No. 06-56468

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MILLER,

Plaintiffs-Appellants

v.

CALIFORNIA SPEEDWAY CORPORATION

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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GUIDELINES

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STATEMENT OF THE ISSUE

Whether the Department of Justice's regulations issued pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq*., require newly-constructed assembly areas to provide wheelchair seating locations with lines of sight over standing spectators where patrons can be expected to stand during events.

INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Rule 29, Fed. R. App. Pro. The United States filed a brief as *amicus curiae* in this case at the invitation of the district court. The United States has previously participated as *amicus* in two

other cases in the courts of appeals interpreting the same regulation: *Caruso* v. *Blockbuster-Sony Music Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), and *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998). The decision in this case may significantly affect the Department of Justice's enforcement responsibilities under Title III.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

1. Regulatory History Of Section 4.33.3

Title III of the Americans with Disabilities Act (ADA) prohibits disability-based discrimination in public accommodations. Title III requires covered public accommodations to "design and construct" any new facilities so that they are "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1). The Department of Justice (Department) is responsible for issuing regulations to carry out the provisions of Title III, including standards applicable to public accommodations. 42 U.S.C. 12186(b). Those regulations must be "consistent with the minimum guidelines" issued by the Architectural and Transportation Barriers Compliance Board (Board). 42 U.S.C. 12186(c). The Board is an independent federal agency composed of 13 individuals appointed by the President and representatives from 12 federal agencies, including the Department. 29 U.S.C. 792(a)(1). The Board's minimum guidelines are merely advisory; they are not enforceable regulations. The Department's regulations are enforceable against public accommodations.

In January 1991, the Board published its proposed ADA Accessibility

Guidelines, known as the ADAAG. 56 Fed. Reg. 2296-01 (1991). With respect to assembly areas, the proposed guidelines stated that wheelchair areas "shall . . . be located to provide lines of sight comparable to those for all viewing areas." 56 Fed. Reg. 2380. The public notice accompanying the rule asked for comments on the issue of lines of sight over standing spectators:

> Section 4.33.3 provides that seating locations for people who use wheelchairs shall be dispersed throughout the seating area and shall be located to provide lines of sight comparable to those for all viewing areas. This requirement appears to be adequate for theaters and concert halls, but may not suffice in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event. In alterations of existing sports arenas, accessible spaces are frequently provided at the lower part of a seating tier projecting out above a lower seating tier or are built out over existing seats at the top of the tier providing a great differential in height. These solutions can work in newly constructed sports arenas as well, if sight lines relative to standing patrons are considered at the time of initial design. The Board seeks comments on whether full lines of sight over standing spectators in sports arenas and other similar assembly areas should be required.

56 Fed. Reg. 2314.

In February 1991, the Department published a Notice of Proposed Rulemaking for its Title III regulations, including adopting the proposed ADAAG "with any amendments made by the [Board] during the rulemaking process." 56 Fed. Reg. 7478-7479 (1991). The Department's notice directed commenters to send any comments on the proposed ADAAG directly to the Board. 56 Fed. Reg. 7479.

In July 1991, the Board published a final ADAAG, which included Section 4.33.3:

> 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.

28 C.F.R. Pt. 36, App. A § 4.33.3. In its analysis of the comments it had received on Section 4.33.3, the Board stated:

> Comment. The NPRM asked questions regarding row spacing and lines of sight over standing spectators in sports arenas and other similar assembly areas. . . . Many commenters . . . recommended that lines of sight should be provided over standing spectators. Response. . . The issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities.

56 Fed. Reg. 35,440 (1991).

The Department issued its final Title III regulations the same day. The Department adopted the Board's final ADAAG as part of its regulations and published those standards as an Appendix to Part 36 of Title 28. All new construction and alterations must comply with these standards. 28 C.F.R. 36.406(a). Section 4.33.3 is identical to the final standard issued by the Board.

The commentary accompanying the regulations stated that:

> The Department put the public on notice, through the proposed rule, of its intention to adopt the proposed guidelines, with any changes made by the Board, as the accessibility standards. As a member of the Board and of its ADA Task Force, the Department participated actively in the public hearings held on the proposed guidelines and in preparation of both the proposed and final versions of the guidelines. Comments on the Department's proposed rule have been addressed adequately in the final guidelines. Largely in response to comments, the Board made numerous changes from its proposal.

56 Fed. Reg. 35,586 (1991).

Title III's new construction provisions became effective in January 1993.

That same year, pursuant to Title III's directive to provide technical assistance to covered entities, 42 U.S.C. 12206(a), (c)(2)(C), the Department published a Technical Assistance Manual providing guidance on Title III's requirements. In 1994, the Department published a supplement to that manual which included the Department's interpretation of Section 4.33.3, stating:

> In addition to requiring companion seating and dispersion of wheelchair locations, [Section 4.33.3] requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public. Thus, in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand.

U.S. Department of Justice, ADA Title III Technical Assistance Manual, 1994 Supplement (TAM) ¶ III-7.5180.

2. District Court Proceedings

Defendant California Speedway Corporation (Speedway) operates a racing track in Fontana, California. E.R. Tab 7 at 3.[1] Plaintiff Robert Miller is a quadriplegic who uses a wheelchair. Each year since the Speedway opened, Miller has attended at least three and as many as six NASCAR events there. E.R. Tab 7 at 3-4. Miller's complaint alleged that when he uses the wheelchair seating area, he cannot see over the spectators in front of him when those spectators stand. As at many events, spectators stand at the most exciting points in the race, making it impossible for Miller to see "the part of the race he wants to see the most." E.R.

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[1] References to "E.R. __" are to pages in the Excerpts of Record filed by the appellant.

Tab 7 at 4.

Miller brought suit, arguing that the Speedway violated Title III and Section 4.33.3 of the Department of Justice regulations requiring that wheelchair areas "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. Miller and Speedway each moved for summary judgment on the issue of liability.

On September 8, 2006, the district court awarded summary judgment to Speedway. The court agreed with the plaintiffs that the Department's interpretation of Section 4.33.3 requiring lines of sight over standing spectators was a reasonable construction of the regulation. The court held, however, that the Department had implicitly adopted the Board's interpretation of Section 4.33.3 as not applying to standing spectators, and could not alter that interpretation without providing notice and comment. E.R. Tab 7 at 16. The district court therefore declined to defer to the Department's interpretation set forth in the TAM.

SUMMARY OF ARGUMENT

The Department of Justice has consistently construed its regulations implementing Title III of the ADA to require newly-constructed assembly areas to include wheelchair locations that provide lines of sight over standing spectators where spectators are expected to stand during events. This interpretation comports with the language of Section 4.33.3 and with the purposes of the statute.

The plain text of the regulation does not limit the phrase "lines of sight" to lines of sight over seated spectators. Five courts, including the district court, have agreed that it is reasonable to read the requirement of "comparable" lines of sight to denote lines of sight that are "comparable" under the conditions in which an arena actually operates. Thus, where the seats for ambulatory patrons provide lines of sight over standing spectators, wheelchair locations cannot provide "comparable" lines of sight unless they allow patrons with disabilities to see over standing spectators as well. That interpretation carries out the statutory mandate to provide those with disabilities the full and equal enjoyment of any place of public accommodation.

The Department has the statutory authority to promulgate regulations implementing Title III's public accommodations provisions, and it has primary enforcement authority under the statute. Accordingly, its interpretation of its regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). The Department's interpretation clearly satisfies that standard.

The district court erred when it declined to defer to the Department's interpretation. The court erred in holding that the Board had interpreted its own guidelines not to require lines of sight over standing spectators. More importantly,

however, the district court erred in imputing the Board's interpretation to the Department. In fact, the Department never adopted the Board's commentary on Section 4.33.3.

Even assuming arguendo that the Board's commentary can properly be imputed to the Department, the district court erred in giving deference to the Board's earlier interpretation instead of the Department's later authoritative interpretation. An agency may change its interpretation of its own regulation without notice and comment. There is no justification for deferring to an interpretation that the Department has never explicitly adopted and that contradicts the Department's explicit interpretation, which it has consistently applied for at least 14 years.

This Court should reverse the district court and hold that Section 4.33.3 requires lines of sight over standing spectators where patrons are expected to stand during events.

ARGUMENT

THE DEPARTMENT OF JUSTICE'S ADA REGULATIONS REQUIRE ASSEMBLY AREAS TO PROVIDE WHEELCHAIR SEATING AREAS WITH LINES OF SIGHT OVER STANDING SPECTATORS WHERE PATRONS CAN BE EXPECTED TO STAND DURING EVENTS

A. The Department's Long-Standing Interpretation Comports With The Language Of The Regulation And Best Effectuates The Purposes Of The ADA And The Regulation

Section 4.33.3 requires that assembly areas "provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A. § 4.33.3. The Department of Justice interprets this provision to require that, in facilities where patrons can be expected to stand during events, wheelchair locations provide lines of sight over standing spectators.

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* 695 (1991). Thus, in the context of arenas, "lines of sight" means the collection of the lines extending from the viewer's eye to all the points on the playing field or surface for the event. Moreover, the term "lines of sight" is not on its face limited to sightlines from a particular position, whether seated or standing. The regulation qualifies the "line of sight" language in only one respect – by requiring that

sightlines be "comparable to those for members of the general public." "Comparable" means "equivalent" or "similar." *Id*. at 267. Taken together, then, the text of Section 4.33.3's comparability language is reasonably understood as requiring a qualitative comparison between the view of the event afforded patrons who use wheelchairs with the views of the event afforded most other members of the audience during the actual conditions under which the facility operates.

As a linguistic matter, it is certainly reasonable to interpret the term "lines of sight comparable to those for members of the general public" as denoting lines of sight that are "comparable" in the actual conditions under which a facility operates. If patrons can be expected to stand during particularly interesting or important portions of events, and seats for the general public reflect that fact by providing unobstructed lines of sight over standing spectators, it is hardly "comparable" to afford wheelchair users an unobstructed line of sight only on those occasions when the rest of the audience sits. Indeed, this Court has affirmed, in a case involving stadium-style movie theaters, the Department's view that Section 4.33.3 requires a *qualitative* comparison between the lines of sight afforded patrons seated in fixed and wheelchair seating. See *Oregon Paralyzed Veterans* v. *Regal Cinemas*, 339 F.3d 1126, 1132-33 (9th Cir. 2003).

This interpretation also comports with the statutory language the "lines of

sight" regulation implements. By its plain terms, the statute requires that newly-constructed facilities be both "readily accessible to" and "usable by" persons with disabilities. 42 U.S.C. 12183(a)(1). That language requires more than mere physical access to the facility; it requires that people with disabilities have a meaningful opportunity to *use* "the goods, services, and programs available therein." S. Rep. No. 116, 101st Cong., 2d Sess. 69 (1989); accord H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 118 (1990); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 63 (1990). Where, as here, the relevant service or program is a sporting or entertainment event, an opportunity to *use* the service includes an opportunity to *see* the event in the circumstances under which the event typically takes place – with an audience that often stands. By recognizing this fact, the Department's reading of the requirement of "comparable" lines of sight manifestly serves the purposes of the statute and its regulations – ensuring that individuals with disabilities receive the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a).

Moreover, the Department has consistently applied this interpretation since the ADA's new construction standards took effect in January 1993. Within months of the statute's effective date, the Department began corresponding with

stadium owners and architects to inform them that the regulation required lines of sight over standing spectators where patrons can be expected to stand during events. See, *e.g.*, *Independent Living* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 735 n.53, 751, 753 (D. Or. 1997) (citing to "uncontroverted" evidence Department had "asserted and enforced its position regarding lines of sight [over standing spectators] since at least early [spring] 1993"). In 1994, pursuant to the ADA's directive to provide technical assistance materials, 42 U.S.C. 12206(a), (c)(2)(C), the Department published the Supplement to its TAM stating that "in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand." TAM, § III-7.5180 at 13. The Department reiterated this position in a 1996 circular titled "Accessible Stadiums." U.S. Department of Justice, *Accessible Stadiums* 2 (May 1996) (available at http://www.ada.gov/stadium.pdf). Lastly, the Department has consistently taken the position in litigation that in sports venues, Section 4.33.3 requires "comparable" lines of sight over standing spectators where patrons can be expected to stand during events. See, *e.g.*, *Paralyzed Veterans*, 117 F.3d at 588; *United States* v. *Ellerbe Becket*, 976 F. Supp. 1262, 1266 (D. Minn. 1997); *Independent Living*, 982 F. Supp. at 735.

B. The Department's Interpretations Of The ADA Standards For Accessible Design Are Entitled To Controlling Weight

This case turns on the validity of the Department's interpretation of its own regulation. The Department has principal authority for administering the ADA's new construction and alterations provisions. The Attorney General has the sole power to issue binding regulations to carry out those provisions. See 42 U.S.C. 12183(a)(2); 12186(b). The Attorney General is also the only federal official with authority to enforce the ADA's public accommodations provisions, including the new construction provisions. See 42 U.S.C. 12188(b)(1)(B).

"[Courts] must give substantial deference to an agency's interpretation of its own regulations. . . . [Their] task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson*, 512 U.S. 504, 512 (1994); accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Barden* v. *City of Sacramento*, 208 F.3d 1085, 1089 (9th Cir. 2000). This deference is based on the presumption that, by virtue of Congress' delegated lawmaking power, the Executive Branch possesses greater authority to make policy choices and to apply its regulatory expertise than do the courts. "[B]road deference is all the more warranted when,

as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson*, 512 U.S. at 512 (quoting *Pauley* v. *BethEnergy Mines, Inc*., 501 U.S. 680, 697 (1991)).

Accordingly, "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). Indeed, this Court has repeatedly applied this deferential standard when upholding the Department's interpretations of Title III regulations, whether such views are set forth in technical assistance manuals or other agency materials. See, *e.g*., *Disabled Rights Action Comm.* v. *Las Vegas Events,* 375 F.3d 861, 875-876 (9th Cir. 2004) (deferring to Department interpretation set forth in the technical assistance manual concerning Title III coverage of facilities leased by private entities); *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 833-834 (9th Cir. 2000) (granting substantial deference to Department's interpretation of landlord liability under Title III as published in technical assistance manual).

Applying the foregoing principles, the Department's interpretation of Section 4.33.3's "lines of sight comparable" language is entitled to "controlling weight" so long as it is not plainly erroneous or inconsistent with the language of the regulation. The Department's reading of the statute clearly merits that standard of deference.

As discussed *supra*, the Department's reading of Section 4.33.3 comports both with the language of the regulation and the statutory provision it implements. Under such circumstances, the Department's construction of Section 4.33.3's comparability requirement can hardly be termed plainly erroneous or inconsistent with the regulation. Indeed, each of the courts to have considered this question, including the district court, has held that this interpretation is reasonable. *Caruso*, 193 F.3d at 733; *Paralyzed Veterans*, 117 F.3d at 584-586; *Independent Living,* 982 F. Supp. at 782; *Ellerbe Becket*, 976 F. Supp. at 1269.

C. The Access Board's Commentary Does Not Undermine The Department's Construction Of Its ADA Regulation

The district court erred in relying on the Board's commentary to reject the Department's interpretation of Section 4.33.3. The Board never expressly stated that its guidelines do not require lines of sight over standing spectators. Even assuming arguendo that the Board did so interpret its guidelines, however, the

Department never adopted the Board's commentary on Section 4.33.3. Since the new construction provisions of Title III became effective in 1993, the Department has consistently stated that it interprets Section 4.33.3 to require lines of sight over standing spectators when patrons are expected to stand during events.

Finally, even if the Board's commentary reduces the level of deference this Court gives the Department's interpretation, this Court should hold that Section 4.33.3 requires lines of sight over standing spectators. There is no justification for this Court deferring to or adopting the Board's alternative interpretation when that interpretation is contrary to the Department's authoritative and consistent position and is less effective in fulfilling the purposes of Title III.

1. The Access Board's Commentary Does Not Inherently Conflict With The Department's Interpretation Of Section 4.33.3

Properly understood, neither the Board's ADA guidelines nor its subsequent statements inherently conflict with the Department's view that Section 4.33.3 mandates lines of sight over standing spectators.

The Board published its draft Title III guidance in January 1991. 56 Fed. Reg. 2296 (Draft ADAAG). The Board's accompanying commentary stated:

> Section 4.33.3 provides that seating locations for people who use wheelchairs shall be dispersed throughout the seating area and shall be located to provide lines of sight comparable to those for all viewing areas. This requirement appears to be adequate for theaters

> and concert halls, but may not suffice in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event.

56 Fed. Reg. 2314.[2] The Board requested "comments on whether full lines of sight over standing spectators in sports arenas and other assembly areas should be required." 56 Fed. Reg. 2314.

That commentary, however, did not state that the proposed text of Section 4.33.3 *would* be insufficient to provide lines of sight over standing spectators. Indeed, by referencing "*full* lines of sight," the Board was likely contemplating not whether draft Section 4.33.3 should be interpreted as requiring lines of sight over standing spectators at all, but, rather, what form of technical or qualitative specifications should govern lines of sight over standing spectators.

In July 1991, the Board published its final Title III architectural guidelines. 56 Fed. Reg. 35,408. The final guideline modified proposed Section 4.33.3 to the current text regarding "lines of sight comparable" subsequently adopted by the Department of Justice in its final regulations. 56 Fed. Reg. 35,514. The commentary noted:

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[2] Specifically, the Access Board's Draft ADAAG provided in relevant part that: "[w]heelchair areas shall be an integral part of any fixed seating plan and shall be dispersed throughout the seating area. They shall . . . be located to provide lines of sight comparable to those for all viewing areas." 56 Fed. Reg. 2380.

> The [Draft ADAAG] asked questions regarding row spacing and lines of sight over standing spectators in sports arenas and other similar assembly areas . . . Many commentators recommended that lines of sight should be provided over standing spectators . . . . The issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities.

56 Fed. Reg. 35,440. This commentary certainly suggests that more detailed standards would be developed in the future. But it is not a definitive statement that the existing provision refers exclusively to lines of sight over seated spectators. To the contrary, the plain language of the provision does not limit the relevant "lines of sight." The comments are equally susceptible to a reading that the Board was reiterating its intention to issue future guidelines that would, for example, provide qualitative or technical refinements for lines of sight over standing spectators.

2. This Court Should Not Impute The Access Board's Commentary To The Department Given The Department's Consistent And Authoritative Interpretation Requiring Lines Of Sight Over Standing Spectators

Even assuming that the Board's views concerning its own guidelines could be interpreted as failing to require sightlines over standing spectators, the district court erred in attributing the Board's commentary to the Department.

The ADA makes clear that neither the Board's guidelines nor its comments bind the Department. The Department – not the Board – is the federal agency

empowered by Congress to issue and enforce regulations implementing Title III. 42 U.S.C. 12186(b). Furthermore, the ADA expressly states that the Board's guidelines are merely "minimum" requirements for the Department's regulations. 42 U.S.C. 12186(c). 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. 35,411.

As the D.C. Circuit held in *Paralyzed Veterans*, while the Department adopted the text of the Board's guidelines as part of its regulations (see 28 C.F.R. Pt. 36, App. A), the Department did not adopt the commentary accompanying those guidelines and cannot be bound by it. 117 F.3d at 587; but see *Caruso*, 193 F.3d at 735-736. The Department published its own detailed commentary to its regulations. 28 C.F.R. Pt. 36 App. B. That commentary described the requirement that new construction and alterations comply with the standards for accessible design published in Appendix A, and described how the standards were organized. It also addressed comments that urged the Department to incorporate alternative accessibility standards, such as those developed by ANSI or the Model Building Codes. 28 C.F.R. Pt. 36, App. B at 633-634.

The Department's commentary did not discuss most of the comments on the individual provisions of the Board's guidelines, including Section 4.33.3. The

Department thus did not discuss the Board's comments about standing spectators, and nowhere suggested that its own regulations did not address lines of sight over standing spectators. *Paralyzed Veterans*, 117 F.3d at 587.

This silence should not be read to mean that the Department intended to interpret its regulation in the same way as the Board interpreted its guideline. Imputing such an intent to the Department is especially inadvisable when the Department's own authoritative statements, beginning just months after the new construction requirements took effect, have consistently interpreted Section 4.33.3 to require lines of sight over standing spectators where patrons can be expected to stand during events.

In *D.H. Blattner & Sons, Inc.* v. *Secretary of Labor*, 152 F.3d 1102 (9th Cir. 1998), this Court confronted a similar situation and deferred to an agency's interpretation of its regulation. There, the Department of Labor's interpretation required *all* independent contractors that operated a mine to file certain reports. The Court found the interpretation reasonable despite "considerable support" in the regulation's legislative history that only independent contractors designated by the Secretary were covered. In particular, the commentary to the reporting regulation had stated that the "status of independent contractors as operators and the attendant responsibilities will be covered by regulations to be promulgated by

the Secretary which are separate from this rule." *Id*. at 1106. While the subsequent regulations themselves did not cover reporting requirements, the guidelines for the subsequent rule stated "independent contractors working at mines are not required to file legal identity reports under [the earlier regulation]," *id.* at 1106-1107. Nonetheless, the Court deferred, noting the guidelines did not expressly state that contractors who qualified as operators would *not* be required to file reports. The Court also "deem[ed] it significant that the Secretary's construction of the regulations most effectively furthers the [Secretary's] ability to achieve [the statute's] goal of protecting health and safety in mines." *Id*. at 1107. Similarly, in this case, the Department has never expressly stated that Section 4.33.3 does not apply to lines of sight over standing spectators. Moreover, the Department's interpretation "most effectively furthers" the goals of Title III.

The district court provided five reasons for its conclusion that the Department implicitly adopted the Board's commentary, which it summarized as follows:

> The Department referred comments on its proposed rule to the Board; the Department relied on the Board to make changes to the rule in response to comments; the Board modified section 4.33.3 based on comments and explained those changes in its commentary; the Department, as it stated in its notice, was a member of the Board and participated actively in the preparation of the proposed and final guidelines; and the Department adopted section 4.33.3 without

> modification and stated generally in its public notice that "Comments on the Department's proposed rule have been addressed adequately in the final guidelines."

E.R. Tab 7 at 13 (citing *Caruso*, 193 F.3d at 736). These facts do not justify the district court's conclusion. While the Department did refer comments regarding the guidelines to the Board, the Department "thoroughly analyzed and considered" all of the comments the Board and Department received on the guidelines. The Department also received some comments on individual provisions of the guidelines directly. 56 Fed. Reg. 35,586. The Department's statement, in the context of this comprehensive and complex process, that the comments on the guidelines were "adequately addressed in the final ADAAG," 56 Fed. Reg. 35,586, does not indicate that the Department adopted and agreed with each individual *comment* that the Board made in its commentary. Rather, it indicates the Department's confidence that the Board's *guidelines* incorporated and reflected the Board's and the Department's consideration of those comments.

The Department's own commentary to its final rule, moreover, fully satisfies the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq*. There is no basis for Speedway's suggestion that refusing to impute the Board's commentary to the Department places the validity of the Department's entire rule in question. The APA requires only that an agency's final rule include

a "concise general statement of [its] basis and purpose." 5 U.S.C. 553(c). "[T]here is no obligation to make references in the agency explanation to all the specific issues raised in comments." *Mt. Diablo Hosp.* v. *Shalala*, 3 F.3d 1226, 1234 (9th Cir. 1993) (rejecting challenge to Medicare rule based on data from Bureau of Labor Statistics alleging Secretary failed to respond specifically to criticisms of data's treatment of part-time workers; comment that data was most reliable available sufficient given "minor significance" of issue).

The Department's comments satisfy this standard. As described above, the Department responded to comments on the provisions of the regulations in Sections A-D of Part 36. In a section of the commentary titled "Comments on Specific Provisions of Proposed ADAAG," the Department noted that it had received "numerous comments on the ADAAG" and that the areas of heaviest response "included assistive listening systems, automated teller machines, work areas, parking, areas of refuge, telephones and visual alarms." 56 Fed. Reg. 35,586. After summarizing the ADAAG's treatment of these issues, as well as a few others, the Department stated that the comments "were considered in the same manner as other comments on the Department's proposed rule, and, in the Department's view, have been addressed adequately in the final ADAAG." 56 Fed. Reg. 35,586. The decision not to address every comment received

individually, given the scope and complexity of this rulemaking, does not call the validity of the rule into question.

3. Even Assuming Arguendo That The Board's Commentary Was Implicitly Adopted By The Department, The Department's Technical Assistance Manual Is A Valid Modification Of An Interpretive Rule That Did Not Require Notice And Comment

An agency can modify an interpretive rule without notice and comment. *Erringer* v. *Thompson*, 371 F.3d 625, 632 (9th Cir. 2004). Accordingly, even assuming arguendo that the Board's commentary interpreted Section 4.33.3 as not requiring lines of sight over standing spectators, and that the Board's commentary can be imputed to the Department, the interpretation set forth in the TAM is a valid interpretation that deserves the court's deference.

The APA establishes two categories of rules: interpretive rules and legislative rules. "[A]n interpretive rule [is one] issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala* v. *Guernsey Mem'l Hosp*., 514 U.S. 87, 99 (1995). "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Industries* v. *DEA*, 333 F.3d 1082, 1087 (9th Cir.

2003). As such, valid legislative rules have the "force of law." *Ibid*.

This Court has adopted a three-part test for determining whether a rule has the "force of law" and is thus a legislative rule: "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." *Hemp Industries*, 333 F.3d at 1087.

An agency issuing a legislative rule must allow notice and comment. 5 U.S.C. 553(b). Interpretive rules are not subject to notice and comment. 5 U.S.C. 553(b)(A). This Court has held that "no notice and comment rulemaking is required to amend a previous interpretive rule." *Erringer*, 371 F.3d at 632; *Hemp Industries*, 333 F.3d at 1088.

Clearly, the Department's Title III regulations, including Section 4.33.3, are legislative rules with the force of law. The Title III regulations were issued pursuant to a direct grant of legislative authority from Congress. The text of Section 4.33.3 provides a standard for accessible wheelchair seating areas in assembly areas: they must provide lines of sight comparable to those for the general public. Section 4.33.3, standing alone, thus is "an adequate legislative basis for enforcement action" requiring lines of sight over standing spectators.

Assuming arguendo that the Board's commentary implied that its guideline did not address lines of sight over standing spectators, that was an interpretation that explains and clarifies the language of Section 4.33.3. Even if imputed to the Department, the Board's commentary remains an interpretive, not a legislative rule.

The Technical Assistance Manual (TAM) is also an interpretive rule. The 1994 TAM sets out the Department's interpretation of the phrase "lines of sight comparable to those of the general public" in Section 4.33.3, clarifying the application of the standard to assembly areas where patrons stand for significant portions of events. The TAM did not modify or amend the language of Section 4.33.3, it merely interpreted it. Thus, even if the Board's commentary were imputed to the Department, the TAM merely "amended a prior interpretive rule."

Furthermore, the TAM does not "amend a prior legislative rule." This Court considers a rule legislative under the "amends a prior legislative rule" test "only if it is inconsistent with another rule having the force of law." *Hemp Industries*, 333 F.3d at 1088; *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327, 1337 (9th Cir. 1997) (White, J., retired, by designation). The TAM is not *inconsistent* with Section 4.33.3 itself. In fact, every court examining this issue has determined that the TAM is a reasonable interpretation of Section 4.33.3. At most, the interpretive

rule in the 1994 TAM modified an earlier interpretive rule. Because modifications of interpretive rules do not require notice and comment, the TAM is a valid interpretive rule that warrants deference by a reviewing court. See *D.H. Blattner*, 152 F.3d at 1109 n.2 (it is irrelevant for purposes of determining whether notice and comment required if the Secretary's current interpretation is inconsistent with prior interpretive rules); *Chief Probation Officers*, 118 F.3d at 1334 (notice and comment not required where rule modified a "short-lived" interpretation of statute).[3]

Indeed, the district court seems to acknowledge that the Board's commentary and the TAM are *interpretations* of Section 4.33.3. E.R. Tab 7 at 15 n.3, 16, 18. The district court thus erred in concluding that "DOJ was not free to change its interpretation in 1994 without first going through the notice and comment process."[4] E.R. Tab 7 at 16.

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[3] *Caruso's* holding to the contrary, 193 F.3d at 737 (TAM effectively amended a prior legislative rule by changing the meaning, not of the Board's commentary, but of Section 4.33.3 itself) is thus inconsistent with this Court's precedent.

[4] *Paralyzed Veteran's* similar statement in dicta that a "fundamental modification" to an interpretive rule requires notice and comment, 117 F.3d at 586, was also error. It is contrary to the APA and inconsistent with precedent in this Circuit. *Erringer*, 371 F.3d at 632; *Hemp Industries*, 333 F.3d at 1088.

4. The District Court Erred In Deferring To The Board's Earlier Interpretation Instead Of The Department's Later Explicit And Consistent Interpretation Of Section 4.33.3

In *Thomas Jefferson*, the Supreme Court stated the general principle that a court must defer to the agency's interpretation "unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." 512 U.S. at 512. To be sure, some cases have held that a longstanding interpretation may deserve greater deference than a changed one. See, *e.g.*, *id*. at 515 ("[a]n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view"). But the Supreme Court has made clear that even a changed interpretation is entitled to some deference. See *id.* at 517 ("The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. * * * Indeed, [a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.) (internal citations and quotation marks omitted); see also *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (holding, in the context of

Chevron deference, that "the mere fact that an agency interpretation contradicts a prior agency position is not fatal"). "How much weight should be given to the agency's views in such a situation * * * will depend on the facts of individual cases." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993).[5]

The facts of this case stand in stark contrast to decisions of this Court and the Supreme Court which reject an agency's modified interpretation. In those cases, the agency's modified interpretation was found to be inconsistent with both the plain language of the regulation and indications of the agency's own intent at the time the regulation was promulgated. See, *e.g.*, *Lal* v. *INS*, 255 F.3d 998, 1008 (9th Cir. 2001) (rejecting BIA's interpretation as inconsistent with the plain language of the regulation, the reasoning in case rule codified, precedent in this Court, and an arbitrary departure from settled policies); see also *Norfolk Southern Railway Co.* v. *Shanklin*, 529 U.S. 344, 356 (2000) (no deference to agency's most recent interpretation of regulation that was both inconsistent with the text of the regulation itself and contrary to a previous agency construction Court adopted as authoritative in earlier case); *Hemp Industries*, 333 F.3d at 1090 (interpretation

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[5] *Good Samaritan* involved an agency's interpretation of a statute. This Court considers cases involving *Chevron* deference as persuasive authority when considering deference to an agency's interpretation of its regulations. *Lal* v. *INS*, 255 F.3d at 1002 n.3.

inconsistent with plain language of regulation and regulatory history); *Crown Pacific* v. *OSHRC*, 197 F.3d 1036, 1039-1040 (9th Cir. 1999) (Secretary's interpretation inconsistent with both plain meaning of regulation's language and intent evidenced in regulatory amendment).

In this case, in contrast, the Department's current interpretation of Section 4.33.3 is clearly consistent with the text of the regulation. Further, the Department's current reading manifestly serves the purposes of the statute and its regulations.

Moreover, in this case, the only indication of a contrary intent at the time of the regulation's promulgation is found not in the Department's own statements, but in a statement by the Board that at most can be *imputed* to the Department. Every authoritative statement of the Department itself since the effective date of the new construction provisions some 14 years ago, including the TAM, has taken the position that lines of sight over standing spectators are required where patrons can be expected to stand during the event. In fact, the Department's interpretation of Section 4.33.3 is even more worthy of deference than the modified agency interpretation upheld by the Supreme Court in *Good Samaritan*. See 508 U.S. at 416-418 (deferring to agency's current reading of statute it administered where agency had embraced a "variety of approaches" over the years but its current

interpretation was "at least as plausible as competing ones" and "closely fit[] the design of the statute as a whole and . . . its object and policy"). Under these circumstances, the district court should have deferred to the Department's interpretation. This Court should hold that Section 4.33.3 requires lines of sight over standing spectators where patrons can be expected to stand during events.

CONCLUSION

This Court should reverse the district court's order granting summary judgment to the defendant and remand to the district court to apply Section 4.33.3 to require lines of sight over standing spectators for wheelchair users at the Speedway.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT is proportionally spaced, has a typeface of 14 points, and contains 6874 words.

_____
KAREN L. STEVENS
Attorney

Date: April 5, 2007

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT were served by overnight delivery on the following counsel of record:

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