No. 02-9034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN MEINEKER and SYBIL MCPHERSON,

Plaintiffs-Appellants,

v.

HOYTS CINEMAS CORPORATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLANTS AND URGING REVERSAL

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF THE AUTHORITY TO FILE

The United States, which has authority to file this brief under Fed. R. App. P. 29(a), has a direct interest in this appeal, which focuses on the interpretation of a Department of Justice regulation implementing Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.* The Attorney General has promulgated regulations establishing accessibility requirements for newly constructed facilities covered by Title III. One of those regulations is Standard 4.33.3, which requires that wheelchair areas in assembly areas (including movie theaters) " be an integral part of [the] fixed seating plan" and provide "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A,

§ 4.33.3. The district court's holding conflicts with the Department of Justice's long-standing interpretation of this regulation.

In addition, the United States has a pending lawsuit against Hoyts Cinemas Corporation (Hoyts), the appellee in this case, alleging violations of Standard 4.33.3 in Hoyts' stadium-style movie theaters nationwide. See *United States v. Hoyts Cinemas Corp.*, No. 00-CV-12567 (D. Mass.). The present appeal involves auditoriums in a single Hoyts theater complex in the Crossgates Mall near Albany, New York. As with the plaintiffs' claims in the present case, the United States asserts in its lawsuit that Hoyts' stadium-style theaters violate Standard 4.33.3's comparable-lines-of-sight and integral seating provisions. Therefore, the outcome of this appeal may affect some of the claims in the United States' lawsuit that pertain to the Crossgates complex.

The decision in this appeal may also affect pending lawsuits that the United States has brought under Standard 4.33.3 against other operators of stadium-style theaters. See *United States v. Cinemark USA, Inc.*, No. 02-3100 (6th Cir.); *United States v. National Amusements, Inc.*, No. 00-CV-12568 (D. Mass.); *United States v. AMC Entm't, Inc.*, No. CV 99-01034 (C.D. Cal); and *Lonberg and United States v. Sanborn Theaters, Inc.*, No. 97-6598 (C.D. Cal.).

STATEMENT OF THE ISSUES

The United States will address two issues:

1. Whether the district court erred in concluding, on a motion for summary judgment, that defendant's stadium-style movie theaters provide patrons in

wheelchairs "lines of sight comparable to those for members of the general public," as required by Standard 4.33.3.

2. Whether the district court erred in concluding that the wheelchair spaces in defendant's stadium-style movie theaters are an "integral" part of the fixed seating plan, as required by Standard 4.33.3, even though in 14 of the 18 theaters, defendant provides no wheelchair seating in the stadium sections where the vast majority of the public sits.

STATEMENT OF THE CASE

1. Title III of the ADA 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). To implement this requirement, 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), 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

> [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 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.

2. This case involves a Hoyts theater complex near Albany, New York, which contains 18 theater auditoriums (JA 301).[1] These auditoriums are public accommodations subject to Title III's requirements for new construction. See 42 U.S.C. 12181(7)(C); Doc. 61 at 2; JA 263-264.

Each of these auditoriums is divided into two distinct sections: (1) a traditional-style section with seats on a flat floor near the screen, and (2) a significantly larger stadium section, whose seating is on a series of elevated tiers similar in configuration to a sports stadium (JA 175, 301). The lowest part of the stadium section is elevated several feet above, and separated by a wall from, the traditional-style portion of the auditorium (JA 175). On average, almost 70% of the seats in the theaters are in the stadium sections (JA 301); in more than one-third of the theaters, between 75% and 79% of the seats are in the stadium sections (JA 177-183, 278). Notwithstanding the fact that the vast majority of the seating is on stadium tiers, in 14 of the 18 theaters, *none* of the wheelchair spaces is in the stadium sections; rather, all such spaces are in the much smaller traditional-style areas (JA 175, 301; Doc. 66 at 5).

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[1] "JA __" indicates the page number of the Joint Appendix. "Doc. __" refers to the number of the document on the district court docket sheet.

When this litigation began, each of the 18 theaters had wheelchair spaces in the front row of the traditional-style seating area, as well as in one or more rows toward the back of that section (JA 302, 307 n.4; Doc. 31 (floor plans); Doc. 34, Exh. F: Salmen Report at 7-10). During the course of the litigation, Hoyts renovated each of the 18 theaters by removing the wheelchair spaces from the front row and placing them in either the last or last two rows of the traditional-style section (JA 174-183, 302, 307 n.4). Of the 18 renovated theaters, 10 have only three or four rows of seats in the traditional-style area (JA 179, 181, 183), five auditoriums have five rows in that section (JA 177, 180, 182), two theaters have six rows in that area (JA 180, 182), and one auditorium has seven rows in that section (JA 178).

The wheelchair spaces in the traditional-style area are far lower and closer to the screen than the elevated stadium seating that most patrons use (JA 175). Plaintiffs produced evidence that wheelchair users who sat in the traditional-style section were forced to look up at the screen at steep angles, often resulting in severe discomfort, and that those individuals were so close to the screen that they had trouble focusing on the picture, which appeared blurry and distorted (JA 52-55, 58, 63, 65-66, 68, 80-81, 95-96, 302; Doc. 40, Exh. 5 at 1). Persons with disabilities have had similar experiences in other stadium-style theaters that restrict wheelchair spaces to the traditional-style area. See *United States v. AMC Entm't, Inc.*, slip op. 7-8, 19, No. CV 99-01034 (C.D. Cal. Nov. 20, 2002) (copy in Addendum).

Even after the renovation of the theaters, the lines of sight from the wheelchair spaces in the traditional-style section are decidedly inferior to those in the stadium seats. Photographs in the record illustrate that, due to the relative height and distance from the screen, seats near the front of the stadium section provide lines of sight superior to those available to wheelchair users in the back row of the traditional-style area (Doc. 62 at 14-20 (comparing photographs); JA 200-212, 222-233, 237-239, 255-257). Plaintiffs also produced evidence that substantial disparities exist between the vertical viewing angles of wheelchair users in the traditional-style area of the renovated theaters and those available to ambulatory patrons in the stadium section. Widely accepted design guidelines for movie theaters recommend that vertical viewing angles to the top of the screen not exceed 30 or 35 degrees because of the discomfort and image distortion that result at steeper angles (Doc. 40, Exh. 3 at 5; Doc. 29, Exh. 4 at 838; Doc. 24 at 112; *AMC*, *supra*, slip op. 12-14). According to plaintiffs' evidence, the vertical viewing angles for most wheelchair locations in the traditional-style sections of the renovated theaters are higher than 35 degrees (and thus well within the discomfort zone),[2] whereas *none* of the seats in the stadium sections has a vertical viewing

[2] Plaintiffs produced evidence that wheelchair locations near the back of the traditional-style areas had the following vertical viewing angles:

(continued...)

angle exceeding 30 degrees and, indeed, many of those seats have vertical angles well under 30 degrees (see Doc. 37, Exh. 3 (floor plans showing point where vertical angle for fixed seats drops below 30 degrees)).

Plaintiffs also produced evidence that most ambulatory patrons sit in the stadium section because of its superior comfort and lines of sight and, consequently, that restricting wheelchair seating to the non-stadium portion of the theater effectively isolates wheelchair users from most other audience members

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[2](...continued)

Theater # (and location of wheelchair space)	Vertical viewing angle from wheelchair space (in degrees)
5 (row 5)	43
6 (row 4)	47
7 (row 4)	42
8 (row 4)	44
9 (row 3)	50
15 (row 4)	42
16 (row 4)	42
17 (row 4)	43
18 (row 3)	49

Doc. 31: ADA Barriers Report (June 26, 2000) at 7 (Bar. # 2085), 9 (Bar. # 1974), 11 (Bar. # 2166), 13 (Bar. # 1987), 15 (Bar. # 2039), 29 (Bar. # 2068), 31 (Bar. # 2054), 33 (Bar. # 1956), 35 (Bar. # 2152). Although these angles were measured prior to the renovation of Hoyts' theaters, the measurements were for wheelchair spaces located in rows that still contain wheelchair seating after the renovations (compare *id.* at 7, 9, 11, 13, 15, 29, 31, 33, 35 with JA 180-183 (locations of wheelchair rows in renovated theaters)). Therefore, these measurements (if accurate when made) should be indicative of the viewing angles for wheelchair users in the renovated theaters. Although the viewing angle measurements are contained in an expert report excluded by the district court, they are properly before this Court because the district judge emphasized that plaintiffs' expert could testify as a fact witness about the measurements he took in the theaters (JA 171).

(see JA 81, 96-99, 110-111; see also JA 50; Doc. 24 at 196-197; Doc. 37 at 4). Other cases have revealed similar evidence about the seating preferences of ambulatory patrons in stadium-style theaters. See, *e.g.*, *AMC*, *supra*, slip op. at 20-21, 35.

3. In September 1998, plaintiffs filed suit against Hoyts, alleging that the 18 stadium-style theater auditoriums were in violation of Title III of the ADA and its implementing regulations, including Standard 4.33.3 (JA 15-36, 300-302). The district court granted summary judgment to Hoyts and denied plaintiffs' cross-motion for summary judgment, concluding that the wheelchair locations in all 18 theaters complied with Standard 4.33.3 (JA 300-311).

First, the court held that the wheelchair seating in Hoyts' renovated theaters complied with the comparable-lines-of-sight requirement of Standard 4.33.3 (JA 306-308). The court concluded that the theaters provided comparable lines of sight because Hoyts "has located the wheelchair seating amongst the floor seating for the general public, thereby affording wheelchair patrons with viewing angles that are comparable to those afforded to a significant portion of the general public" (JA 308). The court apparently assumed that viewing angles for these wheelchair positions are "comparable" if a "significant portion" of the theater's total seats are in the traditional-style area. The district judge further assumed that the traditional-style areas in Hoyts' theaters contain a "significant portion" of the total seats even though, on average, about 70% of the seats in those theaters are in the stadium

sections, and some theaters have as many as 79% of their seats in the stadium sections. See p. 4, *supra*.

At the same time, however, the court rejected Hoyts' proposed interpretation of Standard 4.33.3. Hoyts argued that viewing angles are irrelevant to whether lines of sight are comparable under Standard 4.33.3 and urged the district court to adopt 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 regulation's comparable-lines-of-sight provision required at most that wheelchair users have an unobstructed view of the screen. The district court rejected *Lara*'s reasoning, concluding instead that "[t]he requirement that a line of sight be 'comparable' clearly imposes a qualitative requirement that the sight line be 'similar' and not merely 'similarly unobstructed'" (JA 307). The court explained that such a "qualitative" comparison

> is necessary to address the potential situation where a defendant has relegated wheelchair patrons to a portion of the theater that provided truly inferior viewing angles and limited or no seating for the general public – such as was the case at the start of this litigation where wheelchair patrons were relegated to the absolute worst seats at the very front of the theaters. It would defy common sense to describe the lines of sight afforded by such viewing positions as 'comparable' merely because they were unobstructed. Had Hoyts not undertaken the renovations to relocate the wheelchair seating at the Crossgates theaters, it would unquestionably have been in violation of the ADA.

(JA 307 n.4).

Finally, the court rejected plaintiffs' argument that Hoyts violated the "integral" seating requirement of Standard 4.33.3 by failing to put wheelchair spaces in the stadium section in 14 of its 18 theaters (JA 308-309). The court held

that "the wheelchair seating is an 'integral' part of the fixed seating plan at [Hoyts'] theaters because such seating is incorporated into, and located among, the seating for the general public" (JA 309).

SUMMARY OF ARGUMENT

This case focuses on the interpretation of Standard 4.33.3, a regulation that the Department of Justice promulgated pursuant to its authority under Title III of the ADA. That regulation governs placement of wheelchair seating in public assembly areas (including movie theaters) subject to the new construction requirements of Title III. Standard 4.33.3 requires that wheelchair areas be "an integral part of any fixed seating plan" and provide "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 regulation as requiring that wheelchair users in movie theaters be provided lines of sight within the range of viewing angles offered to most of the patrons of the cinema, and that wheelchair seating in a stadium-style cinema be integrated into the stadium section. The Department's reading of Standard 4.33.3 is consistent not only with the language of the regulation but also with the goals of Title III. At the very least, the Department's interpretation of its own regulation is reasonable and, therefore, is entitled to deference.

Although the district court correctly recognized that viewing angles are relevant in determining whether lines of sight are comparable under Standard 4.33.3, the court erroneously interpreted the regulation to allow theater operators to relegate wheelchair users to an area of the stadium-style theater that provides

viewing angles that are decidedly inferior to those available to the vast majority of the audience. This interpretation thwarts Congress's goals of providing persons with disabilities equal enjoyment of movie theaters and ending the social isolation of such individuals.

The district court also erroneously concluded that the "integral" seating mandate of Standard 4.33.3 does not require that wheelchair spaces be located in the stadium section of the stadium-style theaters. That holding undermines Congress's goal of ending the isolation of persons with disabilities. Denying wheelchair users access to the stadium section of these theaters results in *de facto* isolation of these individuals from the vast majority of the audience. The Department reasonably interpreted its regulation to prohibit such isolation.

ARGUMENT

I

THE COMPARABLE-LINES-OF-SIGHT MANDATE OF STANDARD 4.33.3 REQUIRES THAT VIEWING ANGLES FOR WHEELCHAIR USERS IN MOVIE THEATERS BE COMPARABLE TO THOSE PROVIDED TO MOST MEMBERS OF THE AUDIENCE

Standard 4.33.3 requires, in part, that wheelchair locations in public assembly areas provide "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. The Department has reasonably concluded that factors in addition to physical obstructions – such as viewing angles and distance from the screen – affect whether individuals' lines of sight are equivalent to those of other audience members. Individuals who use wheelchairs need not be provided the best seats in the house, but neither can they be relegated to locations with viewing angles decidedly inferior to those available to most audience members, as they are in many of Hoyts' 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.

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.

The Department's reasonable construction of Standard 4.33.3 was recently upheld in *United States v. AMC Entertainment, Inc.*, No. CV 99-01034 (C.D. Cal. Nov. 20, 2002) (opinion in Addendum), which concluded that a theater operator's

relegation of wheelchair users to a traditional-style area whose viewing angles were inferior to those in the stadium seating violated the regulation's comparable-lines-of-sight mandate (*id.* slip op. at 2-3, 31-38). The opinion in *AMC* contains the most thorough and persuasive judicial analysis to date of the comparable-lines-of-sight requirement of Standard 4.33.3 in the context of stadium-style theaters.

A. The Department Of Justice's Interpretation Is Entitled To Deference

As the Supreme Court has recognized, the Department of Justice's interpretations of Title III of the ADA "are entitled to deference" 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); see 42 U.S.C. 12186(b), 12188(b)(1)(B), 12206(c)(2)(C). Deference is especially appropriate where, as here, a court is asked to review the Department's interpretation of its own regulation. That interpretation must be upheld unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to interpretation in an *amicus* brief); accord *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The court in *AMC* properly applied this standard in deferring to the Department's interpretation of Standard 4.33.3. See *AMC*, *supra*, slip op. 37-38. Similarly, this Circuit and other courts have invoked this deferential standard in other contexts in upholding the Department's interpretations of its ADA regulations. See, *e.g.*, *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 & n.8 (2d Cir. 1997)

(regulation under Title II of the ADA), overruled in part on other grounds by *Zervos v. Verizon N.Y.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001); *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).

B. The District Court Correctly Concluded That Viewing Angles Are Relevant To Whether Lines of Sight Are Comparable

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 field of theater design to encompass viewing angles. See *AMC*, *supra*, slip op. 35 (theater operator "understood – or should have understood – that the meaning of 'lines of sight' in the context of motion picture theaters referred not only to possible obstructions but also to viewing angles").

Long before the enactment of the ADA, various treatises on theater design had recognized that viewing angles were important components of spectators' lines of sight.[3] See *AMC*, *supra*, slip op. 10-14 (surveying these publications). In 1838, in his "Treatise on Sightlines and Seating," Scottish engineer John Scott Russell explained that a factor affecting the quality of sight lines was whether the seat in the auditorium was "too far forward," such that it required a spectator "to look up at a *painful angle* of elevation." George C. Izenour, *Theater Design* 598-599

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[3] Relevant excerpts of these treatises and publications are reproduced in the addendum to this brief. Each is publicly available in the Library of Congress.

(1977) (emphasis added) (reprinting Russell's treatise). Russell's treatise has been described as "the first and still definitive statement on the subject of sight lines in modern theater design." *Id.* at 71. A more recent treatise noted 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, and warned against auditorium designs that "produc[e] upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action." Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* 69 (2d ed. 1964). Similarly, a 1977 treatise explained that "[a] good sight line is one in which there are no impediments to vision and *angular displacement* (vertical and horizontal) of the eyes and head falls within the criteria for comfort." *Theater Design*, *supra*, at 4 (emphasis added).

Shortly before the enactment of the ADA, the Society of Motion Picture and Television Engineers (SMPTE) published guidelines that made clear that viewing angles were a key component of spectators' lines of sight:

> Since the normal line of sight is 12 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* at 3 (Dec. 19, 1989), reprinted in 99 SMPTE Journal 494 (June 1990). The guidelines further explained that "as the viewer's line of sight to the screen deviates from the

perpendicular * * * all shapes [on the screen] become distorted." *Id.* at 493. SMPTE readopted these guidelines in 1994, prior to the construction of the first stadium-style theaters (Doc. 40, Exh. 3). See also American Institute of Architects, *Ramsey/Sleeper Architectural Graphic Standards* 20 (8th ed. 1988) (maximum recommended vertical angle for a "sightline from the first row" of a movie theater is 30º to 35º); Doc. 36, Exh. E (later edition of same publication).

The movie theater industry shared this understanding of the term "lines of sight" at the time of the construction of the first stadium-style theaters in 1995. *AMC*, *supra*, slip op. 14-20. As the *AMC* court explained in detail, the National Association of Theater Owners (NATO), of which Hoyts is a member (Doc. 36, Exh. D at 2), repeatedly took the position in the early to mid-1990s that "sight lines from the last row [of] seats are the best in the house," that "[s]eating in the rear of the auditorium affords the smallest viewing angle," and that "lines of sight are measured in degrees," thus indicating that viewing angles are a component of one's line of sight. *AMC*, *supra*, slip op. 15-17 (citing official position paper and *amicus* brief). Similarly, in 1989, during a congressional hearing on the proposed ADA, a NATO representative cautioned that increasing the upward viewing angle for a wheelchair user could result in "discomfort" when the individual tries "to look up in the designed line of sight." Hearings on H.R. 2273 before the House Judiciary Committee, 101st Cong. 1st Sess. 292 (1989) (Paul A. Roth, Chairman, NATO's Government Relations Committee). Consistent with NATO's position, another major theater chain – American Multi-Cinema, Inc. – filed a pleading in 1995

explaining that "[l]ines of sight for a patron in the auditorium are measured with reference to the horizontal and vertical angles of view the eye must encompass in seeing the screen." *AMC*, *supra*, at 17 (excerpt of pleading reprinted at pp. 75-76 of Addendum).

Given this historical usage of the phrase "lines of sight," the Department of Justice reasonably viewed it as a term of art that, in the context of theater design, would be widely understood by architects and designers as encompassing viewing angles. Indeed, even before the advent of stadium-style theaters in 1995, the Department took the position in enforcing Title III that viewing angles were relevant in determining whether an assembly area complied with the lines-of-sight requirement of Standard 4.33.3. See *Independent Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 708 n.9 (D. Or. 1997) (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).

In 1998, however, the United States learned that Cinemark USA, Inc., a major theater chain, was advocating 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 litigating position, 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 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, and that the regulation requires that wheelchair users be provided lines of sight within the range of viewing angles offered to most members of the audience. Brief of *Amicus Curiae* United States on Summary Judgment Issues, at 8-9, in *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex.) (brief available at 1997 WL 1174429, at *5-*6). The Department's brief in *Lara* reaffirmed the well-established understanding of the term "lines of sight" that has prevailed for years among theater designers.

The district court in this case thus properly concluded that viewing angles are relevant to whether lines of sight are comparable for purposes of Standard 4.33.3. In doing so, the court correctly rejected 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. Under the Fifth Circuit's reasoning, a wheelchair space placed anywhere in the theater, no matter how close to the screen, would comply with the comparable-lines-of-sight requirement so long as the wheelchair user could somehow see the screen without obstruction.

The Fifth Circuit's decision in *Lara* is fundamentally flawed. See *AMC*, *supra*, slip op. 31-34 (finding *Lara* unpersuasive). It conflicts with the plain

language of the regulation, which requires that lines of sight be "comparable," not just unobstructed. See 28 C.F.R. pt. 36, App. A, § 4.33.3. The *Lara* court also failed to recognize that the term "lines of sight" in the context of theater design had commonly been used to refer not just to the degree of obstruction but also the viewing angles of spectators. See pp. 14-17, *supra*. Instead, the court relied on three inapposite federal regulations, which pertain to topics that have no relevance to the ADA, wheelchair seating, or movie theaters. See *Lara*, 207 F.3d at 788-789, citing 47 C.F.R. 73.685 (broadcast antenna's "line-of-sight"); 46 C.F.R. 13.103 (Coast Guard safety regulation); 36 C.F.R. 2.18 (National Park Service regulation governing snowmobile operation by juveniles).

The Fifth Circuit also reasoned that the Department's interpretation of Standard 4.33.3 was not entitled to deference because it allegedly conflicted with the Access Board's understanding of its ADA guidelines. See *Lara*, 207 F.3d at 788-789. That conclusion is both factually and legally incorrect.

In fact, the Access 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. *AMC*, *supra*, slip op. 33-34. For example, the Board has explained that:

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

64 Fed. Reg. 62,278 (Nov. 16, 1999) (emphasis added). The Access Board's technical assistance manual also explains, in a section titled "Sight Lines," that

> Both 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.

ADAAG Manual at 117 (July 1998).

It is true, as 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. See 64 Fed. Reg. 62,278. But positions advocated in the give-and-take of 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 Access Board's discussion of those negotiations does not detract from the Board's clear position that viewing angles are among the factors that determine whether lines of sight are comparable under the existing guidelines. 64 Fed. Reg. 62,278; *ADAAG Manual*, *supra*, at 117. At any rate, 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, 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). 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. *Paralyzed Veterans*, 117 F.3d at 585; *AMC*, *supra*, slip op. 37. For these reasons, this Court should reject the holding of the Fifth Circuit in *Lara*.

C. The District Court Nonetheless Erred In Concluding That All 18 Auditoriums Satisfy The Comparable-Lines-Of-Sight Requirement

Although the district court correctly recognized that viewing angles are relevant to whether lines of sight are comparable, the court nonetheless erred in concluding that all 18 of the Hoyts' stadium-style auditoriums comply with the comparable-lines-of-sight requirement of Standard 4.33.3. The court concluded, in effect, that wheelchair users have comparable lines of sight under Standard 4.33.3 even if their viewing angles are decidedly inferior to those available from the stadium section where the overwhelming majority of the patrons choose to sit. That holding not only conflicts with the Department of Justice's interpretation of its own regulation but also thwarts the basic goals of the ADA.

The vast majority of the seats in each theater are in the "stadium" section, which, as the name suggests, is the quintessential feature of a "stadium-style" theater. In the 18 auditoriums at issue in this appeal, an average of about 70% of the seats are in the stadium section and in some of the theaters, that percentage is as

high as 79%. But that distribution of seats does not tell the whole story. When one considers where audience members actually sit in these theaters, the disparity between the stadium section and the traditional-style area is even more pronounced. Plaintiffs produced evidence that ambulatory patrons generally try to avoid the traditional-style area because of the superior comfort and viewing experience provided by the stadium section. The United States has similarly discovered in its own lawsuits that relatively few ambulatory patrons choose to sit in the traditional-style area if seats are available in the stadium section. See, *e.g.*, *AMC*, *supra*, slip op. 7, 19-21. Indeed, operators of stadium-style theaters sometimes place extra seats at the front of the auditorium knowing that the public will rarely use them because of their inferior sightlines. See *id.* at 13, 19, 35. Therefore, a substantial proportion of the seats in the traditional-style section will often remain empty, even when the stadium section is nearly full.

As a result, although the traditional-style areas of these theaters contain some seats for the general public, the reality is that relatively few ambulatory patrons are ever forced to sit in these inferior locations. Ambulatory patrons might occasionally experience poor viewing angles if they show up late for a sold-out movie, but they generally have the option of avoiding the bad seats in the traditional-style area by getting to the theater early enough to find a seat in the stadium section. By contrast, under the district court's approach, wheelchair users would *always* be in the locations with the poor viewing angles. No matter how

early they arrive for the movie, the wheelchair users would have no choice but to sit in the undesirable spaces designated for their use in the traditional-style areas.

That is not "equal enjoyment" of the benefits of a movie theater. See 42 U.S.C. 12182(a) (prohibiting disability-based discrimination "in the full and equal enjoyment" of the benefits of public accommodations). Such inequality simply cannot be squared with the goals of Title III. See 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").

Moreover, allowing theater owners to relegate wheelchair users to inferior locations near the front of the auditorium may discourage many persons with disabilities from even going to the movies, thus perpetuating the very social isolation that the ADA was designed to overcome. See 42 U.S.C. 12101(2) (noting the historical isolation of individuals with disabilities). In the traditional-style areas of many stadium-style theaters, the viewing experience for wheelchair users is not just inferior to that available to most patrons, it is sometimes so uncomfortable that wheelchair users give up trying to watch movies in those cinemas. When Congress enacted the ADA, it was well-aware of evidence showing that "[t]he large majority of people with disabilities do not go to movies," S. Rep. No. 116, 101st Cong., 1st Sess. 10-11 (1989), and it sought to change that situation. This Court should reject the district court's interpretation of the regulation because it is so "plainly at odds" with the purposes of the underlying statute. *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (upholding agency's interpretation).

The district court's interpretation also conflicts with the recent decision in *AMC*, *supra*, which concluded that restricting wheelchair spaces to the traditional-style area of a stadium-style theater violated the regulation's comparable-lines-of-sight mandate (slip op. 2-3, 31-38). The *AMC* court reached this conclusion even though the traditional-style sections in that case contained up to four rows of seats for ambulatory patrons (*id.* at 3-4) and the wheelchair spaces in some auditoriums were located as far back as the third or fourth row from the screen (*id.* at 23 n.14, 26, 35). Similarly, several of Hoyts' renovated theaters have wheelchair seating in the third or fourth row of the traditional-style section (see JA 177, 179-183).

Under the proper interpretation of the regulation, Hoyts is not entitled to summary judgment. Plaintiffs produced evidence that, even after the renovations of the 18 theaters, the viewing angles from the wheelchair locations were far inferior to those available from the stadium sections where the vast majority of the audience chooses to sit. See pp. 6-8, *supra*. Such evidence, if unrebutted, would establish that Hoyts does not provide wheelchair users with comparable lines of sight as required by Standard 4.33.3.

II

STANDARD 4.33.3 REQUIRES PLACEMENT OF WHEELCHAIR SEATING IN THE STADIUM SECTION OF HOYTS' STADIUM-STYLE THEATERS

In addition to requiring comparable lines of sight, Standard 4.33.3 provides that "[w]heelchair areas shall be an integral part of any fixed seating plan." 28 C.F.R. Pt. 36, App. A, § 4.33.3. As previously noted, in 14 of the 18 theaters at issue in this appeal, Hoyts does not provide any wheelchair spaces in the stadium section. The district court concluded, as a matter of law, that Standard 4.33.3's "integral" seating requirement would not prohibit a theater from restricting wheelchair spaces to the non-stadium portion of a stadium-style cinema (JA 309). That holding conflicts with the Department of Justice's reasonable interpretation of its own regulation.

The Department has construed the "integral" seating mandate of Standard 4.33.3 to require that theater operators provide wheelchair seating in the area of the theater where most members of the general public usually choose to sit. In the typical stadium-style movie theater (as in all the stadium-style theaters at issue here), the overwhelming majority of patrons sit in the stadium section. See *AMC*, *supra*, slip op. 5, 19-20, 22, 35. This is not surprising. The stadium section offers superior lines of sight and comfort, and the major theater chains, including Hoyts, tout stadium seating as a revolutionary advance in the movie-going experience (see *id.* at 4-5, 7-8, 35; Doc. 24 at 121, 197). Thus, the quintessential part of a "stadium-style" theater is, as its name suggests, the "stadium" section. Excluding

wheelchairs from this core area of the theater and, instead, restricting them to an undesirable section of the theater that most ambulatory patrons choose to avoid results in *de facto* isolation of wheelchair users from the vast majority of the audience. See *AMC*, *supra*, slip op. 22 (wheelchair users reported that they "suffer from a sense of embarrassment and isolation from being relegated to a section of the theater where no one else is sitting," and experienced "a feeling of being watched because everyone else in the audience is behind them").

The Department reasonably interprets its regulation to prohibit such isolation. That interpretation is consistent with both the language of Standard 4.33.3 and the core purposes of the ADA. The word "integral" in the regulation is synonymous with "integrated." *Webster's Ninth New Collegiate Dictionary* at 628 (1991). A wheelchair location is not truly integrated into the seating plan if it is relegated to an area where relatively few non-disabled patrons sit. See *Independent Living Res.*, 982 F. Supp. at 712 & n.16, 726 n.34.

Any other interpretation of Section 4.33.3 would result in the very isolation that Title III was designed to prevent. Title III requires that "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. 12182(b)(1)(B). The statute also generally prohibits providing disabled persons with goods, services, or accommodations that are "separate from" those offered to other people. 42 U.S.C. 12182(b)(1)(A)(iii). Congress also found that isolation of persons with disabilities was a pervasive

problem. 42 U.S.C. 12101(a)(2), 12101(a)(5). In light of Congress's goal of combatting such isolation, the Department of Justice has reasonably interpreted its own regulation to require that wheelchair seating be integrated into the portion of stadium-style theaters where most spectators choose to sit. Because the district court failed to defer to the Department's reasonable interpretation of its own regulation, the grant of summary judgment to Hoyts should be reversed.

CONCLUSION

This Court should reverse the grant of summary judgment on plaintiffs' claims under § 4.33.3 of the ADA Standards for Accessible Design.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 6,847 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2002, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL were served by first-class mail, postage prepaid, on the following counsel of record:

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I further certify that the same brief was filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) and 29(e) by sending it to the Clerk of the United States Court of Appeals for the Second Circuit by first-class mail, postage prepaid, on November 27, 2002.

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