No. 01-35554

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PARALYZED VETERANS OF AMERICA,
an Oregon non-profit corporation,

Plaintiff,

and

KATHY STEWMON; TINA SMITH; KATHY BRADDY,

Plaintiffs-Appellants,

v.

REGAL CINEMAS, INC.,
a Tennessee corporation doing business in Oregon;
EASTGATE THEATRE, INC., d/b/a Act III Theater,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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 Department of Justice files this brief on behalf of the United States under Fed. R. App. P. 29(a). The United States has a direct interest in this appeal because the district court rejected the Department of Justice's interpretation of its own 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 Section 303 of the ADA, 42 U.S.C. 12183. One of those regulations is Standard 4.33.3, which provides that wheelchair areas in assembly areas (including movie theaters) "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 district court rejected the Department of Justice's interpretation of this regulation as it applies to stadium-style movie theaters.

The outcome of this appeal may affect two pending lawsuits within the Ninth Circuit that the United States has brought against theater chains that operate stadium-style theaters. See *United States v. AMC, et al.*, No. 99-1034 (C.D. Cal.); *Lonberg and United States v. Sanborn Theaters, Inc.*, No. 97-6598 (C.D. Cal.). The United States also has three other pending lawsuits against the operators of stadium-style theaters that involve violations of Standard 4.33.3 similar to those alleged in this case. See *United States v. Cinemark*, No. 99-CV-705 (N.D. Ohio); *United States v. Hoyts Cinemas Corp.*, No. 00-CV-12567 (D. Mass.); *United States v. National Amusements, Inc.*, No. 00-CV-12568 (D. Mass.).

STATEMENT OF THE ISSUES

The United States will address two issues concerning the interpretation of Standard 4.33.3:

1. Whether, in the context of a movie theater, the regulation's requirement that "lines of sight" be "comparable" to those enjoyed by members of the general public means only that wheelchair users must be provided an unobstructed view of the movie screen.

2. Whether, in the context of stadium-style movie theaters, the regulation's requirement that wheelchair areas be "an integral part of any fixed seating plan" is satisfied if wheelchair users are excluded altogether from the stadium section of the theaters where the vast majority of the public sits.

STATEMENT OF THE CASE

1. 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 takes place 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 covered by Title III, see 42 U.S.C. 12181(7)(D), and are subject to the accessibility

requirements for new construction because they were designed and constructed for first occupancy after January 26, 1993 (ER 18-19 (¶¶ 32, 45)).[1]

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, also 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 these regulations is Standard 4.33.3, which provides that in public assembly areas (including movie theaters),

> [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. In April 2000, three persons with disabilities who use wheelchairs filed suit against Regal Cinemas, Inc. and Eastgate Theatre, Inc. (collectively "Regal")[2]

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[1] "ER __" refers to the page of the Appellants' Excerpts of the Record. "Doc. __" indicates the entry number on the district court docket sheet.

[2] Regal acquired Eastgate Theatre, Inc. (d/b/a Act III Theaters) in 1998 (Doc. (continued...)

alleging that several of their stadium-style theaters in Oregon were in violation of the accessibility requirements of Title III of the ADA and its implementing regulations (ER 1-13).[3] Plaintiffs argued, among other things, that Regal's placement of wheelchair seating in its stadium-style theaters violated Standard 4.33.3 (ER 7). Regal operates a nationwide theater chain that has more movie screens than any other chain in the United States (ER 26, 33).

Regal, like many other theater chains, began constructing stadium-style theaters in 1995 (Doc. 40, Exh. A at 2 (¶ 4)). These cinemas, which have become increasingly common in the United States in recent years, offer an enhanced movie-going experience for most customers, and in particular, provide the general public with lines of sight superior to those available in traditional movie theaters (ER 26-27, 31, 137-138). At the front of a typical stadium-style cinema are a few rows of traditional-style seating, which are on a sloped floor near the screen (ER 38). The rest of the seating is in a stadium section on a series of level tiers similar in configuration to a sports stadium (ER 38, 40, 137). Each tier of seats is elevated several inches (in this case, up to 18 inches) above the one below (ER 38). Many of these theaters, including Regal's, have high-backed seats that tilt backward (ER 26, 31, 108, 112). Regal and other theater chains promote stadium-style seating as

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[2](...continued)
40, Exh. A at 2 (¶ 3)).

[3] Oregon Paralyzed Veterans of America also was a plaintiff below but is not a party to this appeal.

a significant improvement in the movie-going experience because of the increased comfort and unobstructed views (ER 26, 31).

The plaintiffs in this case allege that wheelchair users do not receive the benefit of these innovations at Regal's stadium-style theaters (ER 4-9, 40). In most of those theaters, the tiered seating can be reached only by climbing steps, thus denying persons in wheelchairs access to the stadium section (ER 40). Wheelchair users in those cinemas are confined to the non-stadium area at the front of the theater close to the screen (ER 40-58, 69-70, 72, 77). Because most patrons choose to sit in the elevated tiered seating because of its superior comfort and visibility, restricting wheelchair seating to the non-stadium portion of the theater effectively segregates wheelchair users from most other members of the audience (ER 69, 72, 76-80).

These wheelchair locations are far lower and closer to the screen than the tiered stadium-style seating used by most patrons. As a result, wheelchair users are forced to look up at the screen at sharp angles, often resulting in severe discomfort and pain (ER 40-58, 69-70, 72, 76, 78, 108-112). In addition, because of the close proximity to the screen, wheelchair users often have difficulty focusing on the picture, which may appear blurry and distorted and cause the viewer to become dizzy or nauseous (ER 69, 72, 76, 78-79, 110-111). Plaintiffs allege that they have experienced a significant (and sometimes unbearable) level of discomfort, pain, dizziness, and nausea in trying to watch movies at Regal's theaters (ER 8, 69-70, 72-73, 76-89). Plaintiffs produced evidence, including expert reports, showing that

the viewing angles for wheelchair users in many of Regal's theaters are far inferior to those available to most patrons who sit in the elevated tiered seating, and even fall below recommended design standards (ER 40-58, 108, 112).[4] 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 these theaters have no option but to sit in the undesirable spaces designated for their use, no matter when they arrive for the movie (ER 72, 79-80).[5]

3. The district court granted summary judgment to Regal (ER 143, 145). The court rejected plaintiffs' argument that the comparable "lines of sight" requirement in Standard 4.33.3 required that wheelchair users be provided viewing angles comparable to those available to the general public (ER 139-143). Declining "to rely on the 'plain meaning' of the regulation" (ER 142), the district

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[4] See ER 88: Society of Motion Picture and Television Engineers, *Engineering Guideline: Design of Effective Cine Theaters*, EG 18-1994 at 5 (physical discomfort occurs when vertical viewing angle to top of screen is more than 35 degrees). Plaintiffs produced evidence that in several of Regal's theaters, the average vertical viewing angle from the wheelchair areas exceeds 35 degrees (ER 40-58, 108) and that the angles in some wheelchair spaces are as high as 60 degrees (ER 40, 49-51).

[5] In enforcing Title III, the Department of Justice has discovered that not all stadium-style theaters have these problems. Some, especially those with newer designs, provide wheelchair access to the elevated, stadium portion of the theater. One way to accomplish this is to place the entrance to the theater at a cross-aisle that is located in the mid-section of the auditorium above some of the tiered seating. Ambulatory patrons may then walk down to rows below the cross-aisle or walk up to rows above it. Placing wheelchair seating at this cross-aisle level allows wheelchair users to have a better line of sight to the screen and integrates them into the stadium portion of the cinema.

court instead 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 "lines of sight" language required at most that wheelchair users have an unobstructed view of the movie screen. Relying on *Lara*, the district court rejected the argument that the Department of Justice's interpretation of its regulation is entitled to deference (ER 142-143).

In a footnote, the district court also rejected plaintiffs' contention that the wheelchair locations are not "an integral part of [the] fixed seating plan" in Regal's theaters, as required by Standard 4.33.3 (ER 143 n.3). The court stated that it did not read plaintiffs' complaint "to state such a theory of liability" (ER 143 n.3). Nonetheless, the court went on to conclude that plaintiffs' argument was meritless in light of the Fifth Circuit's decision in *Lara*, which the court interpreted as holding that the restriction of wheelchair seating to the non-stadium portion of a stadium-style theater does not violate the ADA (ER 143 n.3).

SUMMARY OF ARGUMENT

This case raises questions 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) 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 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 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 elevated, stadium portion of the theater. 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 controlling weight.

The interpretation of Standard 4.33.3 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 many of those theaters have relegated wheelchair users to highly undesirable locations close to the screen that make viewing films uncomfortable and in some cases unbearable. The district court's interpretation of the regulation would allow this to continue, thus thwarting Title III's goal of providing persons with disabilities equal enjoyment of the benefits of public accommodations, including movie theaters.

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 MEMBERS OF THE GENERAL PUBLIC

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. The Department of Justice interprets 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 allegedly are in many of Regal's 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.

In the context of stadium-style theaters, the Department publicly announced this interpretation of Standard 4.33.3 in an *amicus* brief filed in 1998 (ER 121-126). Since then, the Department has consistently adhered to its interpretation that viewing angles must be taken into account in determining whether lines of sight are comparable for wheelchair users in stadium-style theaters. Even before the construction of the first stadium-style theaters in 1995, the Department had taken

the position that viewing angles were relevant in determining whether a public assembly area complied with the comparable-lines-of-sight requirement of Standard 4.33.3.[6]

The Department's construction of Standard 4.33.3 best comports with the language of the regulation and with the goals of Title III of the ADA. At the very least, the Department's interpretation of its own regulation is reasonable and is thus entitled to controlling weight.

A. The Department Of Justice's Interpretations Of The ADA Standards For Accessible Design Are Entitled To Deference

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 enforce Title III of the ADA, which includes the new construction requirements. See 42 U.S.C. 12188(b)(1)(B). As the agency "directed by Congress to issue implementing regulations, to render technical assistance

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[6] See Letter of November 21, 1994, from Department of Justice regarding Yakima County Stadium at 3 ("In 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. * * * 'Line of sight' in an assembly area refers to both the ability to see performance areas and the angle from which performance areas are seen."), cited in *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 709 n.9 (D. Or. 1997). This letter is included in the addendum to this brief.

explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the [Justice] Department's views are entitled to deference." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

This deference is especially great where, as here, a court is asked to review the Department's interpretation of its own Title III regulations. As this Court has recognized, judicial "review of an agency's interpretation of its own regulations is extremely deferential." *Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1074 (9th Cir. 2001). The agency's construction is "controlling" unless "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 properly applied this deferential standard in other contexts in upholding the Department's interpretations of its Title III regulations. See *Botosan v. Paul McNally Realty*, 216 F.3d 827, 833-834 (9th Cir. 2000) (Department's interpretation of 28 C.F.R. 36.201(b)); *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). Such deference is appropriate even if the

Department's interpretation was articulated for the first time in an *amicus* brief. *Auer*, 519 U.S. at 462; *Navellier v. Sletten*, 262 F.3d 923, 945 (9th Cir. 2001).

B. The Department's Interpretation Is A Reasonable Reading Of The Regulatory Requirement That Wheelchair Locations Offer "Lines Of Sight Comparable To Those For Members Of The General Public"

The Department's interpretation is, at the very least, a reasonable reading of the phrase "lines of sight comparable to those for members of the general public." The common meaning of "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 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 truly equivalent.

The district court acknowledged that the language of Standard 4.33.3 could support the interpretation adopted by the Department of Justice. See Doc. 62: Transcript at 13 ("If I look at 'lines of sight' standing alone, it might pop into my head" that it refers to viewing angles.); ER 142 (noting that it was "tempting * * * to rely on the 'plain meaning' of the regulation"). But instead of adhering to the plain language, the district court erroneously adopted the holding of the Fifth Circuit in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 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* is fundamentally flawed. Under the Fifth Circuit's reasoning, a wheelchair space placed anywhere in the theater auditorium, no matter how close or far from the screen, would provide comparable lines of sight so long as the patron in the wheelchair could somehow see the screen without obstruction. Nothing in the language of the regulation supports the Fifth Circuit's interpretation. The regulation requires that "lines of sight" be "comparable," not just unobstructed. See 28 C.F.R. Pt. 36, App. A, § 4.33.3.

The comparability requirement of Standard 4.33.3 must be read in the context of Title III's purpose 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 quite 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. The Fifth Circuit's holding in *Lara* thus thwarts one of the central goals of Title III of the ADA.

The Fifth Circuit's interpretation is also contrary to the common usage of the term "lines of sight" in the context of theater and arena design. Both before and

after the enactment of the ADA, the term "lines of sight" in theaters and other assembly areas was commonly understood to take into account the spectators' viewing angles. For example, in 1994 – prior to the construction of the first stadium-style theaters – the Society of Motion Picture and Television Engineers (SMPTE) published the following guidelines on appropriate lines of sight in movie theaters:

> Since the normal line of sight is 12 º to 15 º 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 35 º, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15 º.

SMPTE, *Engineering Guideline: Design of Effective Cine Theaters*, EG 18-1994 at 5 (ER 88); see also *id.* at 1, 7 (ER 84, 90).[7] Prior to the enactment of the ADA in 1990, other publications on theater design had provided similar explanations about the effect of viewing angles on lines of sight.[8] In addition, prior to the construction

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[7] We cite this excerpt simply to illustrate that theater designers have traditionally understood viewing angles to be a component of "lines of sight." We are not suggesting that Standard 4.33.3 incorporates the SMPTE guidelines or prescribes any maximum acceptable viewing angles. Rather, the viewing angles for wheelchair users must simply be comparable to those available to members of the general public.

[8] See, *e.g.*, Will Szabo, *Some Comments on the Design of Large-Screen Motion-Picture Theaters*, 85 SMPTE Journal 159, 161-162 (March 1976) ("Comfort criteria relate to the audiences' vertical and horizontal viewing angles which affect his physical comfort. * * * [W]e recommend that any head movement required to align one's line of sight with the centerline of the screen be 15 º or less.") (excerpt in addendum to this brief); Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* at 69 (2d ed. 1964) ("Raising the stage will make it possible to reduce

(continued...)

of the first stadium-style theaters in the United States, the National Association of Theater Owners (NATO), a membership organization representing theater owners nationwide, published a position paper on wheelchair seating stating that "lines of sight are measured in degrees," thus indicating that viewing angles are a component of one's line of sight. See NATO, *Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums* at 6 (Jan. 27, 1994) (ER 83). And in the context of wheelchair seating in assembly areas other than movie theaters, another circuit has recognized that viewing angles can affect the quality of lines of sight for purposes of Standard 4.33.3. See *Caruso v. Blockbuster-Sony Music Entertainment Ctr. at Waterfront*, 193 F.3d 730, 732 (3d Cir. 1999) ("it seems plausible to read the 'lines of sight comparable' requirement as follows: if a facility's seating plan provides members of the general public with different lines of sight to the field or stage * * *, it must also provide wheelchair users with a comparable opportunity to view the field or stage from a variety of angles").

The Fifth Circuit was thus mistaken in suggesting that the phrase "lines of sight" has traditionally been understood to mean only unobstructed view. In support of its contention, the Fifth Circuit relied on three inapposite federal

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[8](...continued)
the floor slope but at the penalty of producing upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action.") (excerpt in addendum), reprinted in *Time-Saver Standards for Building Types* at 404 (3d ed. 1990) (ER 104); *Theaters and Auditoriums*, *supra*, at 68 (diagram showing "[m]aximum tolerable upward sight line angle for motion pictures") (ER 104).

regulations. See *Lara*, 207 F.3d at 788-289, citing 47 C.F.R. 73.685 (regulation 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 Fifth Circuit's analysis in *Lara* is also flawed in other respects. In rejecting the Department's interpretation of Standard 4.33.3, 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 Department's 1994 version of its 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 because 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. See ER 142 (noting that stadium-style design for movie theaters was first used in 1995). Although design experts have recognized for years that viewing angles affect lines of sight in movie theaters (see pp. 15-16 & n.8, *supra*), the traditional-style movie theaters in existence prior to 1995 usually had gently sloping floors that did not create the types of dramatic disparities in vertical viewing angles that are found in some stadium-style theaters. When the Department promulgated its regulation in 1991, it could not anticipate every factor that might arise in the future that would affect the comparability of lines of sight in theaters. But that 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).

At any rate, the Access Board's commentary in 1991 on its accessibility guidelines is consistent with the Department's interpretation of Standard 4.33.3. Although the Access Board did not use the term "viewing angle" when it promulgated the ADAAG, the Board did explain that "[s]ightlines and visibility are affected by several factors, including the slope of the floor; the height of the screen; the distance between rows; and the staggering of seats." 56 Fed. Reg. 35,440 (July

26, 1991). While the staggering of seats seems to relate primarily to the issue of sightline obstruction, other factors mentioned by the Board – in particular, the slope of the floor and the height of the screen – are relevant to the viewing angle of the spectator.

The Fifth Circuit also 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" (ER 120: ADAAG Manual at 117 (July 1998)). It is true that the Access Board stated in 1999 that it had not yet decided whether to amend its guidelines to adopt the specific standards that the Department

of Justice had used in some settlement negotiations to assess whether viewing angles were comparable. But the Board left no doubt 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.

In any event, 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. Even though 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 regulation. *Paralyzed Veterans*, 117 F.3d at 585.

For these reasons, this Court should reject the flawed analysis of the Fifth Circuit in *Lara*. The Department of Justice's interpretation of Standard 4.33.3 as requiring comparable viewing angles for wheelchair users is consistent with the language of the regulation and the purposes of Title III. At the very least, it is a reasonable interpretation of the regulation to which this Court should defer.

II

THE DISTRICT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT STANDARD 4.33.3 DOES NOT REQUIRE INTEGRATION OF WHEELCHAIR SEATING INTO THE STADIUM PORTION OF STADIUM-STYLE THEATERS

In addition to requiring comparable lines of sight, Standard 4.33.3 also 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. Although the district court did not read plaintiffs' complaint as asserting a claim under this portion of the regulation, the court nonetheless went on to conclude, 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 (ER 143 n.3). The court apparently read the Fifth Circuit's decision in *Lara* as dispositive on this issue (see *ibid.*). Although we take no position on whether plaintiffs properly raised this issue in the district court, we will nonetheless address the "integral" seating requirement because the district court adopted an erroneous interpretation that conflicts with the Department of Justice's reading of its own regulation.

The Department of Justice has interpreted this portion of Standard 4.33.3 to require that wheelchair seating be located in the area of the theater or arena where most members of the general public usually sit. In the context of stadium-style theaters, the Department has construed the "integral" provision of Standard 4.33.3 to require that wheelchair seating be provided in the stadium portion of the cinema

and not be limited only to the non-stadium area near the movie screen. The Department publicly announced this interpretation, as it applies to stadium-style theaters, in an *amicus* brief filed in 1998 (ER 121-126). In stadium-style theaters, the general public sits primarily in the elevated, stadium portion of the cinema. When wheelchair locations are placed only in the non-stadium sections of those auditoriums, the result is segregation of wheelchair users from the majority of the spectators.

The Department reasonably interpreted its regulation to prohibit such segregation. That interpretation is consistent with the language of the regulation. One common definition of "integral" is "integrated." *Webster's Ninth New Collegiate Dictionary* at 628 (1991). In accordance with this common meaning, other courts have interpreted the "integral" language of Standard 4.33.3 to require, in the context of sports arenas, that wheelchair seating be "integrated" with seating for ambulatory patrons. *Paralyzed Veterans of Am.*, 117 F.3d at 582, 588; *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 708 (D. Or. 1997); *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C.*, 950 F. Supp. 393, 399-400, 405 (D.D.C. 1996). Under this reading of the regulation, a wheelchair location is not an "integral" part of a seating plan if it is relegated to an area where relatively few non-disabled patrons sit. *Independent Living Resources*, 982 F. Supp. at 712 & n.16, 726 n.34. The same rationale logically should apply in other assembly areas covered by Standard 4.33.3, including stadium-style movie theaters.

Any other interpretation of Section 4.33.3 would result in the very segregation 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). In addition, Congress made findings in enacting the ADA that segregation 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 segregation, the Department of Justice 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 Department's construction of its own regulation is reasonable, it should be given "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 512.

Rather than deferring to the Department's reasonable interpretation of its regulation, however, the district court assumed that the Fifth Circuit's decision in *Lara* was controlling on this point. The court was mistaken because *Lara* addressed the comparable "lines of sight" portion of the regulation, not the "integral" seating requirement. The district court has conflated the two issues, apparently concluding that the "integral" language of the regulation could never require placement of wheelchair seating in the stadium portion of a stadium-style

movie theater, so long as the wheelchair users had unobstructed views of the screen. This interpretation cannot be squared with the language of Standard 4.33.3, which makes clear that the integration requirement is distinct from the comparable "lines of sight" mandate. See 28 C.F.R. Pt. 36, App. A, § 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 * * * lines of sight comparable to those for members of the general public.") (emphasis added). This Court should reject the district judge's erroneous reading of Standard 4.33.3 and instead defer to the Department's reasonable interpretation of that regulation.

CONCLUSION

This Court should reverse the grant of summary judgment and remand for further proceedings on those claims that are based on alleged violations of § 4.33.3 of the ADA Standards for Accessible Design.[9]

Respectfully submitted,

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[9] This appeal may be subject to an automatic stay under 11 U.S.C. 362 because Appellees filed for Chapter 11 bankruptcy on October 11, 2001. See *In re Regal Cinemas, Inc.*, No. 01-11305 (Bankr. M.D. Tenn.); *In re Eastgate Theatre, Inc.*, No. 01-11314 (Bankr. M.D. Tenn.).

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1 FOR CASE NO. 01-35554

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,133 words.

_____
GREGORY B. FRIEL
Attorney

October 19, 2001

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2001, 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 each of the following attorneys:

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I further certify that copies of the same brief were filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) by sending them to the Clerk of the United States Court of Appeals for the Ninth Circuit by first-class mail, postage prepaid, on October 19, 2001.

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