities reported going out to shows, movies, sporting events, classes, or club meetings, as compared to 61.7% of persons without disabilities. This continued disparity nearly fifteen years after the passage of the ADA suggests its importance and ultimate success lies not only in suc-

18. See 42 U.S.C. § 12101(b)(1) (2000). The subsection states that the chapter's purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Id.

19. See id. § 12101(a)(2) (finding that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem”).

20. See 42 U.S.C. § 12188(a) (“The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination . . . .”) The reference to “section 2000a-3(a)” is 42 U.S.C. § 2000a-3 (1999), the codified version of section 204(a) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.


cessful lawsuits against ADA violators, but in a better understanding of what exactly is "discrimination" under the ADA and what is the best way for society to promote integration and full participation of people with disabilities.

B. Title III: Protecting the Disabled in Areas of Public Accommodation

Title III of the ADA prohibits discrimination on the basis of "disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." This part of the ADA is intended to open the doors for the disabled to participate in everyday activities, such as buying food in a grocery store, enjoying a meal at a local restaurant, exercising at a local health club, or watching a movie in a theater.

Numerous private employers are subject to Title III requirements, including (but by no means limited to) hotels, restaurants, museums, zoos, day care centers, theaters, concert halls, stadiums, and motion picture houses. Under Title III of the ADA, these types of businesses must provide the same type and quality of care, services, and access to facilities to disabled customers as to non-disabled customers. For example, operators of public accommodations must not: (1) provide the disabled with goods, services, facilities, privileges, advantages, and accommodations that are not in "the most integrated setting appropriate to the needs of the individual," (2) deny the disabled equal opportunity to participate in activities that are not separate or different, or (3) exclude or deny an individual equal treatment because of that person's association or relationship with a person who has a disability.

Congress created two different standards of compliance for public accommodations—one for public accommodations already in existence when the Act was passed and one for newly constructed or

26. Id. § 12182(a).
27. See id. § 12101(a)(3) (stating that Congress created the ADA to address "discrimination against individuals with disabilities ... in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").
28. See id. § 12181(7).
29. See id. § 12182.
30. Id. § 12182(b)(1)(B).
31. Id. § 12182(b)(1)(C).
32. Id. § 12182(b)(1)(E).
altered public accommodations. Acknowledging that existing places of public accommodation would be difficult and expensive to alter, the ADA mandated modifications "readily achievable" by their owners, lessees, lessors, or operators, and created a loophole for those who could demonstrate that the required changes would result in an "undue burden." However, the ADA instructs that all new construction of commercial facilities and places of public accommodation, as well as alterations of existing ones, must be designed and constructed consistent with accessibility requirements for persons with disabilities.

There are two avenues for enforcement of Title III: (1) private lawsuits by individuals and (2) lawsuits brought by the DOJ. In private lawsuits, remedies are limited to permanent or temporary injunctions, restraining orders, or other equitable remedies. Injunctive relief includes an order "to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by [Title III]." Claims for monetary damages are not authorized. Therefore, any individual who sues under Title III is not doing so for personal monetary gain, but rather to force architectural changes that will give better access to the disabled. If the DOJ sues, on the other hand, the penalties for noncompliance include monetary damages, as well as the granting of a temporary or permanent injunction, as considered appropriate by the court. Violators can be fined up to $50,000 for a first violation and $100,000 for any subsequent violations.

Congress hoped to provide "clear, strong, consistent, enforceable standards" for achieving the ADA's mandate for the elimination of discrimination against individuals with disabilities. Soon after the passage of the ADA, however, commentators noted that Title III "cre-

33. See id. §§ 12182(b)(2)(A), 12183.
34. Id. § 12182(b)(2)(A)(iv).
35. See id. § 12182(b)(2)(A)(iii).
36. Id. § 12183.
37. See id. § 12188(a).
38. See id. § 12188(b).
39. See id. § 12188(a) ("The remedies and procedures set forth in section [42 U.S.C.] 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability violation of this subchapter . . . .").
40. See id. § 12188(a)(2).
41. See id. § 12188(a).
42. Id. § 12188(b)(2).
43. Id. § 12188(b)(2)(C).
44. Id. § 12101(b)(1)-(2).
ated more conflicts in implementation than any other aspect of the ADA."\textsuperscript{45}

C. The ADA Accessibility Guidelines and Section 4.33.3: The Line of Sight Clause

Prior to the enactment of the ADA, Congress charged the Architectural and Transportation Barriers Compliance Board ("Access Board" or "Board") with establishing and maintaining minimum guidelines and requirements for the standards issued pursuant to an older disabilities act commonly known as the Architectural Barriers Act of 1968.\textsuperscript{46} Upon the passage of the ADA, Congress also charged the Access Board with establishing minimum guidelines and requirements for implementing the ADA, including Title III.\textsuperscript{47} While the DOJ has the responsibility for issuing the actual regulations to be used in enforcing the ADA's requirements,\textsuperscript{48} Congress requires that its regulations be consistent with the Board's guidelines.\textsuperscript{49} On July 26, 1991, the Board published the ADA Accessibility Guidelines ("ADAAG").\textsuperscript{50} On the same day, the DOJ adopted ADAAG as its own standard for the construction and alteration of all facilities affected by the ADA.\textsuperscript{51}

The ADAAG triggers wheelchair seating requirements in any area seating four or more people.\textsuperscript{52} Section 4.33.3 of the guidelines requires that "[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities . . . lines of sight comparable to those for members of the general public."\textsuperscript{53} However, neither Congress, nor the DOJ, nor the Access Board defined the phrase "lines of sight comparable." This ambiguity has been the source of much dispute.

\textsuperscript{48} See 42 U.S.C. § 12186(b) (2000).
\textsuperscript{49} See id. § 12186(c).
\textsuperscript{50} See 64 Fed. Reg. at 62,248, 62,248.
\textsuperscript{51} See 28 C.F.R. pt. 36, app. A (2001); 28 C.F.R. § 36.402(b)(2) (2001) (stating alterations to existing public accommodations and commercial facilities must comply with appendix A); id. § 36.406(a) (stating new construction must comply with "appendix A (ADAAG)").
\textsuperscript{53} Id. § 4.33.3 (emphasis in original).
II. Interpreting Section 4.33.3: Stadium Seating in Movie Theaters

A. Stadium-Style Movie Theaters

Over the past decade movie theater chains have built multi-screen complexes with stadium-style seats in cities across America.54 These theaters were built in response to complaints that "traditional" movie theaters only offered "ideal" seats for relatively few patrons.55 To maximize unobstructed views for theater patrons, stadium-style theaters place most seats on stepped risers, with each row raised fifteen to eighteen inches above the one in front of it.56 Only the first four or five rows utilize the traditional theater set-up of non-stepped sloped rows.57 According to Larry Jacobsen, a former AMC executive, in a stadium theater there is a point one-third of the way back from the screen behind which all seats have an optimal view of the screen.58 Most theater-goers (66.3% of those surveyed) substantially prefer the seats in the stadium-style section to seats outside the stadium section.59 Nevertheless, stadium-style theaters create a problem. People with disabilities protest that such theaters ignore their needs.60 In stadium-style theaters only the first few rows in the theater are on a sloped floor accessible to wheelchairs.61 While most other theater-goers are free to climb the steps to find the seats of their choice, wheelchair users are relegated to accessible seats, primarily available only in the front rows.62 This arrangement places wheelchair users in a decidedly uncomfortable situation because they cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater.63 For some the pain is so acute it has forced them not

56. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 339 F.3d 1126, 1127 (9th Cir. 2003).
57. Id.
58. See Last, supra note 55.
61. See, e.g., AMC Entm't, 232 F. Supp. 2d at 1096.
63. Id. at 1128.
to go to movie theaters at all. Others report a "sense of embarrassment or isolation" from being forced to sit in a section of the movie theater where no one else is sitting. Some wheelchair users even feel anger and humiliation, or report "a feeling of being watched because everyone else in the audience is behind them." As a result, lawsuits have sprung up across the country alleging that such seating arrangements violate the ADA, specifically the ADAAG section 4.33.3, which requires that wheelchair seating provide "lines of sight comparable to those for members of the general public."

B. The DOJ's Interpretation of 4.33.3: What Does "Lines of Sight Comparable" Mean?

The DOJ has consistently argued that section 4.33.3 means that wheelchair patrons are entitled to a view comparable to that provided in the stadium section. In an amicus brief filed in Lara v. Cine-
The DOJ stated that "comparable" lines of sight, consistent with its plain meaning, means that patrons who use wheelchairs "must be offered lines of sight of similar quality, or that are 'equivalent.'" It therefore interpreted section 4.33.3 to require that, in stadium-style theaters, wheelchair users be provided with "lines of sight within the range of viewing angles offered to most of the general public, rather than some of the worst seating in the theater." In attempting to settle particular cases, the DOJ has asserted that wheelchair seating locations must:

1. Be placed within the stadium-style section of the theater, rather than on a sloped floor or other area within the auditorium where tiers or risers have not been used to improve viewing angles;
2. Provide viewing angles that are equivalent to or better than the viewing angles (including vertical, horizontal, and angle to the top of screen) provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and
3. Provide a view of the screen, in terms of lack of obstruction (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium.

The DOJ's interpretation has not yet been codified into an official regulation.

C. Judicial Interpretation of 4.33.3

1. *Lara v. Cinemark*: The Fifth Circuit Rejects the DOJ's Interpretation and Holds a "Comparable Line of Sight" Means an Unobstructed View

Soon after construction was completed in September 1997, Tinseltown USA, a new movie cineplex owned by Cinemark USA, Inc., opened in El Paso, Texas. Tinseltown became the biggest cineplex in El Paso with twenty stadium-style movie theaters. Soon after the cineplex opened, disabled patrons in wheelchairs discovered that they could not fully access the theaters or watch movies without discomfort.

In an effort to meet these requirements, United Artists pledged to spend at least $250,000 a year. *Id.*

70. 207 F.3d 783 (5th Cir. 2000).
72. *Id.*
73. ADA Accessibility Guidelines for Buildings and Facilities, 64 Fed. Reg. 62,248, 62,278 (proposed Nov. 16, 1999); see also Lara, 207 F.3d at 788.
74. *Lara*, 207 F.3d at 785.
because wheelchair seating was only provided in the front rows.\textsuperscript{76} After attempts by advocacy groups to negotiate design changes with Cinemark failed, \textit{Lara v. Cinemark}\textsuperscript{77} was filed in federal court on behalf of eight disabled individuals and two advocacy groups in El Paso.\textsuperscript{78} \textit{Lara} became the first case to visit the issue of what section 4.33.3 requires of movie theater owners.\textsuperscript{79}

Cinemark claimed it complied with the ADA by following the accessibility standards pronounced in the ADAAG.\textsuperscript{80} The district court disagreed, finding that Cinemark had violated the "clear and unambiguous" meaning of section 4.33.3.\textsuperscript{81} The court reasoned that the "common, ordinary, English language, dictionary meaning" of the word "comparable" is "equivalent or similar."\textsuperscript{82} Therefore, the district court agreed with the plaintiffs' contention that section 4.33.3's language means wheelchair-using patrons "should and must be afforded seating providing lines of sight at least similar to those afforded to the average patron of the theater rather than being relegated to the worst seats in the house."\textsuperscript{83} In two subsequent remedy hearings, the court ordered Cinemark to modify eighteen of its theaters by: (1) moving the wheelchair seating location further back from the screen and higher off the floor, and (2) lowering the screen by approximately one foot.\textsuperscript{84}

On appeal, however, the Fifth Circuit reversed, holding that the failure to place wheelchair accessible seats within the stadium-style section of theaters does not violate the ADA.\textsuperscript{85} The DOJ unsuccessfully argued, in an amicus brief, that the phrase "comparable lines of sight" requires movie theaters to provide similar lines of sight for those in wheelchairs as for the general public, including a similar viewing angle.\textsuperscript{86} The court instead interpreted the section 4.33.3

\textsuperscript{76} \textit{Id.}
\textsuperscript{80} See \textit{id}.
\textsuperscript{81} \textit{Id.} at *5--*7.
\textsuperscript{82} See \textit{id.} at *5.
\textsuperscript{83} See \textit{id.} at *5--*6.
\textsuperscript{84} See \textit{Lara v. Cinemark}, 207 F.3d 783, 785 (5th Cir. 2000).
\textsuperscript{85} \textit{Id.} at 784--785.
\textsuperscript{86} See \textit{id.} at 788--89.
"lines of sight comparable" provision as requiring only that wheelchair-bound patrons have unobstructed views of the screen. The court noted that, unlike the question of "viewer obstruction," which the DOJ and the Access Board explicitly considered before issuing section 4.33.3, questions regarding "viewing angle" did not arise until much later. The court reasoned that if "line of sight" was intended to require anything more than the traditional "unobstructed view" meaning, it was the responsibility of the DOJ, in conjunction with the Access Board, to implement clear language to that effect. "In light of the lack of any evidence that the Access Board intended section 4.33.3 to impose a viewing angle requirement," the court reasoned that "to impose a viewing angle requirement . . . would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers."

2. District Courts Grant Deference to the DOJ’s Interpretation

a. United States v. AMC Entertainment, Inc.

In United States v. AMC Entertainment, the United States Department of Justice filed suit against AMC in the United States District Court for the Central District of California for violating section 4.33.3 in its design, construction, and operation of over eighty stadium-style movie theaters across the nation. The court expressly disagreed with the Fifth Circuit’s opinion in Lara that section 4.33.3’s reference to "line of sight comparable" meant simply "unobstructed view." The court criticized the Fifth Circuit for failing to recognize the importance of the language in the Access Board’s Notice of Proposed Rulemaking, suggesting "that 'line of sight' refers not only to possible obstructions, but also refers to viewing angles." The court cited the following portion of the Access Board’s Notice of Proposed Rulemaking:

Stadium-style motion picture theaters comprise a type of assembly area that has become increasingly popular in the last several years. They provide the general public with sight lines to the screen that generally are far superior to those offered in traditional-style mo-

87. Id. at 789.
88. Id. at 788.
89. See id. at 789.
90. Id.
92. Id. at 1094.
93. Id. at 1110.
94. Id. at 1110–1111.
tion picture theaters. Stadium-style theaters provide improved viewing in one key way: they furnish an unobstructed view of the entire screen through the utilization of relatively high risers that furnish unobstructed viewing over the heads of the persons seated in the rows ahead. As stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen.95

The court emphasized that the Board used “inferior lines of sight” to refer to uncomfortable viewing angles, not just to obstructions.96

The court rejected AMC’s argument that the DOJ’s interpretation was not worthy of deference because section 4.33.3 was drafted by the Access Board rather than the DOJ.97 In so doing, the district court adopted the rationale set forth in Paralyzed Veterans of America v. D.C. Arena.98 In D.C. Arena, where the court examined section 4.33.3 in a sports arena setting, the District of Columbia Circuit Court stated that the DOJ’s interpretation of Access Board language is entitled to deference because “[o]nce the Board’s language was put out by the Department as its own regulation, it became . . . the Justice Department’s and only the Justice Department’s responsibility.”99 Since Congress “unquestionably delegated to the Department the authority to flesh out the statutory framework by issuance of its regulations . . . the Department has a good deal more legal/policymaking authority than would be true if it had merely a prosecuting role.”100

The AMC Entertainment court concluded that the DOJ’s position in the case represented a “fair and considered judgment” and a rea-

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97. Id. at 1113.

98. Id. (citing Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 585–86 (D.C. Cir. 1997)).

99. D.C. Arena, 117 F.3d at 585.

100. Id.
reasonable interpretation of section 4.33.3.101 Accordingly, it awarded
deerence to the DOJ's position and concluded that AMC violated the
ADA by failing to provide its patrons who use wheelchairs with compa-
rable lines of sight to the movie screen.102 The court, however, did not
give guidance on how to remedy the line of sight violations.103

b. United States v. Hoyts Cinemas104

In March 2003, the United States District Court for the District of
Massachusetts decided in United States v. Hoyts Cinemas that the
ADAAG require that wheelchair accessible seating be located within
the stadium section of newly constructed stadium-style movie thea-
ters.105 The defendants' theaters ("the Cinemas") almost always lo-
cated wheelchair-accessible seating in the sloped "traditional" area at
the front of the theaters.106 While a few theaters positioned wheel-
chair seating only in the very front rows, most often the Cinemas lo-
cated wheelchair-accessible seats both within the "traditional" section
and also immediately in front of the stadium section in the access-aisle
that separates the two sections.107 In a few instances, the theaters pro-
vided wheelchair-accessible seats in three areas: the traditional sec-
tion, the access-aisle, and in the very back row of the movie theater.108
Despite these many variations, the court found that the heart of the
problem was that most of the wheelchair-accessible seating was located
in the traditional section, while the best seats in the house were lo-
cated in the stadium section.109

The court rejected the Cinemas' arguments that a comparable
line of sight is merely an unobstructed view and that the integral seat-
ing requirement only requires that accessible seating be placed some-
where in the theater where the general public sits.110 The court
reasoned that the DOJ's views are normally entitled to deference
when interpreting Title III of the ADA because it is "the agency 'di-

101. Id. at 1113.
102. AMC Entm't, 232 F. Supp. 2d at 1094.
103. The district court denied AMC's request for an interlocutory appeal in light of a
pending Ninth Circuit decision in a similar case, Oregon Paralyzed Veterans of Am. v. Regal
Cinemas, 339 F.3d 1126 (9th Cir. 2003). See AMC Entm't, 245 F. Supp. 2d at 1101–02 (C.D.
Cal. 2003). The Regal Cinemas opinion is discussed infra Part II.C.3.a.
105. Id. at 93.
106. See id. at 79.
107. Id.
108. Id. at 79–80.
109. See id. at 81.
110. See id. at 87–89.
rected by Congress to issue implementing regulations . . . , to render technical assistance explaining the responsibilities of covered individuals and institutions . . . , and to enforce Title III in court.’” The court explained that it “must defer to agency interpretations of regulations unless these interpretations are ‘plainly erroneous or inconsistent with’ the regulation.” It then found that, in this case, the DOJ’s interpretation was not erroneous, nor inconsistent with the plain language or intent of section 4.33.3, and therefore its interpretation of the regulation was entitled to deference. The court announced it would “follow[ ] AMC Entertainment in ruling that stadium-style theaters cannot possibly offer ‘lines of sight comparable to those for members of the general public’ when wheelchair-accessible seats are placed only in the traditional-seating section, whether on risers or otherwise.” The court ruled, however, that it would only be fair to apply its ruling to the Cinemas’ theaters constructed or refurbished on or after the date on which the lawsuit commenced.

3. A Circuit Split Ensues: The Ninth and Sixth Circuits Reject the Fifth Circuit’s “Unobstructed View” Interpretation


In Regal Cinemas, three Oregonians confined to wheelchairs and the Oregon Paralyzed Veterans of America sued Regal Cinemas, Inc. and Eastgate Theater, Inc., two companies that owned and operated six movie theaters in Oregon. The plaintiffs claimed that the companies’ stadium-style theaters violated section 4.33.3 because they forced those in wheelchairs to sit only in the floor seats in front of the stadium seating. The district court granted summary judgment in favor of the defendants, following the Fifth Circuit’s decision in Lara v. Cinemark, the only federal appellate decision at the time directly addressing the viewing angle issue. The Ninth Circuit reversed, holding that section 4.33.3 requires “a viewing angle for wheelchair seating within the

111. Id. at 89–90 (quoting Bragdon v. Abbot, 524 U.S. 624, 646 (1998)).
112. Id. at 89 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).
113. See id. at 90.
114. Id. at 88 (emphasis in original).
115. See id. at 92–93.
116. 339 F.3d 1126 (9th Cir. 2003).
117. Id. at 1127.
118. See id. at 1127–28.
range of angles offered to the general public in the stadium-style seats." Judge Fletcher, writing for the majority, noted expert research, which demonstrated that anyone sitting in the wheelchair accessible areas had to look up an average of forty-two degrees to view the screen, compared to an average of twenty degrees from the other seats in the theater. The court found "it simply inconceivable that this arrangement could constitute ‘full and equal enjoyment’ of movie theater services by disabled patrons."

The panel also took issue with the district court’s conclusion that the DOJ’s interpretation was so inconsistent with the regulation as to preclude deference. Judge Fletcher explained that the plain meaning of “line of sight” included viewing angles, citing the dictionary definition and noting that theater industry documents demonstrated that theaters regularly used the term “line of sight” interchangeably with “viewing angle.” While the court agreed that the DOJ had not contemplated viewing-angle issues in the context of stadium-style seating when it drafted section 4.33.3, it determined that “a broadly-drafted regulation—with a broad purpose—may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated.” Consequently, the court reversed the district court and held that the DOJ’s interpretation was valid and entitled to deference. Moreover, the court unambiguously expressed its disagreement with the Fifth Circuit’s decision in Lara:

We disagree with the Fifth Circuit’s suggestion in Lara . . . that it is impossible to parse “comparability” without embarking on subjective judgments of where each individual prefers to sit in a movie theater. The point is this: Able-bodied movie theater patrons in a stadium-style theater may choose from a wide range of viewing angles, most of which are objectively comfortable . . . , regardless of what personal viewing preferences individuals may have within that comfortable range. As it currently stands in the theaters at issue, however, wheelchair-bound patrons may sit only in the first few rows, where uncontroverted evidence demonstrates that, not only is the viewing angle objectively uncomfortable for all viewers, but the discomfort is exacerbated for wheelchairbound viewers relative to able-bodied viewers sitting in the same row. . . . [T]he Society of Motion Picture and Television Engineers] has determined that

120. *Regal Cinemas*, 339 F.3d at 1133.
121. *Id.* at 1128.
122. *Id.* at 1133.
123. *See id.* at 1131.
124. *See id.* at 1131-32.
125. *Id.* at 1132-33.
126. *Id.* at 1133.
physical discomfort occurs "for most viewers" when the viewing angle exceeds 35 degrees; the average vertical viewing angle for disabled patrons in the subject theaters is 42 degrees. Thus, there is objective evidence that disabled patrons would likely experience discomfort in the theaters in question.\textsuperscript{127}

This opinion made the Ninth Circuit the first circuit court to consider and reject the Fifth Circuit's position in \textit{Lara}. On June 28, 2004 the Supreme Court denied Regal Cinemas' petition for writ of certiorari.\textsuperscript{128}

b. \textit{United States v. Cinemark}\textsuperscript{129}

In November 2003, the plot thickened when a case came before the Sixth Circuit that again involved Cinemark, the same theater chain that successfully defended itself in the Fifth Circuit in \textit{Lara}. This time Cinemark did not fare as well. The Sixth Circuit decided to follow the Ninth Circuit rather than the Fifth Circuit precedent and awarded deference to the government's position that the ADA requires that theater owners take into account the viewing angle in its wheelchair-accessible seating arrangements.\textsuperscript{130} The court, however, remanded the case to the district court to determine what approach might satisfy the viewing-angle requirement.\textsuperscript{131} The government stated in its brief that it would not make any demands with regard to Cinemark's theaters within the Fifth Circuit, and the court did not address that issue in its decision.\textsuperscript{132}

III. The Impact of the Circuit Split

The courts' irreconcilable conclusions have put the movie theater industry in a quandary. The Fifth Circuit tells theater owners that they may place wheelchair seating anywhere in the theater so long as there is an unobstructed view.\textsuperscript{133} The Ninth and Sixth Circuits tell theaters owners that their current practice of including wheelchair seating almost exclusively in the sloped traditional section of the theater is a violation of the ADA.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 1132 n.7 (emphasis in original).
\item \textsuperscript{128} Regal Cinemas, Inc. v. Stewmon, 124 S. Ct. 2903, 2903 (2004).
\item \textsuperscript{129} 348 F.3d 569 (6th Cir. 2003).
\item \textsuperscript{130} See \textit{id.} at 578–79.
\item \textsuperscript{131} See \textit{id.} at 579, 584. The district court has not yet determined a remedy.
\item \textsuperscript{132} \textit{Id.} at 584.
\item \textsuperscript{133} See \textit{Lara} v. Cinemark, 297 F.3d 783, 789 (5th Cir. 2000).
\item \textsuperscript{134} See \textit{Or. Paralyzed Veterans of Am. v. Regal Cinemas}, 339 F.3d 1126, 1133 (9th Cir. 2003); \textit{Cinemark}, 348 F.3d at 572.
\end{itemize}
The defendant in the Ninth Circuit case, Regal Entertainment Group, operates 6,119 screens in 562 locations across thirty-nine states.\textsuperscript{135} Cinemark USA, the defendant in the Fifth and Sixth Circuit cases, operates 297 theatres, with 3,177 screens across thirty-three states.\textsuperscript{136} These decisions impact not just those two defendants, but all theater owners who operate stadium-style theaters and their patrons with wheelchairs. Ninth Circuit Judge Andrew Kleinfeld, in a sharply-worded dissent from the \textit{Regal Cinemas} majority opinion, argued that it is unfair to expect theaters to redesign facilities that were "built in compliance with the law according to the best knowledge of design professionals at the time."\textsuperscript{137} He asked, "If a judge on the panel cannot say just what is required [to comply with the law], how can a movie theater owner? It is irresponsible to impose on the country a decision that will require of an industry so much reconstruction, without clear guidance on what must be done."\textsuperscript{138}

Due process requires that laws be sufficiently clear in order to provide fair warning as to what is prohibited.\textsuperscript{139} The \textit{Hoyts} court noted that the Supreme Court stated a long time ago:

"[The] basis [for an administrative action] must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, we must know what a decision means before the duty becomes ours to say whether it is right or wrong."\textsuperscript{140}

While the DOJ has articulated its viewpoint through litigation and recommendations to the Access Board, to date it has not adopted its position into an official regulation. It is unfair to hold theater owners responsible for noncompliance with the ADA when the ADAAG requirements for "comparable" lines of sight for wheelchair users are

\textsuperscript{137} \textit{Regal Cinemas}, 339 F.3d at 1134 (Kleinfeld, J., dissenting).
\textsuperscript{138} \textit{Id.} (Kleinfeld, J., dissenting). An attorney for the National Association of Theater Owners for California similarly noted, "You can not [sic] go to an architect and say 'provide me comparable lines of sight.' They don't know what you mean. And a building inspector has a hard time approving a plan for what is 'comparable' or 'equivalent.'" Jason White, Testimony before the U.S. Architectural and Transportation Barriers Compliance Board, Public Hearing on the Americans with Disabilities Act (L.A., Cal., Jan. 31, 2000), http://www.access-board.gov/ada-aba/LAestimony.htm (last accessed June 4, 2004).
so vague as to spawn a circuit court split. As the Hoyts court noted, this argument strongly favors holding theater owners to the DOJ's interpretation of the rule prospectively rather than retrospectively.\(^\text{141}\)

Yet, allowing movie theaters to maintain the status quo leaves disabled patrons with no choice but to endure an inferior viewing experience.\(^\text{142}\) The disagreement about the validity of the DOJ's section 4.33.3 interpretation leaves no one satisfied. Until this issue is resolved, theater owners and designers cannot confidently build or redesign theaters, and many disabled movie-goers in wheelchairs will be unable to enjoy the revolutionary stadium-style theater experience.

IV. Will the Access Board's Proposed Revision of the Accessibility Guidelines Solve the Problem?

In response to the call for a clearer, more user-friendly ADA standard, the Board approved the very first full-scale update of the ADA Accessibility Guidelines on January 14, 2004.\(^\text{143}\) On July 23, 2004, three days prior to the fourteenth anniversary of the signing of the ADA into law, the new ADAAG were finally published.\(^\text{144}\) The guidelines went into effect September 21, 2004.\(^\text{145}\) The DOJ's standards for compliance with the ADA (the ADA Standards for Accessible Design) are statutorily required to be consistent with any guidelines and requirements issued by the Board.\(^\text{146}\) New ADA Title III regulations will therefore be published accordingly.\(^\text{147}\)

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142. See Regal Cinemas, 339 F.3d at 1128 (describing viewers' uncomfortable viewing experiences in the front row of the theater).
147. See Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities, 67 Fed. Reg. 74,162, 74,162 (Dec. 9, 2002) ("In order to maintain consistency between ADAAG and ADA Standards, the Department is reviewing its title III regulations and expects to propose, in one or more stages, to adopt the revisions proposed by the Access Board and to make related revisions to the Department's title III regulations.").
In its attempt to clarify specifications for lines of sight for wheelchairs spaces, the Board has deleted section 4.33.3 entirely.\textsuperscript{148} Section 221.2.3 of the new ADAAG now addresses dispersion of wheelchair spaces and lines of sight.\textsuperscript{149} It requires that "[w]heelchair spaces shall provide spectators with choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to all other spectators."\textsuperscript{150} The guidelines advise that "while individuals who use wheelchairs need not be provided with the best seats in the house, neither may they be relegated to the worst."\textsuperscript{151} Wheelchair spaces must be dispersed both horizontally and vertically;\textsuperscript{152} however, in assembly areas with three hundred or fewer seats, horizontal dispersion is not required so long as the wheelchair spaces are "located within the 2nd or 3rd quartile of the total row length."\textsuperscript{153} and vertical dispersion is not required "if the wheelchair spaces provide viewing angles that are equivalent to, or better than, the average viewing angle provided in the facility."\textsuperscript{154} The new ADAAG also provide that, "[w]here spectators are provided lines of sight over the heads of spectators seated in the first row in front of their seats, spectators seated in the first row in front of theirs seats," as in stadium-style movie theaters, wheelchair spaces must "be afforded lines of sight over the heads of seated spectators in the first row in front of wheelchair spaces."\textsuperscript{155} Further, "[w]here spectators are provided lines of sight over the shoulders and between the heads of spectators seated in the first row in front of their seats, spectators seated in wheelchair spaces shall be afforded lines of sight over the shoulders and between the heads of seated spectators in the first row in front of wheelchair spaces."\textsuperscript{156}

The Board also provides that the meaning of any terms not specifically defined in the new ADAAG or in ADA regulations issued by the DOJ must be defined by "collegiate dictionaries in the sense that


\textsuperscript{149} Id. at 44,104.

\textsuperscript{150} Id. at 44,198, § 221.2.3 (second and third emphasis added).

\textsuperscript{151} Id. at 44,198, § 221.2.3 advisory.

\textsuperscript{152} See id. at 44,198–44,199, §§ 221.2.3.1–221.2.3.2. Specifically, section 221.2.3.2 of the new ADAAG provides that, "[w]heelchair spaces shall be dispersed vertically at varying distances from the screen." Id. at 44,199, § 221.2.3.2 (alteration in original). In an advisory note, the Board further explains that this means that they must be "placed at different locations within the seating area from front-to-back so that the distance from the screen . . . is varied among wheelchair spaces." Id. at 44,199, § 221.2.3 advisory.

\textsuperscript{153} Id. at 44,198, § 221.2.3.1.

\textsuperscript{154} Id. at 44,199, § 221.2.3.2 (second emphasis added).

\textsuperscript{155} Id. at 44,391, § 802.2.1.1 (first and second emphasis added).

\textsuperscript{156} Id. at 44,392, § 802.2.1.2 (first and third emphasis added).
the context implies."\textsuperscript{157} This command recalls the district court's reasoning in \textit{Lara} and the Ninth Circuit's decision in \textit{Regal Cinemas}.\textsuperscript{158}

These new rules were designed to address the problems wheelchair-bound patrons have in stadium-style movie theaters.\textsuperscript{159} The Board has long been aware of the DOJ's interpretation of section 4.33.3 with respect to stadium-style seating.\textsuperscript{160} Therefore, it is not surprising that the new provisions are consistent with the DOJ's litigating position in stadium-style theater cases such as \textit{Lara}.

The National Association of Theater Owners ("NATO") has not yet issued a response to the new guidelines.\textsuperscript{161} It had proposed its own set of design criteria to the Access Board, which does not appear in the new \\textit{ADAAG}.\textsuperscript{162} NATO's position was that: (1) wheelchair seating should be one-third of the way back into the theater; (2) the appropriate vertical viewing angle should be specified as thirty-five degrees or less and "measured by drawing a horizontal [line] from the eye of the person sitting in a wheelchair to the screen and another line from the eye of that person to the top of the screen;" and (3) wheelchair seating must be on risers in order to get the benefit of stadium-style seating.\textsuperscript{163} The new \\textit{ADAAG} require more dispersal of wheelchair seating than NATO desired and also does not allow theater owners to simply put wheelchair users on risers with a thirty-five degree or less viewing angle.\textsuperscript{164} This is a victory for disabled patrons. Though NATO's proposition was a step in the right direction, it would nevertheless have continued the practice of consigning wheelchair users to only one part of the house and would have also continued to provide wheel-

\begin{itemize}
\item \textsuperscript{157} \textit{Id.} at 44,163, § 106.3.
\item \textsuperscript{158} See discussion \textit{supra} Parts II.C.1, II.C.3.a.
\item \textsuperscript{160} See ADA Accessibility Guidelines for Buildings and Facilities, 64 Fed. Reg. at 62,278.
\item \textsuperscript{161} This was true as of July 2004.
\item \textsuperscript{163} See \textit{id}.
\item \textsuperscript{164} Compare \textit{id.} (explaining NATO's proposed design criteria), with ADA Accessibility Guidelines for Buildings and Facilities, 69 Fed. Reg. 44, 198, 44,198–44,199 (July 23, 2004) (to be codified at 36 C.F.R. pts. 1190–1191) (requiring that lines of sight be dispersed both horizontally and vertically for wheelchair spaces such that spectators are provided with viewing angles "substantially equivalent to, or better than, the choices of seating locations and viewing angles available to all other spectators").
\end{itemize}
chair users with lines of sight that are inferior to those of the average moviegoer.\textsuperscript{165} The new ADAAG therefore guarantee that wheelchair patrons are not simply relegated to a wheelchair area at one point of the theater, but rather that they have a variety of choices in where they sit. Even more importantly, they also ensure that wheelchair users are afforded as comfortable a position as non-wheelchair users. These new guidelines are a great leap towards giving wheelchair users truly equal access and achieving integration of wheelchair users within the general population.

It is still unclear, however, whether the Board intends to require that wheelchair seating be moved into the stadium portion of movie theaters with less than three hundred seats. The rules state that horizontal and vertical dispersion is not required in assembly areas with less than three hundred seats, yet these assembly areas must still provide wheelchair patrons with viewing angles that are deemed equal to or better than the average viewing angle in the facility.\textsuperscript{166} Presumably, this means that owners must still install wheelchair spaces in the stadium-seating area of their theaters, since those seats have the best viewing angle.\textsuperscript{167} The DOJ must clarify this when it adopts the new regulations lest new litigation arise over this uncertainty.

Notably, "[any] determination that [the new ADAAG] applies to existing facilities . . . is solely within the discretion of the [DOJ] and is effective only to the extent required by regulations issued by the [DOJ]."\textsuperscript{168} Recall that when the ADA originally passed, it only required existing places of public accommodation to make modifications that were "readily achievable" and required no changes where doing so would result in an "undue burden."\textsuperscript{169} The DOJ may update this section to apply to those places of public accommodation that are

\textsuperscript{165} While the Society of Motion Picture and Television Engineers has concluded that, for most viewers, physical discomfort occurs when the viewing angle exceeds thirty-five degrees, the average median line of sight for non-wheelchair seating in stadium-style movie theaters is twenty degrees. \textit{See} Or. Paralyzed Veterans of Am. v. Regal Cinemas, 339 F.3d 1126, 1128 (9th Cir. 2003).

\textsuperscript{166} \textit{See} ADA Accessibility Guidelines for Buildings and Facilities, 69 Fed. Reg. at 44,198–44,199, §§ 221.2.3.1, 221.2.3.2.

\textsuperscript{167} \textit{See} discussion \textit{supra} Part II.A. In addition, the Board's statement that "individuals who use wheelchairs need not be provided with the best seats in the house" may not apply to stadium-style theaters, no matter how many seats they provide. Since \textit{all} seats in the stadium-style section can be considered the "best seats" in the house, it follows that there must be wheelchair seating in the stadium-style section in order to comply with the new ADAAG's "substantially similar viewing angle" requirement.


\textsuperscript{169} \textit{See} discussion \textit{supra} Part I.B.
in existence when the regulations are updated. Warwick Wicksman, an architect and designer of multiplex motion picture theaters and a member of NATO, complained that the new guidelines will make theaters so complicated to build that it will cause their construction to be economically infeasible.\textsuperscript{170} He explained that the new guidelines would necessitate an increase of the overall size of the theater just to maintain current seat counts and that the resulting cost of becoming ADA compliant for a twenty-plex theater would be $3.3 million.\textsuperscript{171} Whether the DOJ will consider this cost an undue burden, or whether it will consider the required changes "readily achievable" is unclear. The DOJ will need to clarify this in certain terms in its updated regulations or again face controversy and more litigation.

It does seem clear, at least, that the Board’s comments and changes give credence to the position that the DOJ’s litigating position was not supported by the old ADAAG requirements. When the Access Board revised the regulations, it said that it “consider[ed] 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” and “whether in assembly areas large enough to require dispersion it would be appropriate to mandate that: spectators seated in wheelchair spaces have lines of sight that are equivalent to or better than the lines of sight provided to the majority of spectators.”\textsuperscript{172} This language can be interpreted to mean that the regulations needed to be revised to sustain the DOJ’s litigating position. The DOJ, however, attempted to rely on the position that the then-current ADAAG required that theaters provide wheelchair users equivalent or better viewing angles than other patrons—the Board’s statements indicate this was not necessarily so.

While the DOJ should be commended for its work in attempting to define a “comparable line of sight” broadly, it was decidedly unfair for it to sue theater owners for designing theaters that did not conform to this un-codified interpretation.\textsuperscript{173} Nevertheless, this hard-line

\begin{itemize}
\item \textsuperscript{171} Id.
\item \textsuperscript{172} ADA Accessibility Guidelines for Buildings and Facilities, 64 Fed. Reg. 62,248, 62,278 (proposed Nov. 16, 1999).
\item \textsuperscript{173} Nevertheless, the Fifth Circuit’s holding that a “comparable line of sight” meant merely an unobstructed view does not seem warranted. While theaters could not have been expected to know that “comparable line of sight” meant having viewing angles for wheelchair spaces that are equivalent to or better than that of the average patron, 4.33.3’s lan-
position did promote a much needed awareness of the needs of wheelchair patrons in stadium-style theaters and provoked serious dialogue on how best to amend the rules to reflect the ADA's goal of affording wheelchair users a better life.

**Conclusion**

The Access Board's new guidelines affirm the civil rights model of integration on which the ADA is based. The ADA was enacted partly in response to a showing that the disabled have long been unable to fully-participate in society and have been prevented from enjoying movies and other public events due to architectural barriers. Therefore, if the ADA was to achieve nothing else, it was to make movie theaters and other places of public accommodation places where the disabled feel comfortable and welcome. Nevertheless, fourteen years after the passage of the ADA, wheelchair users continue to find themselves segregated from the mainstream, forced to sit in spaces that not only offer them inferior lines of sight to the movie screen, but make them feel inferior as well.

Accomplishing better sightlines for wheelchair users will make the ADA the tool for civil rights it was intended to be. Better sightlines for wheelchair users will not be achieved, however, unless the DOJ adopts new regulations that leave no room for interpretation. Unless and until the DOJ revises its ADA regulations with enough specificity such that theater owners and architects cannot be mistaken as to what is technically required for their compliance, lawsuits between theater owners and their disabled patrons will continue. While the new guidelines promulgated by the Access Board offer a long overdue solution to the problems wheelchair users face when they visit stadium-style movie theaters, the current predicament will not be resolved unless the remaining ambiguities, though few, are clarified. This will ensure wheelchair users are finally able, just like everyone else, to enjoy the best seats in the house.

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guage did not appear to mean simply "unobstructed view" either. Compare Or. Paralyzed Veterans of Am. v. Regal Cinemas, 339 F.3d 1126, 1135–36 (9th Cir. 2003) (Kleinfeld, J., dissenting) (arguing that what is "comparable" is a subjective standard), with id. at 1132–33 (arguing that a "comparable line of sight" is something more than what the Fifth Circuit held it to mean in *Lara*). The Fifth Circuit's position ignored the spirit of the ADA entirely.
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