No. 02-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

PROOF BRIEF FOR THE UNITED STATES AS APPELLANT

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – PHB 5024
950 Pennsylvania Avenue., N.W.
Washington, D.C. 20530
(202) 514-3876

TABLE OF CONTENTS

PAGE

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS

A. *Cinemark's Stadium-Style Theaters* 3

B. *The Department of Justice's Regulation* 6

C. *The District Court's Decision* 7

STANDARD OF REVIEW 9

SUMMARY OF ARGUMENT 9

ARGUMENT:

THE DISTRICT COURT ERRED IN CONCLUDING, ON A MOTION FOR SUMMARY JUDGMENT, THAT ALL OF CINEMARK'S STADIUM-STYLE THEATERS COMPLIED WITH STANDARD 4.33.3 11

A. *The Department Of Justice's Interpretation Of Its ADA Regulation Is Entitled To Deference* 12

B. *The "Lines of Sight" Portion Of The Regulation Requires That Wheelchair Users Be Provided Comparable Viewing Angles, Not Just Unobstructed Views Of The Movie Screen* 14

1. *In the Context of Theater Design, "Lines of Sight" is a Well-Established Term of Art That Encompasses Viewing Angles* 14

TABLE OF CONTENTS (continued): **PAGE**

2. *By Taking Into Account Spectators' Viewing Angles, the "Lines of Sight" Requirement Furthers the Central Goal of Title III* 19

C. *The District Court Erred In Adopting The Fifth Circuit's Reading Of The Comparable-Lines-of-Sight Requirement Of Standard 4.33.3* 20

CONCLUSION 28

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

UNITED STATES' APPENDIX DESIGNATIONS

TABLE OF AUTHORITIES

CASES: **PAGE**

Auer v. Robbins, 519 U.S. 452 (1997) 13

Botosan v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000) 14, 15

Bragdon v. Abbott, 524 U.S. 624 (1998) 12-13

Independent Living Res. v. Oregon Arena Corp.,
982 F. Supp. 698 (D. Or. 1997) 17-18

International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979) 23

Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998) 13

Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir.),
cert. denied, 531 U.S. 944 (2000) . . . . *passim*

Lara v. Cinemark USA, Inc., No. EP-97-CA-502-H (W.D. Tex.) 18

Martin v. Occupational Safety and Health Review Comm'n,
499 U.S. 144 (1991) 23

Paralyzed Veterans of Am. v. D.C. Arena, L.P.,
117 F.3d 579 (D.C. Cir. 1997),
cert. denied, 523 U.S. 1003 (1998) 13-14, 24, 25

Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 23

Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) 9

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 13

United States v. Midwest Suspension and Brake,
49 F.3d 1197 (6th Cir. 1995) 13

STATUTES: **PAGE**

Title III of the Americans With Disabilities Act of 1990 (ADA),
42 U.S.C. 12181 *et seq.* . . . . *passim*
42 U.S.C. 12181(7)(C) 6
42 U.S.C. 12182 . . . . 6, 8
42 U.S.C. 12182(a) 19
42 U.S.C. 12182(b)(1)(A)(ii) 19
42 U.S.C. 12183 6
42 U.S.C. 12183(a)(1) 6, 13
42 U.S.C. 12186(b) 6, 13, 24
42 U.S.C. 12186(c) 6, 24
42 U.S.C. 12188(b) 1
42 U.S.C. 12188(b)(1)(B) 13
42 U.S.C. 12204 6

28 U.S.C. 1291 1

28 U.S.C. 1331 1

28 U.S.C. 1345 1

REGULATIONS:

28 C.F.R. 36.406(a) 6

Standard 4.33.3, 28 C.F.R. pt. 36, App. A, § 4.33.3 . . . . *passim*

36 C.F.R. 2.18 21

46 C.F.R. 13.103 21

47 C.F.R. 73.685 21

56 Fed. Reg. 35,408 (July 26, 1991) 24

56 Fed. Reg. 35,411 (July 26, 1991) 24

56 Fed. Reg. 35,546 (July 26, 1991) 6

64 Fed. Reg. 62,278 (Nov. 16, 1999) 25, 26

MISCELLANEOUS: **PAGE**

American Institute of Architects, *Ramsey/Sleeper Architectural Graphic Standards* (student ed. 1989) 17

George C. Izenour, Theater Design (1977) 14-16

Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* (2d ed. 1964) 15

SMPTE, *Engineering Guideline: Design of Effective Cine Theaters* EG 18-1989 (Dec. 19, 1989), reprinted in 99 SMPTE Journal (June 1990) 16

Time-Saver Standards for Building Types (3d ed. 1990) 15

Webster's Ninth New Collegiate Dictionary (1991) 11

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The United States believes oral argument would assist the Court in deciding this appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-3100

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

PROOF BRIEF FOR THE UNITED STATES AS APPELLANT

JURISDICTIONAL STATEMENT

The United States brought this action to enforce the anti-discrimination provisions of Title III of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12181 *et seq.*, and its implementing regulations. The district court had subject-matter jurisdiction under 28 U.S.C. 1331 and 1345 and 42 U.S.C. 12188(b).

This Court has jurisdiction under 28 U.S.C. 1291. The district court entered a final judgment on November 19, 2001, disposing of all parties' claims (R. 108 Judgment, Apx. p. __). The United States filed a timely notice of appeal on January 16, 2002 (R. 111 Notice of Appeal, Apx. p. __).

STATEMENT OF THE ISSUE

Whether the district court erred in concluding, on a motion for summary judgment, that all of defendant's "stadium-style" movie theaters complied with a Department of Justice regulation requiring that wheelchair areas in newly constructed assembly 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." 28 C.F.R. pt. 36, App. A, § 4.33.3.

STATEMENT OF THE CASE

On March 24, 1999, the United States filed suit alleging that Cinemark USA, Inc. (Cinemark) had engaged in a pattern or practice of discrimination, in violation of Title III of the Americans With Disabilities Act, 42 U.S.C. 12181 *et seq.* (ADA), and its implementing regulations (R. 1 Complaint, Apx. pp. __-__). The complaint alleged, among other things, that many of Cinemark's "stadium-style" movie theaters failed to comply with a Title III regulation which dictates that wheelchair areas in newly-constructed assembly 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," 28 C.F.R. pt. 36, App. A, § 4.33.3 (R. 1 Complaint at 8-9, Apx. pp. __-__).

Cinemark moved for summary judgment on the United States' claims, arguing that all of Cinemark's stadium-style theaters complied with Title III and

its implementing regulations, including § 4.33.3. The United States cross-moved for partial summary judgment with respect to some of Cinemark's stadium-style theaters.

The district court granted Cinemark's motion for summary judgment, denied the United States' cross-motion, and entered final judgment for Cinemark on the claims arising under Title III and its implementing regulations (R. 107 Mem. Op. & Order, Apx. pp. __-__; R. 108 Judgment, Apx. p. __). The United States is appealing the grant of summary judgment to Cinemark on the § 4.33.3 claim.[1]

STATEMENT OF FACTS

A. *Cinemark's Stadium-Style Theaters*

Cinemark owns and operates a large, nationwide chain of movie theaters (R. 80 Exh. A Tab 4: Harton Affidavit ¶ 3, Apx. p. __; R. 15 Mem. Op. & Order at 1, Apx. p. __). In 1995, Cinemark began constructing "stadium-style" theaters and now has more than 70 stadium-style complexes, each containing between seven and 24 auditoriums (R. 71 Tab A: Harton Affidavit ¶¶ 3-4, Apx. p. __). Cinemark operates stadium-style theaters in Ohio and at least 26 other states (*id.* at Tab 1, Apx. pp. __-__).

---

[1] In an earlier decision, the district court dismissed a counterclaim that Cinemark had filed against the United States (R. 47 Mem. Op. & Order, Apx. pp. __-__; R. 48 Judgment, Apx. p. __). The counterclaim alleged that the Department of Justice's interpretation of § 4.33.3 was, in reality, a new rule that the government had unlawfully tried to impose without going through notice-and-comment rulemaking (R. 17 Answer & Counterclaim at 7-20, Apx. pp. __-__). Cinemark has not appealed the dismissal of its counterclaim.

Many of Cinemark's stadium-style theaters contain two types of seating. At the front of these theaters are a few rows of traditional-style seating on a sloped or flat floor in close proximity to a large wall-to-wall screen. The vast majority of the seating, however, is in a stadium section on a series of elevated tiers similar in configuration to a sports stadium. This elevated stadium section is located behind the traditional-style portion of the auditorium, farther back from the movie screen (R. 83 Perry Declaration ¶¶ 4-5, Apx. p. __; R. 80 Exh. A Tab 6: Perry Declaration ¶ 4, Apx. p. __).

Stadium-style seating offers an enhanced movie-going experience for most customers, and in particular, provides the general public with lines of sight "superior" to those available in traditional-style theaters (R. 15 Mem. Op. & Order at 2, Apx. p. __; see also, *e.g.*, R. 80 Exh. A Tab 8: press releases at 17, 33, 42, Apx. pp. __, __, __). Cinemark touts its stadium-style theaters as a dramatic improvement over traditional-style movie seating. For example, Cinemark boasts that "[w]ith stadium seating, there is a great view from every seat!" and further asserts that "every seat" is the "best seat in the house" (*ibid.*, Apx. pp. __, __, __; R. 29 Exh. L Exh. 1: Cavalier letter at 1, Apx. p. __).

But wheelchair users do not receive the benefits of these enhanced lines of sight at many of Cinemark's stadium-style theaters. Many of these theaters are designed so that the tiered seating can be reached only by climbing steps, thus denying persons in wheelchairs access to the stadium sections in these theaters. Wheelchair users in this type of auditorium are confined to the non-stadium area at

the front of the theater close to the wall-to-wall screen, sometimes in the first row (R. 9 Exh. 7: Hofius Affidavit at 2, Apx. p. __; R. 80 Exh. A Tab 6: Perry Declaration ¶¶ 4, 6, Apx. p. __; R. 83 Perry Declaration ¶ 6 & Exh. 2, Apx. pp. __-__; R. 71 Tab A: Harton Affidavit ¶¶ 5, 7, Apx. p. __).

These wheelchair locations are far lower and closer to the screen than the tiered stadium-style seating that most patrons use (R. 80 Exh. A Tab 6: Perry Declaration ¶ 6, Apx. p. __). As a result, wheelchair users are sometimes forced to look up at the screen at sharp angles, resulting in severe discomfort and pain. In addition, because the wheelchair areas are so close to the large wall-to-wall screen, wheelchair users sometimes have difficulty seeing the entire screen or focusing on the picture and, as a result, experience headaches or other discomfort while trying to watch a movie. Because of these problems, some wheelchair users have found Cinemark's stadium-style theaters unusable (R. 9 Exh. 7: Hofius Affidavit at 2, Apx. p. __; R. 80 Exh. A Tab 23: Amended Order at 4, Apx. p. __; R. 9 Exh. 8: Miller Declaration ¶ 4, Apx. p. __; R. 9 Exh. 9: Cohen Declaration ¶ 4, Apx. p. __; R. 107 Mem. Op. & Order at 5, Apx. p. __).

Not all stadium-style theaters create such problems, however. Some theaters, including some of Cinemark's newer designs, provide wheelchair access to the elevated, stadium portions of the auditoriums, thus improving wheelchair users' lines of sight and comfort level. This can be accomplished through use of ramps or cross-aisles located in the elevated stadium section of the theater (R. 83 Perry Declaration ¶ 6 & Exh. 1, Apx. pp. __, __). Other stadium-style theaters

operated by Cinemark use elevators to provide wheelchair users access to the stadium-style sections of the auditoriums (R. 80 Exh. A Tab 6: Perry Declaration ¶ 8, Apx. p. __; R. 71 Tab A: Harton Affidavit ¶ 5, Apx. p. __).

B. *The Department Of Justice's Regulation*

Title III of the ADA prohibits disability-based discrimination in public accommodations, 42 U.S.C. 12182, and generally requires that public accommodations and commercial facilities designed and constructed for first occupancy after January 26, 1993, be "readily accessible to and usable by" persons with disabilities. 42 U.S.C. 12183(a)(1). For purposes of Title III, construction that occurs after January 26, 1993, is considered "[n]ew construction." 42 U.S.C. 12183. The movie theaters at issue in this case are public accommodations subject to Title III's requirements for new construction (R. 107 Mem. Op. & Order at 4 n.3, Apx. p. __). See 42 U.S.C. 12181(7)(C).

Congress directed the Attorney General to promulgate regulations under Title III that are consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board, commonly known as the Access Board. See 42 U.S.C. 12186(b), 12186(c); see also 42 U.S.C. 12204. In 1991, the Department of Justice issued final regulations establishing accessibility requirements for new construction and alterations. 56 Fed. Reg. 35,546 (July 26, 1991). These regulations, known as the Standards for Accessible Design, incorporated the ADA Accessibility Guidelines (ADAAG) promulgated by the Access Board. See 28 C.F.R. 36.406(a); 28 C.F.R. Pt. 36, App. A. One of

the Department's regulations is Standard 4.33.3, which provides that in public assembly areas (including movie theaters),

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

28 C.F.R. pt. 36, App. A, § 4.33.3.

C. *The District Court's Decision*

The district court granted summary judgment to Cinemark on all of the United States' claims and denied the United States' cross-motion for partial summary judgment. The court concluded, among other things, that all of Cinemark's stadium-style theaters complied with Standard 4.33.3 (R. 107 Mem. Op. & Order at 11-19, Apx. pp. __-__).

The court rejected the United States' argument that the comparable-lines-of-sight mandate in Standard 4.33.3 requires that wheelchair users in stadium-style theaters be provided viewing angles that are comparable to those available to most of the general public (*id.* at 11-13, Apx. pp. __-__). Instead, the district court adopted the reasoning of *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir.),

cert. denied, 531 U.S. 944 (2000), which held that the regulation's comparable "lines of sight" language required at most that wheelchair users have an unobstructed view of the screen (R. 107 Mem. Op. & Order at 9-11, 14, Apx. pp. __-__, __). The district court interpreted certain comments by the Access Board in a 1999 notice-of-proposed-rulemaking as indicating that the Department's position on viewing angles "is not embodied in current Section 4.33.3" (*id.* at 13, Apx. p.__). The court further concluded that Cinemark had presented undisputed evidence that all the wheelchair locations in its theaters had unobstructed views of the movie screens (*id.* at 15-18, Apx. pp. __-__).

The court also rejected the United States' argument that Cinemark's placement of wheelchair seating in its stadium-style theaters violated the "integral" seating requirement of Standard 4.33.3 (*id.* at 13-14, Apx. pp. __-__). The court reasoned that the "integral" requirement was designed primarily to ensure that wheelchair users would be able to sit near family and friends in the theater (*ibid.*), and concluded that Cinemark's theaters satisfied this standard because the wheelchair areas were located either among, or adjacent to, seating used by other members of the general public (*id.* at 18-19, Apx. pp. __-__).[2]

[2] The court also rejected the United States' argument that the wheelchair seating in many of Cinemark's theaters violated § 302 of the ADA, 42 U.S.C. 12182 (R. 107 Mem. Op. & Order at 14-15, Apx. pp. __-__). The § 302 claim is not at issue in this appeal.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment. *Petrey v. City of Toledo*, 246 F.3d 548, 553 (6th Cir. 2001). Cinemark, as the moving party, has the burden of establishing that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. See *ibid.* In reviewing the grant of summary judgment, this Court "must view all the evidence in the light most favorable to the nonmoving party." *Ibid.*

SUMMARY OF ARGUMENT

This case raises an important question about the proper interpretation of Standard 4.33.3, a regulation that the Department of Justice promulgated through notice-and-comment rulemaking pursuant to its authority under Title III of the ADA. That regulation governs placement of wheelchair seating in public assembly areas (including movie theaters) that are subject to the new construction requirements of Title III. Standard 4.33.3 provides, in relevant part, 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.

28 C.F.R. pt. 36, App. A, § 4.33.3.

The comparable-lines-of-sight portion of this regulation requires, among other things, that wheelchair users in a movie theater be provided lines of sight within the range of viewing angles offered to most of the patrons of the cinema. In adopting the "lines of sight" language in Standard 4.33.3, the Department of Justice used a well-recognized term of art in the area of theater design that

has long been understood to encompass spectators' viewing angles. By requiring that wheelchair users have viewing angles that are comparable to those offered to most of the general public, the regulation's lines-of-sight provision furthers Title III's goal of providing persons with disabilities equal enjoyment of the benefits of public accommodations, including movie theaters.

The district court, however, adopted an interpretation of Standard 4.33.3 that is at odds with the common usage of the term "lines of sight" in the context of theater design. The court held that, as applied to movie theaters, the comparable-lines-of-sight mandate of Standard 4.33.3 requires only that wheelchair users have unobstructed views of the movie screen. Thus, under the district court's reasoning, a wheelchair space placed anywhere in the theater, no matter how close or far from the screen, would comply with the lines-of-sight requirement so long as the patron in the wheelchair could somehow see the screen without obstruction. That interpretation cannot be squared with the language of Standard 4.33.3, which requires that lines of sight be "comparable," not just unobstructed. See 28 C.F.R. pt. 36, App. A, § 4.33.3.

The district court's decision has great practical significance for wheelchair users who wish to attend movies. In recent years, stadium-style theaters have become increasingly common in the United States, and some of those theaters – including many of Cinemark's auditoriums – have relegated wheelchair users to highly undesirable locations close to the screen that make viewing films uncomfortable and even painful. At the same time, those theaters provide

ambulatory patrons with elevated seating that offers enhanced lines of sight that are, in many instances, far superior to those available from the wheelchair spaces. The district court's interpretation of the regulation would allow this inequality to continue, thus thwarting the goals of Title III of the ADA.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING, ON A MOTION FOR SUMMARY JUDGMENT, THAT ALL OF CINEMARK'S STADIUM-STYLE THEATERS COMPLIED WITH STANDARD 4.33.3

Standard 4.33.3 requires, in part, that wheelchair locations in public assembly areas provide persons with physical disabilities "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, § 4.33.3. A "line[] of sight" is "a line from an observer's eye to a distant point toward which he is looking." *Webster's Ninth New Collegiate Dictionary* at 695 (1991). In the context of movie theaters, that line is the one extending from the viewer's eye to the points on the screen where the film is projected. "Comparable" in this context means "equivalent" or "similar." *Id.* at 267.

The Department of Justice construes Standard 4.33.3 to require, *inter alia*, that a theater operator provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons in the theater. Individuals who use wheelchairs need not be provided the best seats in the house, but neither can they be relegated to locations with the worst viewing angles, as they are in many of Cinemark's stadium-style theaters. Instead, patrons in wheelchairs must be afforded viewing angles that are "comparable" – in other words, similar or

equivalent – to those enjoyed by most other members of the audience. The Department has reasonably concluded that factors in addition to physical obstructions – such as viewing angles and distance from the screen – affect whether individuals' views of the movie screen are equivalent to those of other patrons.

This reading of Standard 4.33.3 best comports with the language of the regulation, with the well-established usage of the term "lines of sight" in the context of theater design, and with the goals of Title III of the ADA. At the very least, the Department's interpretation of its own regulation is a reasonable one to which this Court should defer.

A. *The Department Of Justice's Interpretation Of Its ADA Regulation Is Entitled To Deference*

Neither Cinemark nor the district court has questioned the validity of Standard 4.33.3, which the Department of Justice promulgated pursuant to notice-and-comment rulemaking under express authority delegated by Congress. Therefore, for purposes of this appeal, the Court must assume that the regulation itself is valid. This case turns, instead, on the proper interpretation of that regulation.

As the Supreme Court has emphasized, "the [Justice] Department's views are entitled to deference" in interpreting Title III of the ADA because it is the agency "directed 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." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). The Department of Justice has principal authority for administering the provisions of the ADA that govern the design and construction of new facilities. The Attorney General has the sole power to issue binding regulations to carry out those new-construction provisions. See 42 U.S.C. 12186(b); see also 42 U.S.C. 12183(a)(1). And the Department of Justice is the only federal agency with authority to bring suit to enforce Title III of the ADA, which includes the new-construction requirements. See 42 U.S.C. 12188(b)(1)(B).

Deference is especially appropriate where, as here, a court is asked to review the Department's interpretation of its own regulation. See *United States v. Midwest Suspension and Brake*, 49 F.3d 1197, 1203 (6th Cir. 1995). The Department's interpretation must be upheld unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). "In other words, [the Court] must defer to the [Department's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [Department's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). This Circuit and other courts have applied this deferential standard in other contexts in upholding the Department's interpretations of its ADA regulations. See *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (regulation under Title II of the ADA); *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 584-585 (D.C. Cir. 1997) (Department's reading of Standard 4.33.3 on the

issue of lines of sight over standing spectators), cert. denied, 523 U.S. 1003 (1998); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 833-834 (9th Cir. 2000) (Department's interpretation of another Title III regulation).

B. *The "Lines of Sight" Portion Of The Regulation Requires That Wheelchair Users Be Provided Comparable Viewing Angles, Not Just Unobstructed Views Of The Movie Screen*

In adopting the "lines of sight" language in Standard 4.33.3, the Department of Justice used a term of art that has long been understood in the area of theater design to take into account spectators' viewing angles. By ensuring that wheelchair users are provided viewing angles that are comparable to those afforded to most of the general public, the regulation furthers Title III's goal of providing persons with disabilities equal enjoyment of the benefits of public accommodations, including movie theaters.

1. *In the Context of Theater Design, "Lines of Sight" is a Well-Established Term of Art That Encompasses Viewing Angles*

Long before the enactment of the ADA in 1990, various treatises and other publications on theater design had recognized that viewing angles were important factors affecting the quality of spectators' lines of sight.[3] In the 1830s, for example, the Scottish engineer John Scott Russell presented a "Treatise on Sightlines and Seating," which has been described as "the first and still definitive statement on the subject of sight lines in modern theater design." George C.

[3] For the convenience of the Court, we have reproduced the relevant excerpts of these treatises and publications in the addendum to this brief. Each is publicly available in the Library of Congress.

Izenour, *Theater Design* at 71 (1977). Russell's treatise emphasized that the "best" seats in an auditorium are not "too far forward"; in other words, "they are not so far forward as, by being immediately under the speaker, to require [one] to look up at a *painful angle* of elevation." *Id.* at 598 (reprinting Russell's treatise) (emphasis added). Russell further noted that seats that are "too far forward" in an auditorium are "unpleasant" because "they are too low" in relation to the point at which the audience member is looking. *Id.* at 599.

More recent treatises and publications on theater design have reiterated that viewing angles affect the quality of lines of sight. For example, a treatise published in 1964 took the position that the "[m]aximum tolerable upward sight line angle for motion pictures" was 30 degrees from the horizontal position to the top of the movie screen. Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* at 69 (2d ed. 1964).[4] The same treatise cautioned that elevating the stage too much in an auditorium could adversely affect the quality of the viewing experience by "producing upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action." *Ibid.* Another treatise, published in 1977, similarly explained that the quality of spectators' lines of sight is affected not just by the degree of obstruction but also by viewing angles: "A good sight line is one in which there are no impediments to

---

[4] Relevant excerpts of this treatise are reprinted in *Time-Saver Standards for Building Types* at 404 (3d ed. 1990), a portion of which was introduced below (R. 80 Exh. A Tab 20, Apx. p. __).

vision and angular displacement (vertical and horizontal) of the eyes and head falls within the criteria for comfort." George C. Izenour, *Theater Design* at 4 (1977); see also *id.* at 3 (diagram showing "Normal Sight Line" as 15 degrees below horizontal). That treatise went on to note that "distance and angular displacement" are among the types of "sight line problems" found in some auditoriums. *Id.* at 284.

Just prior to the enactment of the ADA in 1990, other publications confirmed that, in the field of movie theater design, viewing angles were commonly understood to be an important component of spectators' lines of sight. For example, in 1989, the Society of Motion Picture and Television Engineers (SMPTE) approved the following guidelines on appropriate lines of sight in movie theaters:

> Since the normal line of sight is 12º to 15º below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35º, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15º.

SMPTE, *Engineering Guideline: Design of Effective Cine Theaters*, EG 18-1989 at 3 (Dec. 19, 1989), reprinted in 99 SMPTE Journal 494 (June 1990). Accordingly, the SMPTE guidelines specified that "[t]he nearest viewer's vertical line of sight should not exceed 35º from the horizontal to the top of the projected image." *Id.* at 495 (EG 18-1989 at 6). The guidelines further explained that "as the viewer's line of sight to the screen deviates from the perpendicular * * * all

shapes [on the movie screen] become distorted." *Id.* at 493 (EG 18-1989 at 2). SMPTE readopted these guidelines in 1994, prior to the construction of the first stadium-style theaters in the United States (R. 80 Exh. A Tab 18: SMPTE, *Engineering Guideline: Design of Effective Cine Theaters*, EG 18-1994 (March 25, 1994), Apx. pp. __- __). Moreover, the 1989 edition of a well-known architectural reference book emphasized the importance of viewing angles in deciding how far seats should be from the movie screen:

> The minimum distance between the first row and the screen * * * is determined by the maximum allowable angle between the sightline from the first row to the top of the screen and the perpendicular to the screen at that point. A maximum angle of 30 to 35º is recommended.

American Institute of Architects, *Ramsey/Sleeper Architectural Graphic Standards* 17 (student ed. 1989).[5]

In light of this common usage of the term "lines of sight" in the context of theater design, the Department of Justice reasonably used the same phrase in its regulation to take into account spectators' viewing angles. Even before the advent of stadium-style theaters in 1995,[6] the Department took the position in enforcing Title III that viewing angles were relevant in determining whether a public assembly area complied with the comparable-lines-of-sight requirement of

---

[5] Another edition of *Architectural Graphic Standards*, containing identical guidelines, was introduced as an exhibit below (R. 80 Exh. A Tab 19, Apx. p. __).

[6] The first stadium-style movie theaters in this country were built in approximately 1995 (see R. 17 Answer & Counterclaim at 10, Apx. p. __; R. 80 Exh. A Tab 8: press release at 17, Apx. p. __).

Standard 4.33.3. See *Independent Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 709 n.9 (D. Or. 1997) (noting that Department stated in 1994 that "[i]n order to fulfill the requirement that comparable lines of sight and admission prices be provided in new construction," wheelchair seating locations must be provided "in each price range, level of amenities, and *viewing angle*.") (emphasis added).

Moreover, given the historical usage of the term "lines of sight," the Department of Justice reasonably viewed the phrase as a term of art that, in the context of theater design, would be widely understood by architects and designers as encompassing viewing angles. In 1998, however, the United States learned that Cinemark was advocating, as a litigating position, an interpretation of "lines of sight" that conflicted with the long-standing, common usage of that term in the field of theater design. Cinemark argued, as a defendant in a private lawsuit, that the comparable "lines of sight" language in Standard 4.33.3 had nothing to do with viewing angles and simply meant that the spectators' view of the screen must be unobstructed. In response to Cinemark's unusual interpretation, the Department of Justice filed an *amicus* brief in 1998 confirming that the phrase "lines of sight" in Standard 4.33.3 refers not only to the degree of obstruction but also to spectators' viewing angles (R. 90 Exh. E Tab 2: Response of *Amicus Curiae* at 3-5, in *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex.), Apx. pp. __-__).[7] The

---

[7] Cinemark, the defendant in *Lara*, was of course aware of the Department's *amicus* brief. Nonetheless, even after the United States filed its *amicus* brief in *Lara*, Cinemark continued to design and construct stadium-style theaters that

(continued...)

Department's position in *Lara* simply reaffirmed the well-established understanding of the term "lines of sight" that has prevailed for years among theater designers.

2. *By Taking Into Account Spectators' Viewing Angles, the "Lines of Sight" Requirement Furthers the Central Goals of Title III*

The regulation's requirement that "lines of sight" be "comparable" must be read in the context of Title III's goal of providing persons with disabilities "equal enjoyment" of the benefits of public accommodations. 42 U.S.C. 12182(a); see also 42 U.S.C. 12182(b)(1)(A)(ii) (it is generally discriminatory to provide a person with a disability a benefit that is "not equal to that afforded to other individuals"). The quality of the viewing experience is highly relevant to whether there is "equal enjoyment" of the benefits of a movie theater. A wheelchair user who must watch a movie from an extreme angle that causes significant discomfort and distortion of the picture has not been afforded "equal enjoyment" of the movie if most other patrons are able to watch the film at more comfortable angles. 42 U.S.C. 12182(a).

The inequality of the viewing experience is particularly pronounced at those Cinemark theaters that exclude wheelchair users altogether from the stadium-style sections of the auditoriums. In those theaters, ambulatory patrons can sit in the

---

[7](...continued)
failed to comply with the comparable-lines-of-sight requirement of Standard 4.33.3 (see R. 83 Perry Declaration ¶¶ 4, 7, Apx. p. __; R. 80 Exh. A Tab 6: Perry Declaration ¶¶ 4, 6, Apx. p. __).

elevated stadium-style sections, which Cinemark itself acknowledges provide enhanced sightlines and superior viewing experiences as compared to traditional-style seating. But unlike ambulatory patrons who have the choice of virtually any seat in the house if they get to the cinema early enough, wheelchair users in those theaters have no option but to sit in the spaces designated for their use in the traditional-style areas, no matter how early they arrive for the movie. In many of Cinemark's theaters, these wheelchair spaces are especially undesirable because they are far lower in elevation and much closer to the screen than the seats in the stadium-style section. Consequently, wheelchair users in many of Cinemark's theaters are forced to look up at the screen at uncomfortable (and even painful) viewing angles and have difficulty focusing on the large wall-to-wall screen because it is so close. In comparison to the enhanced viewing experience of the ambulatory patrons in the elevated stadium-style sections, these wheelchair users simply do not have an equal opportunity to enjoy the movies in many of Cinemark's theaters. The district court's interpretation of Standard 4.33.3 allows Cinemark to perpetuate this inequality, thus thwarting Title III's goals.

C. *The District Court Erred In Adopting The Fifth Circuit's Reading Of The Comparable-Lines-of-Sight Requirement Of Standard 4.33.3*

The district court adopted the holding of *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000), which concluded that the comparable-lines-of-sight provision in Standard 4.33.3 requires at most that wheelchair users' views of the movie screen be unobstructed. The Fifth Circuit's

holding in *Lara* (and hence, the district court's decision below) is fundamentally flawed.

The Fifth Circuit's interpretation finds no support in the language of the regulation. Under the Fifth Circuit's reasoning, a wheelchair space placed anywhere in the theater, no matter how close or far from the screen, would comply with the comparable-lines-of-sight requirement so long as the patron in the wheelchair could somehow see the screen without obstruction. The regulation, however, requires that lines of sight be "comparable," not just unobstructed. See 28 C.F.R. pt. 36, App. A, § 4.33.3.

The Fifth Circuit was mistaken in suggesting that the phrase "lines of sight" had traditionally been understood to mean only unobstructed view. See *Lara*, 207 F.3d at 788-789. As explained above, the term "lines of sight" in the context of theater design has commonly been used to refer not just to the degree of obstruction but also the viewing angles of spectators. In support of its interpretation, the Fifth Circuit relied on three inapposite federal regulations. See *ibid.*, citing 47 C.F.R. 73.685 (requiring antennae to have a "line-of-sight," without major obstruction, over the communities they serve); 46 C.F.R. 13.103 (Coast Guard safety regulation defining "[d]irectly supervised" as "being in the direct line of sight of the person in charge" or in communication by radio); 36 C.F.R. 2.18 (National Park Service regulation prohibiting the operation of a snowmobile by a person under 16 years of age "unless accompanied and supervised within line of sight by a responsible person 21 years of age or older").

These regulations pertain to topics that have no relevance to the ADA, wheelchair seating, or movie theaters. More importantly, none of the regulations deals with the issue of whether lines of sight are "comparable." The United States does not dispute that persons in wheelchairs who have unobstructed views will have lines of sight to the screen. However, those lines of sight will not be comparable if the viewing angles are inferior to those enjoyed by most other patrons.

The analysis in *Lara* is flawed in other respects. The Fifth Circuit emphasized that neither the Attorney General nor the Access Board explicitly mentioned viewing angles prior to the Department's promulgation of Standard 4.33.3 in 1991. *Lara*, 207 F.3d at 788. The court in *Lara* also found it significant that the 1994 version of the Department's Title III Technical Assistance Manual did not expressly discuss viewing angles. *Ibid.* But the absence of such explicit discussion in 1991 or 1994 is understandable for at least two reasons. First, as previously noted, the Department of Justice reasonably understood, when it promulgated the regulation and when it later issued the Technical Assistance Manual, that the phrase "lines of sight" was a well-recognized term of art in the context of theater design and that architects and designers would naturally understand the term as encompassing viewing angles. See pp. 14-19, *supra*. Second, inferior viewing angles for wheelchair users in movie theaters did not become a prominent problem until after the first stadium-style theaters were constructed in this country in 1995. Although design experts have recognized for years that viewing angles affect lines of sight in movie theaters (see pp. 14-17,

supra), the traditional-style theaters in existence prior to 1995 lacked the elevated seating of the stadium-style cinemas and thus did not have the type of dramatic disparities in vertical viewing angles that are found in some stadium-style theaters (see R. 80 Exh. A Tab 9: Fellman Affidavit ¶¶ 11-13, Apx. p. __ (noting the significant change that occurred in the movie theater industry as the traditional-style design gave way to elevated, stadium seating)).

When the Department promulgated its regulation in 1991 and amended its Technical Assistance Manual in 1994, it could not anticipate every design innovation that might occur in the future that could affect the comparability of lines of sight in theaters. But that inability to predict the future does not limit the authority of the Department to apply the broad language of its regulation to new factual situations as they develop even if they were unanticipated at the time Standard 4.33.3 was promulgated. Cf. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (broad language of ADA can be applied to prisons even if Congress did not expressly anticipate coverage of prisons when it drafted the language). Indeed, one reason that the judiciary defers to administrative agency interpretations is to allow a "measure of flexibility to [the] agency as it encounters new and unforeseen problems over time." *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979); see also *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991) (agency has inherent authority to interpret its own regulations because "applying an agency's regulation to

complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives").

The Fifth Circuit also reasoned that the Department's interpretation of Standard 4.33.3 is not entitled to deference because it is inconsistent with the Access Board's understanding of its ADA guidelines. That conclusion is incorrect, both legally and factually.

The Fifth Circuit erred in assuming that the Access Board's post-1991 interpretation of Standard 4.33.3 could limit the authority of the Department of Justice to construe its own regulation. The Department of Justice, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Those regulations must be "consistent with the minimum guidelines and requirements issued by the" Access Board. 42 U.S.C. 12186(c). But the Board is not required to approve the Department's standards, and the Board's guidelines do not themselves have the force of law. They merely set minimum guidelines for the Attorney General's regulations to follow. As the Board itself has recognized, the Attorney General is free to issue rules that "exceed the Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991).

Therefore, although the Access Board originally drafted the comparable "lines of sight" language that the Department of Justice adopted in Standard 4.33.3, it is the Department's views – not the Access Board's – to which the courts owe deference in determining the meaning of the Department's regulation. See

Paralyzed Veterans, 117 F.3d at 585 (courts must defer to the Department of Justice, not the Access Board, in interpreting Standard 4.33.3). "Once the Board's language was put out by the Department as its own regulation, it became, as the statute contemplates, the Justice Department's and only the Justice Department's responsibility." *Ibid.*

At any rate, the Fifth Circuit mistakenly assumed that the Access Board does not interpret Standard 4.33.3, as currently written, to require comparable viewing angles in theaters. See *Lara*, 207 F.3d at 788-789. In fact, the Board has recognized that viewing angles are relevant in determining whether lines of sight in a stadium-style theater are "comparable" for purposes of Standard 4.33.3. For example, the Access Board has explained that

> [a]s 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.

64 Fed. Reg. 62,278 (Nov. 16, 1999) (emphasis added). The Access Board also has published a technical assistance manual explaining, in a section titled "Sight Lines," that "[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas. A variety of factors determine the quality of vertical' sight lines, such as the distance from the performance areas, row spacing, staggering of seats, and floor slope" (R. 80 Exh. A Tab 15: ADAAG Manual at 117 (July 1998); Apx. p. __).

It is true, as the district court and the Fifth Circuit emphasized, that the Access Board stated in 1999 that it had not decided whether to amend its guidelines to expressly incorporate certain technical factors that the Department of Justice had used in some *settlement negotiations* to assess whether viewing angles were comparable (R. 107 Mem. Op. & Order at 11-12, Apx. pp. __-__). See 64 Fed. Reg. 62,278 (Nov. 16, 1999) (discussing positions "DOJ has asserted in attempting to settle particular cases"). But positions advocated in the give-and-take of particular settlement discussions are not necessarily identical to the legal requirements that Standard 4.33.3 itself imposes, and thus the Board's comments about the Department's settlement negotiations shed little light on what the Board believes is mandated by the current version of the regulation. The Board's discussion of the Department's settlement positions does not detract in any way from the Board's clear position – reflected both in its 1999 notice-of-proposed-rulemaking and its 1998 technical assistance manual – that viewing angles are among the factors that determine whether lines of sight are comparable under the existing guidelines (see 64 Fed. Reg. 62,278; R. 80 Exh. A Tab 15: ADAAG Manual at 117 (July 1998), Apx. p. __).

For these reasons, the Court should reject the flawed analysis of the Fifth Circuit in *Lara*. The *Lara* court adopted an interpretation of Standard 4.33.3 that not only conflicts with the well-established meaning of the term "lines of sight" in the context of theater design, but also thwarts the statutory goal of providing wheelchair users equal enjoyment of public accommodations. A wheelchair user

who is forced to sit very close to the movie screen and to watch the film at an uncomfortable viewing angle will not have an equal opportunity to enjoy the benefits of the theater if most other audience members are allowed to sit in elevated, stadium-style seating that provides comfortable viewing angles. The Fifth Circuit's strained interpretation of Standard 4.33.3 would allow theater owners to restrict wheelchair users to decidedly inferior seating. This Court should refuse to endorse a reading of Standard 4.33.3 that would so undermine the purposes of Title III of the ADA.

D. *The Grant of Summary Judgment Should Be Reversed*

Because the district court adopted an erroneous interpretation of Standard 4.33.3, this Court should reverse the grant of summary judgment to Cinemark. In moving for summary judgment, Cinemark never disputed the United States' allegations and evidence on two key points: (1) that many of Cinemark's stadium-style theaters place wheelchair locations so close to the screen that wheelchair users have difficulty focusing their eyes on the movie and are forced to look up at the screen at uncomfortable and even painful viewing angles, and (2) that this viewing experience is significantly inferior to that offered to most other patrons, who benefit from the enhanced sightlines provided by the elevated seating in the stadium-style sections of the theaters (see generally R. 70 Cinemark's Second Motion for Summary Judgment; R. 86 Cinemark's Reply in Further Support of its Second Motion for Summary Judgment). At the very least, the evidence the United States presented on the cross-motions for summary judgment raises a

genuine issue of material fact as to whether the wheelchair locations in many of Cinemark's stadium-style theaters create an inferior viewing experience for wheelchair users as compared to most other patrons. If the United States proves these allegations at trial, it will establish a violation of Standard 4.33.3.

CONCLUSION

This Court should reverse the grant of summary judgment and remand for further proceedings on the United States' claim under Standard 4.33.3.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – PHB 5024
950 Pennsylvania Avenue., N.W.
Washington, D.C. 20530
(202) 514-3876

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 7,064 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

____

GREGORY B. FRIEL
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2002, one copy of the foregoing PROOF BRIEF FOR THE UNITED STATES AS APPELLANT was served by Federal Express, next business-day delivery, on the following counsel of record for the Appellee:

Laura M. Franze, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1700 Pacific Avenue
Suite 4100
Dallas, Texas 75201

I further certify that the same proof brief was filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) by sending it to the Clerk of the United States Court of Appeals for the Sixth Circuit by first-class mail, postage prepaid, on March 18, 2002.

____
GREGORY B. FRIEL
Attorney