USING THE AMERICANS WITH DISABILITIES ACT TO INFORM "ACCESS TO SPORTING VENUES" UNDER THE DISABILITIES CONVENTION

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I. Introduction

This paper considers a line of recent cases in which Title III of the Americans with Disabilities Act (ADA) has been considered with respect to entertainment venues' obligations to facilitate wheelchair access for its patrons. Most of those cases have concerned "stadium-style" cinemas, two have concerned sports stadia, and all have turned on the meaning of the phrase, "lines of sight comparable,"[1] as used in the regulations attending Part III of the ADA. In addition to considering that specific aspect of the legislation, the cases have also shed light on the extent to which the courts are obliged to defer to the Justice Department's interpretation of the relevant regulations and its application of the notice and comment provisions of the Administrative Procedures Act. Hopefully, this paper will facilitate interested parties' understanding of those provi-

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[1] 28 C.F.R pt. 36, app. A, § 4.33.3 (2008).

sions, especially the implications of the new regulations that are under development at the time of writing.

This paper also has a second aim – but hopefully one that is no less important. It considers whether this aspect of the ADA can help shed light on the potential implications of one particular provision of the new United Nations Convention on the Rights of Persons with Disabilities (Convention).[2] The provision in question is Article 30.5(c), which commits state parties to ensuring that "persons with disabilities have access to sporting, recreational, and tourism venues."[3]

The general provisions found elsewhere in the Convention illuminate the specific provisions of Article 30.5. Article 1 states that "Persons with Disabilities" includes "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[4] Meanwhile Article 2 defines "discrimination on the basis of disability" as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms. . . . It includes all forms of discrimination, including denial of reasonable accommodation."[5] The phrase "reasonable accommodation" is in turn defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights."[6]

The Convention obliges State Parties to "take all appropriate steps to ensure that reasonable accommodation is provided" to those with disabilities.[7] When Article 30.5(c) is read in conjunction with those provisions, it thus obliges ratifying states to recognize the significant attributes of sport in terms of the opportunities sport provides for socialization, rehabilitation and promotion of self-esteem. Subsection (c) does so by providing opportunities not for active participation (which is covered elsewhere in Article 30.5), but for simply being "part of the crowd,"

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[2] The Convention was adopted in December 2006 and came into force in May 2008 after the twentieth ratification thereof. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 46 I.L.M. 433 [hereinafter Convention].

[3] *Id.* at art. 30(5)(c).

[4] *Id.* at art. 1.

[5] *Id.* at art. 2.

[6] *Id.*

[7] *Id.* at art. 5.

thereby promoting what Ann Hubbard has called the "major life activity of belonging."[8]

Although the United States has not signed the Convention, on several occasions during his election campaign President Obama clearly stated that, if he were elected, the United States would do so and he would urge the Senate to ratify it.[9] With that in mind, it is hoped that this paper might assist monitoring organizations in the U.S. and beyond that are responsible for scrutinizing the compliance of signatory states' activities with Article 30.5(c). This paper might help such organizations understand what that provision might connote in practice for wheelchair users, and perhaps inform interpretation of relevant domestic provisions.

The decision to focus this paper specifically on access rights afforded to wheelchair users was made partly because the cases discussed herein have concerned wheelchair access. It was also a pragmatic decision intended to circumvent the difficulties that arise because different jurisdictions have different definitions of "disability." Even the most conservative judicial interpretation of the most narrowly-drawn domestic legislation would be hard-pressed to deny that people using wheelchairs have a "disability," which is not the case with other forms of mobility impairment. This does not mean that other forms of mobility disability are less significant when it comes to advancing disability rights. Wheelchair access is simply the most visible manifestation of the difficulties disabled people face in overcoming the architectural barriers often present in sports stadia, cinemas, and other places of entertainment.

II. THE PROCEDURAL REQUIREMENTS OF THE TITLE III STADIUM ACCESS PROVISIONS

The ADA Title III provision that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation"[10] clearly extends to sports stadia.[11] The ADA further provides that facilities constructed after January 26, 1993 must be "readily accessible to and usable by individuals with disabilities."[12] For new buildings, the only available defense to a failure to ensure disabled access arises where meeting this requirement would be "structurally impracticable" – namely, in "those rare circumstances when

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[8] *See generally* Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217 (2004).

[9] *See, e.g.,* Barack Obama's Plan to Empower Americans with Disabilities, my.barackobama.com/page/content/awdplan (last visited Dec. 18, 2008).

[10] Americans with Disabilities Act of 1990 § 302, 42 U.S.C. § 12182(a) (2000).

[11] *See generally* Mark A. Conrad, *Wheeling Through Rough Terrain – The Legal Roadblocks of Disabled Access in Sports Arenas*, 8 MARQ. SPORTS L.J. 263 (1998).

[12] 42 U.S.C. § 12182(b)(2)(B)(i).

the unique characteristics of the terrain prevent the incorporation of accessibility features."[13]

The bare provisions of Title III were supplemented by accessibility regulations promulgated by the Justice Department. Congress gave the Architectural and Transportation Barriers Compliance Board (the Access Board) initial drafting responsibility, and the Justice Department was then charged with issuing regulations which had to be at least "consistent with the minimum guidelines and requirements" issued by the Access Board.[14] While the late Adam Milani described the two-step process adopted for this purpose as "unusual,"[15] with the benefit of hindsight "unnecessary" may have been a more appropriate epithet. The process certainly seems to have caused more difficulties than it averted. That the regulations had to be "consistent with the minimum" rather than slavishly follow the Access Board's guidelines is significant to whether the courts should have deferred to the Department's interpretation of those regulations. This issue is discussed below.

For the purposes of this paper, the key provision of the regulations appears in Standard 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 . . . ."[16]

The Justice Department's implementing regulations stipulate that sports stadia and other venues covered by Article III must provide "equal enjoyment" for patrons with disabilities.[17] So, for example, in addition to complying with the voluminous provisions[18] on disability access to water coolers, lavatories, ATMs, doorways, concessions, and lift facilities, the regulations specifically provide that facilities must ensure that wheelchair users are offered "lines of sight comparable" to what is afforded to the general public. The regulations stipulate that there must be adjoining wheelchair-accessible egress, that companion seating be provided, and that where seating capacity exceeds 300, wheelchair space must be provided from more than one location.[19]

While many of the Regulation's provisions have not proved controversial, "lines of sight comparable" has resulted in a significant amount of litigation. The circuits have been in conflict on the particular issue of

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[13] 42 U.S.C. § 12183.

[14] Adam A. Milani "*Oh, Say, Can I See – and Who Do I Sue If I Can't?": Wheelchair Users, Sightlines over Standing Spectators, and Architect Liability Under the Americans with Disability Act*, 52 FLA. L. REV. 523, 529 & n.17 (2000) (citing 42 U.S.C. §s 12186(c)).

[15] Milani, *supra* note 14, at 528.

[16] 28 C.F.R. pt. 36, app. A, § 4.33.3 (2008).

[17] 42 U.S.C. § 12182(a).

[18] *See* 28 C.F.R. pt. 36, app. A, § 4.33.3 (2008).

[19] *Id.*

whether stadium-style cinemas with wheelchair access confined to the front of the cinema breached the provision. These cinemas might be in breach because patrons' viewing angles were poor and uncomfortable in comparison with the rest of the venue. The Justice Department's interpretation of its own regulations contended that because movie theatres did not provide a choice of seating options for wheelchair users, the lines of sight were not "comparable."[20] While some courts deferred to this interpretation, this paper shows how others have interpreted "lines of sight comparable" differently, eschewing the Justice Department's interpretation. Prior to 2008, the interpretation had not been attended by notice and comment, and this ostensibly provided courts with cogent grounds for not giving it effect.

III. THE *DC ARENA* LITIGATION

In *Paralyzed Veterans of America v. DC Arena*,[21] the Court of Appeals for the District of Columbia sought to clarify the standards relating to the construction of seating for disabled people, as initially established in the 1996 Regulations. The Paralyzed Veterans of America had failed in its attempts to bring suit against the architects,[22] but the action proceeded against the owners. The case concerned disability access to the MCI Center, which was under construction in downtown Washington. The Center would provide a venue for basketball and hockey as well as for concerts and other events, and therefore was covered by the ADA provision that newly-constructed facilities must be "readily accessible to and usable by individuals with disabilities."[23] Most of the difficulties arising in the case, and the cases subsequent to it, concern the permissibility of interpretation of the Justice Department's regulations on the ADA, specifically the "lines of sight" element of Standard 4.33.3.

In 1991, the Access Board provided accessibility guidelines (ADAAG) that required wheelchair seating to be "located to provide lines of sight comparable to those for all viewing areas."[24] But, being mindful that such a provision may not suffice for areas where patrons would frequently stand up, the Access Board solicited comment on "whether full lines of sight over standing spectators . . . should be required."[25] Shortly

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[20] *See generally* Felicia H. Ellsworth, *The Worst Seats in the House: Stadium-Style Movie Theatres and the Americans with Disabilities Act*, 71 U. CHI. L. REV. 1109 (2004).

[21] Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997).

[22] Milani, *supra* note 14, at 574 (discussing Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D. D.C. 1996)).

[23] 42 U.S.C. § 12183(a)(1).

[24] Architectural and Transportation Compliance Board, 56 Fed. Reg. 2296, 2314 (proposed Jan. 22, 1991).

[25] *Id.*

thereafter, the Justice Department issued a Notice of Proposed Rulemaking and indicated it proposed to adopt the Access Board's guidelines on accessibility in their entirety.[26] The Justice Department instructed that any comments on the matter should be addressed to the Access Board directly.[27] Several months later, the Access Board issued its guidelines in substantially the same terms but omitted any reference to the problems caused by standing spectators.[28] On the same day (in July 1991), the Justice Department promulgated Standard 4.33.3, which carried wording identical to the Access Board's guideline.[29]

Prior to late 1994, the Justice Department had shed little light on its interpretation of the "lines of sight" provision save for a few comments at industry gatherings. During its 1993 investigations into the facilities for the Atlanta Olympics, it issued a clearer pronouncement that "lines of sight comparable to those for members of the general public [meant] lines of sight over standing spectators."[30] The Justice Department laid down its general position regarding ADA compatibility in the voluminous Technical Assistance Manual.[31] This manual had been issued in accordance with the Justice Department's general regulatory responsibility, but initially it too was silent on the specific implication of "lines of sight comparable." In late 1994, however, the Department published, without notice and comment, a supplement to the Manual stipulating that:

> In addition to requiring companion seating and dispersion of wheelchair locations, ADAAG 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. This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.[32]

Milani states that "[g]iven the history of Standard 4.33.3, it is not surprising that the courts [have been] split over whether they should give

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[26] *See* Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 581 (D.C. Cir. 1997).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Department of Justice, ADA Title III Technical Assistance Manual (1993), http://www.ada.gov/taman3.htm (last visited Dec. 5, 2008).

[32] Department of Justice, ADA Title III Technical Assistance Manual 1994 Supplement, III-7.5180, http://www.ada.gov/taman3up.html (last visited Dec. 5, 2008).

deference to [the Department's] interpretation of the regulation."[33] After the Justice Department published its guidance, the DC Arena owners adopted a seating plan that would better disperse wheelchair areas and afford sixty percent of those in the disabled seating areas a clear line of sight when other spectators stood up. The DC Arena's amended proposals were rejected because of inadequate dispersal, but they were found to sufficiently integrate wheelchair seating.[34] Although the district judge held that the Justice Department's Manual and Supplement constituted a binding construction of its own regulation, to which he was obliged to defer, he found that the regulation did not require that every wheelchair area have an unimpeded line of sight over standing spectators.[35]

Taking into account the settlement reached for the Atlanta Olympic venues,[36] the *DC Arena* judge held that the stadium's being in "substantial compliance" would be sufficient, although the seating plan as initially proposed was not "substantial" enough.[37] The stadium owners had suggested implementing "no-sell" and "no-stand" policies, the idea being that the seats in front of the disabled access seats would either be kept empty or the people in the seats would be given notice that they were not permitted to stand; signs and robust security would be deployed in order to encourage compliance.[38] According to the court, however, "no-stand" was an "operational" rather than a "design" solution, and thus violated the ADA requirement that the design and construction must provide the access.[39] Similarly, while "no-sell" provisions could operate successfully in higher-priced areas of the stadium, in the lower reaches the wheelchair spaces were confined to the end-zones. Even if people were not able to use the seats in front of those spaces, wheelchair users in the cheaper seats would remain "ghettoized."[40] This interpretation is consistent with the spirit and intent of the ADA, for if "access" is only secured through policies that oblige able-bodied people to either alter their behavior within the venue or sit somewhere else, the social and physical isolation

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[33] Milani, *supra* note 14, at 532.

[34] Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, 950 F. Supp. 393, 405 (D.D.C. 1996) (order granting preliminary injunction).

[35] Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 582 (D.C. Cir. 1997).

[36] Press Release, Department of Justice, 1996 Olympic Games and Paralympics to Be Accessible to Spectators with Disabilities (May 15, 1996), *available at* www.usdoj.gov/opa/pr/1996/may96/222.cr.htm.

[37] *D.C. Arena L.P.*, 117 F. 3d at 584 (ruling that the facility would be ADA compliant if between 75% and 88% of the wheelchair seats in each part of the arena had lines of sight over standing spectators).

[38] Milani, *supra* note 14, at 537.

[39] *Id.*; Conrad, *supra* note 11, at 274.

[40] Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, 950 F. Supp. 393, 398 (D.D.C. 1996).

attaching to the mobility-impaired spectator would actually be enhanced rather than diminished.

Both parties appealed the decision. The Paralysed Veterans Association argued that Standard 4.33.3 required all wheelchair areas to have unimpeded lines of sight over standing spectators, while the Arena's owners argued that the regulation did not require any of the wheelchair areas to have such sightlines.[41]

Like the district court, the Court of Appeals was critical of the Justice's Department's handling of the regulations, notably for its "hazy tapestry of action and inaction,"[42] and for its repeated refusal to intervene in the case[43] despite the district court's exasperated requests for such action. The Appeals Court, however, ruled that while "lines of sight comparable" was certainly an ambiguous phrase, agencies' interpretations of their own regulations were treated with deference by reviewing courts unless they were "plainly erroneous or inconsistent" with the regulation.[44] The Appeals Court held the language of Standard 4.33.3 was amenable to the interpretation given it by the Justice Department in the 1994 Supplement. Bearing in mind the *Chevron* ruling,[45] there was no barrier to an agency altering its initial interpretation of a regulation to adopt another one, so long as the new one was reasonable.[46] The new interpretation did not amount to a fundamental change in the Department's interpretation of a substantive regulation, so the Justice Department was not obliged to engage in notice and comment for the interpretation under the Administrative Procedures Act,[47] even though the Access Board rather than the Department had actually drafted the regulation.[48] Congress had not obliged the Justice Department to follow the Access Board's guidelines; its regulations simply had to be consistent with the *minimum* requirements laid down by the Board.[49] And while the Court noted that the arena owners had "almost but not quite establish[ed] that the Department significantly changed its interpretation of the Regulation when it issued the 1994 technical manual," it held, in the end, that "the Department never authoritatively adopted a position contrary to its manual

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[41] *D.C. Arena L.P.*, 117 F.3d. at 582.

[42] *Id.* at 582.

[43] *Id*.

[44] *Id* at 584.

[45] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[46] *D.C. Arena L.P.*, 117 F.3d at 586.

[47] Administrative Procedure Act, 5 U.S.C. § 553 (1994).

[48] *D.C. Arena L.P.*, 117 F.3d at 585 ("We do not defer, however, to an administrative agency's interpretation of its regulation solely because its employees are the drafters and presumably have superior knowledge as to what was intended. . . . [T]he doctrine of deference is based primarily on the agency's statutory role as the sponsor of the regulation, not necessarily on its drafting expertise.").

[49] Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(c) (2000).

interpretation and as such it is a permissible construction of the regulation" to find that 4.33.3 envisaged clear lines of sight even when other patrons were standing.[50]

Bearing all this in mind, and taking a purposive approach to the ADA, the Appeals Court concluded that the district court had been entitled to find that "substantial compliance" with the regulations was sufficient, and that requiring between 75% and 88% of wheelchair areas to have unfettered sightlines would be sufficiently substantial (the district court having noted that the accessibility agreement for the Atlanta Olympics was in similar terms).[51] The Court of Appeals noted that requiring 100% compliance could be achieved only by having all the wheelchair-user areas entirely separate from, rather than integrated with, the other spectators.[52] This would merely exacerbate wheelchair users' physical and social isolation from the rest of the audience.

IV. The Courts Adopt a Contrary View

DC Arena has been significant in several "sightlines" cases involving sports venues and "stadium-style" cinemas[53] where "stepped-seating that rises at a slope of well over 5%" is built to "eliminate[ ] the line-of-sight problems that typically occur, for example, when a tall individual sits in front of a shorter individual."[54] In the first tranche of those cases, however, the courts proved far less willing to defer to the Department's interpretation of Standard 4.33.3.

For example, *Independent Living Resources v. Oregon Arena*[55] concerned wheelchair access to the facility now known as the Rose Garden in Portland. The District Court in Oregon rejected the *DC Arena* interpretation and said the department's interpretation of the regulation was not entitled to deference. Finding that the clustering of over eighty percent of wheelchair seating in three comparatively poor-quality viewing areas was "a far cry from exact or even rough proportionality"[56] as

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[50] *D.C. Arena L.P.*, 117 F.3d at 587.

[51] *Id.* at 589.

[52] *Id.*

[53] The idea behind the design of stadium-style cinemas is that they more closely resemble sports stadiums or arenas than do traditional cinemas. Stadium style cinemas provide stepped seating on a steeper incline, thus improving sightlines to the screen. The problem then is that people using wheelchairs are obliged to sit only at the very front of the seating, where there are no steep steps.

[54] Lara v. Cinemark USA, Inc., 207 F.3d 783, 785 (5th Cir. 2000). *See also* Joshua Watts, Note, *Let's All Go to the Movies, and Put an End to Disability Discrimination:* Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc. *Requires Comparable Viewing Angles for Wheelchair Seating*, 34 Golden Gate U. L. Rev. 1 (2004).

[55] Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698 (D. Or. 1997).

[56] *Id.* at 714.

required by the ADA, the District Court refused to defer to the Department in the interpretation of the "lines of sight comparable" provision.[57] The court held that it was reasonable for the Department to require sightlines over standing patrons (and thereby rejected Oregon Arena's argument that this amounted to "preferential treatment" because some able-bodied patrons' views were similarly obscured).[58] The court further said the Department had been reasonably entitled to conclude that the provision of sightlines that were physically identical to those of ambulatory spectators was not sufficient.[59] Simply providing nominally identical facilities which "may be facially neutral but in practice have a disparate impact on those in wheelchairs" would undermine "all of the efforts that have been made to ensure accessible entrances, restrooms and concession stands . . . wheelchair users won't attend events" if they cannot see the events that they have paid to watch.[60]

However, the court ruled that even though the Department had been entitled to reach that conclusion, the 1994 Supplement was not a valid "interpretive regulation." Although the Department had adopted the Access Board's language, it had not adopted the Access Board's commentary and it had not sufficiently provided its own commentary on the accessibility guidelines to satisfy the notice and comment requirements. In particular, the Department had not responded to public comments on its decision to adopt the Access Board's standards rather than those of another body (such as the American National Standards Institute). Nor had it responded to specific public comments about individual standards and the language it had chosen to adopt with respect to those standards.[61] While it was not necessary for the Department to respond to every comment or to analyze every issue, its failure to respond in the 1994 Supplement to any of the comments made or issues raised represented "an attempt to impose a new substantive obligation"[62] that did not satisfy the Administrative Procedure Act's notice and comment requirements.

In the first of the "cinema cases," *Caruso v. Blockbuster-Sony Music Entertainment Center*, the Court of Appeals for the Third Circuit also rejected the Justice Department's interpretation of 4.33.3.[63] The case concerned wheelchair access to a venue now known as the Susquehanna Bank Center in Camden, New Jersey, and turned again on the extent to which the court should defer to the Justice Department's interpretation of the regulations. While the Appeals Court agreed that the provision was ambiguous, it held that it was not obliged to follow the Department's

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[57] *Id.* at 716.

[58] *Id.* at 734.

[59] *Id.* at 733-34.

[60] *Id.* at 734.

[61] Milani, *supra* note 14, at 549.

[62] *Independent Living Resources*, 982 F. Supp. at 743.

[63] Caruso v. Blockbuster-Sony Music Entm't Ctr., 193 F.3d 730 (3d. Cir. 1999).

interpretation, even though that interpretation could not be regarded as "plainly erroneous or inconsistent with the regulation."[64] Having considered *Independent Living Resources* and reviewed the history of the regulation, the Justice Department's relationship with the Access Board, and the consultation procedures that had occurred with respect to Standard 4.33.3, the Appeals Court stated:

> [W]e respectfully disagree with the District of Columbia Circuit's conclusion [in *DC Arena*] that the [Justice Department] did not adopt what the Access Board had said. Instead, we conclude that the [Department] implicitly adopted the Access Board's analysis of 4.33.3. This conclusion is strongly supported by the following factors: 1) the [Department] referred all comments to the Board; 2) the [Department] relied on the Board to make adequate changes based on those comments; 3) the Board specifically changed the language of 4.33.3 in response to comments and explained that change in its commentary; 4) the [Department] was a 'member of the Board' and 'participated actively . . . in preparation of both the proposed and final versions of the [guidelines].' 28 CFR Part 36, App. B, at 362; and 5) the [Department's] commentary stated that the final guidelines promulgated by the Board adequately addressed all comments.[65]

The Appeals Court went on to say that, "The [Department] could, of course, adopt a new substantive regulation to require that wheelchair users be given lines of sight equivalent to standing patrons—and such a rule certainly has much to commend it—but to do this it must proceed with notice-and-comment rulemaking."[66]

In *Oregon Paralyzed Veterans of America v. Regal Cinemas Inc.*, three wheelchair users sued two operators of stadium-style cinemas over alleged violations of standard 4.33.3's "lines of sight comparable" provision.[67] The district court noted that the provision predated the emergence of stadium-style cinemas, where the presence of steps between rows means wheelchair users often have no access to higher areas where the viewing angle is shallower.[68] The district court stated that prior to these cases Standard 4.33.3 seemed concerned solely with securing unimpeded views for wheelchair users rather than with their viewing angle.[69] The question thus arose whether locating all wheelchair-accessible areas

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[64] *Id.* at 733 (quoting Thomas Jefferson Univ. v. Shahala, 512 U.S. 504 (1994) (internal quotations removed)).

[65] *Id.* at 736.

[66] *Id.* at 737.

[67] Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003).

[68] *Id.* at 1130 (citing Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 142 F. Supp. 2d. 1293, 1297 (D. Or. 2001)).

[69] *Id.*

immediately in front of the screen, on a flat floor, satisfied the requirements of section 4.33.3 because the views were "unimpeded."[70] The federal district court answered in the affirmative, basing its decision on *Lara* and finding that the Department of Justice's interpretation was so inconsistent with the regulation that it precluded deference.[71]

However, the Court of Appeals for the Ninth Circuit reversed, saying viewing angles had to be taken into account when assessing the comparability of sightlines.[72] The Court of Appeals also said it was possible to objectively evaluate and compare the amenity and comfort of the viewing angles and sightlines available for wheelchair users through reference to the relevant engineering guidelines.[73] Since these guidelines clearly stated that the sharp viewing angles available from the front were "uncomfortable," the Court found it inconceivable that presenting wheelchair users with just one option - objectively uncomfortable seating – could meet the requirements of the ADA to provide "full and equal enjoyment."[74] The ruling vindicated the Department of Justice's interpretation of the regulation as requiring viewing angles for wheelchair seating within the range of angles available for non-wheelchair users. The plain meaning of "line of sight" clearly encompassed "viewing angles" (the two terms being used interchangeably within the cinema industry documents).[75] While the Ninth Circuit accepted the *Lara* court's findings that viewing angles may not have been considered when the regulation was drafted, it noted that "a broadly-drafted regulation – with a broad purpose – may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated."[76]

The decision was not without its difficulties. As Judge Kleinfeld noted in his dissenting opinion, the lines of sight requirement could not be translated into something akin to the other, very detailed, provisions that exist elsewhere within the regulations. While Judge Kleinfeld gave the example of minimum knee clearance for wheelchair users at tables,[77] the same point could also be made in respect of toe clearance levels in wheelchair-accessible toilet stalls[78] or the detailed specifications for wheelchair-accessible elevators.[79] The fact remains, however, that *Regal Cinemas*

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[70] *Id.*

[71] *Id.* at 1133.

[72] *Id.* at 1132. *Contra* Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000) (holding that lines of sight did not encompass viewing angles, but merely required sightlines to be unobstructed).

[73] *Regal Cinemas, Inc.*, 339 F.3d at 1132 (discussing the Society of Motion Picture and Television Engineers (SMPTE)'s Engineering Guideline).

[74] *Id.* at 1131.

[75] *Id.* at 1132.

[76] *Id. at* 1133.

[77] *Id. at* 1134-35.

[78] 28 C.F.R. pt. 36, app. A, § 4.17 (2008).

[79] 28 C.F.R. pt. 36, app. A, §§ 4.2, 4.5, 4.11, 4.27.

confirmed that wheelchair users should not be segregated into one particular area, given that the underlying purpose of the ADA is integration.

In *Lara v. Cinemark*, the district court found that the wheelchair arrangements of a cinema complex did not provide comparable lines of sight because wheelchair users were confined to the area immediately in front of the screen in the same configuration. While the sightlines were unobstructed, there was no choice as to where to sit.[80] This gave rise to the same difficulties with viewing angles as in *Oregon Paralyzed Veterans*, although the defendants in *Lara* asserted that able-bodied patrons were happy to use seats with the same thirty-five degree angles (which are "well into the discomfort zone") even when other seats were available.[81]

The Court of Appeals for the Fifth Circuit, however, reversed the decision. It rejected the Justice Department's interpretation of "lines of sight comparable," again on the ground that questions concerning "viewing angles" had not arisen until long after 4.33.3 was promulgated in 1994. In the *Cinemark* case, the wheelchair arrangement proposals had been approved by the state and city authorities after 4.33.3's promulgation, and the action commenced shortly after the facility's completion in September 1997. Because the Department of Justice interpretation had not been incorporated by the Access Board into the ADAAG, the court was obliged to reject the Department's interpretation "in the absence of specific regulatory guidance."[82] It was not clear that the Access Board had decided to adopt the Justice Department's interpretation, and that interpretation was therefore not determinative of the issue. To the contrary:

> [T]he Access Board has just recently [November 1999] proposed modifying section 4.33.3 to require explicitly that auditoria provide wheelchair-users with unobstructed lines of sight. . . . As the Access Board explained:
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> [The Department] has asserted in attempting to settle particular cases that wheelchair seating locations [in stadium-style theaters] must: (1) be placed within the stadium-style section of the theater . . . ; (2) provide viewing angles that are equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen, in terms of lack of obstruction . . . that is in the top 50 percent of all seats of any type sold in the auditorium. . . .
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> Significantly, the proposed regulations define "line of sight" problems only in the context of obstructed views, and recognize that

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[80] *See* Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000).
[81] *Id.* at 786.
[82] *Id.* at 789.

> additional language will be necessary to codify the [Department's] litigating position.[83]

The district court had thus erred in deciding the cinema complex did not provide "lines of sight comparable" seating. Because there was no specific regulatory guidance to the contrary, Standard 4.33.3 did not require cinemas to provide wheelchair users with the same viewing angles that were available to other patrons, but simply "with unobstructed views of the screen. To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers."[84] The Court of Appeals thus adopted the same line of reasoning taken in *Caruso* and *Independent Living Resources*. It held that "comparable lines of sight" in cinemas simply required unobstructed views of the screen, rather than a choice of viewing angles comparable to those enjoyed by able-bodied viewers. This can be contrasted with the *DC Arena* approach of deferring to the Department's interpretation of the regulations and facilitating a more purposive interpretation of the ADA.

V. Subsequent Case Law

To summarize, the Appeals Court ruling in *Lara* underpinned a series of cases on wheelchair access asserting that "lines of sight comparable" simply required that wheelchair users be provided with an uninterrupted view. This interpretation represented a partial weakening of the Justice Department's position on the matter because the courts refused to defer to the Department's interpretation of Regulation 4.33.3 – a refusal predicated upon the courts' belief that judicial deference was not appropriate.

While these difficulties could have been avoided if the Justice Department had utilized notice and comment (a step it eventually took in 2008), there is an argument that the Department's interpretation should have been respected anyway. Because there is no "notice and comment" requirement under the Administrative Procedures Act for interpretive rules as opposed to substantive rules, the courts should have deferred to the Department because these rules were interpretive. The Department's failure to engage in notice and comment should therefore not have been fatal. While it is often difficult to distinguish between interpretive and substantive rules, the 1994 Manual bears the characteristics of an interpretive rule. It seeks to "interpret" the phrase "lines of sight comparable," which is left uninterpreted in Standard 4.33.3. In this respect, the DC Court of Appeal's view in *DC Arena* that "the manual interpretation is not sufficiently distinctive or additive to the regulation to require notice

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[83] *Id.* at 788.

[84] *Id.* at 789.

and comment"[85] is the better one. Notice and comment are not required simply because an agency changes its policy or interpretation[86] or because it was inconsistent with an earlier rule (so long as that earlier rule did not have the force of law).[87] Adam Milani explains that *Chevron v. NRDC* was an authority for the proposition that, when Congress delegates interpretive authority to an administrative agency, the courts should defer to its regulatory interpretations unless they are "arbitrary, capricious or manifestly contrary to the statute" or regulation.[88] Furthermore, Milani expains that *Bowles v. Seminole Rock and Sand* stands for the proposition that if the agency's interpretation is reasonable, the courts should not substitute their own for it.[89] Professor Milani also pointed out that in subsequent cases, the courts have held that a regulatory body's interpretation is "reasonable" if it is consistent with the text of the regulation[90] and with the purpose of the governing statute.[91] Milani further asserts that the Department's "interpretation of Standard 4.33.3 as requiring lines of sight over standing spectators satisfies both criteria: it is consistent with both the text of Standard 4.33.3 and the purpose of the ADA" and is thus entitled to deference under the *Seminole Rock* standard.[92]

In any event, the view of a wheelchair-bound patron can never be "comparable" to the views of able-bodied patrons when others choose to stand. Wheelchair users cannot stand, of course, nor can they contort their bodies or crane their necks to the same extent as other patrons to obtain a better view. If the word "comparable" is to have any substantive meaning, "the 'comparability' of wheelchair seating to that of the general public, therefore involves a choice of 'requiring the superior, enhanced views or accepting the completely eclips[ed], unenhanced views.'"[93] Taking the latter approach would be completely at variance with the stated intention of the ADA, which is "to bring persons with disabilities into the economic and social mainstream of American life."[94] The Department's interpretation of "comparability" as used in Standard 4.33.3 has been entirely consistent with that intention.[95]

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[85] Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997).

[86] Chief Probation Officers of California v. Shalala, 118 F.3d 1327, 1337 (9th Cir. 1997).

[87] Warder v. Shalala, 149 F.3d 73, 79 (1st Cir. 1998); *Shalala,* 118 F.3d at 1337.

[88] Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Milani, *supra* note 14, at 557-58

[89] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Milani, *supra* note 14, at 558.

[90] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1993).

[91] United States v. Larionoff, 431 U.S. 864, 873 (1976).

[92] Milani, *supra* note 14, at 559.

[93] *Id.* at 560 (quoting, 950 F. Supp. 393, 400 n.16 (D.D.C. 1996)).

[94] *Id.* at 562, (citing S. REP. NO. 101-116, at 2 (1989)).

[95] *Id.*

A. *U.S. v. AMC Entertainment*

A trend towards judicial acceptance of this approach, and one more in keeping with *DC Arena*, can be discerned in three cases heard subsequent to *Lara*. *United States v. AMC Entertainment* was factually very similar to *Lara* in that it was concerned with viewing angles in cinemas and the dispersal of wheelchair areas.[96] The defendants argued once again that "lines of sight comparable" meant they only had to provide wheelchair areas from which views were not restricted by persons sitting closer to the screen.[97] The defendants argued that they had satisfied the ADA's requirement to provide uninterrupted sight lines by locating the overwhelming majority of wheelchair areas immediately in front of the screen, rather than providing wheelchair areas in the stadium-style areas further back.[98] The seats in the stadium-style areas clearly provided more comfortable viewing angles, which did not require patrons to strain their necks, afforded a generally better "moviegoing experience," and were generally acknowledged to be preferred by the overwhelming majority of patrons.[99] Most patrons would only sit in the non-stadium type areas if there was no alternative.[100] The California district court heard evidence that, within the cinema industry, the meaning of "lines of sight" was not limited to "unobstructed view" but also included viewing angles,[101] and that most of the defendant's wheelchair areas fell outside what the industry referred to as "preferred seating areas."[102]

The district court granted the government summary judgment on the issue of whether its interpretation of "lines of sight comparable" in Standard 4.33.3 was reasonable. It stated that it did not find the Fifth Circuit's ruling in *Lara* "persuasive."[103] The court was particularly unimpressed by the weight the *Lara* court had attached to the use of the phrase "lines of sight" in other contexts – specifically, the sighting of antennae, the meaning of "direct supervision," and the driving of snowmobiles by minors - that were entirely irrelevant to the question of views afforded to wheelchair users in public venues.[104] However, the court also noted that in the Notice of Proposed Rulemaking, the phrase "lines of sight" had been used by the Department in reference not only to possible obstruc-

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[96] United States v. AMC Entertainment Inc., 232 F. Supp. 2d 1092 (C.D. Cal. 2002), *reversed and remanded,* 549 F.3d 760 (9th Cir. 2008) on the ground that the district court had both acted retrospectively and purported to bind other circuits where there was conflicting precedent.

[97] *Id.* at 1106.

[98] *Id.* at 1111.

[99] *Id.* at 1103-05.

[100] *Id.* at 1112.

[101] *Id.* at 1102, 1103.

[102] *Id.* at 1104.

[103] *Id.* at 1110.

[104] *Id.* at 1110.

tions but also to uncomfortable viewing angles.[105] And the *AMC Entertainment* court noted the *Lara* district court's failure to discuss ways in which the decisions in *Oregon Paralyzed Veterans of America v Regal Cinemas*[106] and *United States v Cinemark*[107] were unpersuasive in their determination that "lines of sight comparable" only referred to possible obstructions.[108]

While the *AMC Entertainment* court agreed with the *Lara* court that there was no evidence that stadium-style cinemas were considered when Standard 4.33.3 was adopted, "absent a requirement that the promulgated regulations cannot be flexibly interpreted to apply to innovative forms of construction, the Court will not interpret 4.33.3 to be static and inflexible. . . . [I]t is clear to the court that [the defendants] 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."[109] The court noted that its holding was consistent with the court's observation in *Independent Living Resources v. Oregon Arena*[110] that a venue may not create a "wheelchair ghetto" which "consigns wheelchair users to the least desirable seats in the house."[111]

However, the court opined that even if it felt the language of Standard 4.33.3 did not pertain to dispersal and integration, it would have been compelled to defer to the Justice Department on the matter.[112] Citing *Bowen v. Georgetown University Hospital*,[113] the court ruled that the Department's position was consistent with the regulation and was a "fair and considered judgment" to which the court was obliged to defer.[114]

B. *U.S. v. Cinemark*

In *United States v. Cinemark*,[115] the Sixth Circuit Court of Appeals overturned a district court's decision that the defendants were in compli-

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[105] *Id.* at 1111 (discussing ADA Guidelines for Buildings & Facilities, 64 Fed. Reg. 62248, 62278 (Nov. 16, 1999)).

[106] Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003).

[107] United States v. Cinemark USA, Inc., No. 1:99 CV-705, 2001 U.S. Dist. LEXIS 24418 (N.D. Ohio Nov. 19, 2001).

[108] United States v. AMC Entertainment, Inc., 232 F. Supp. 2d 1092, 1111 (C.D. Cal. 2002).

[109] *Id*.

[110] Independent Living Resources v. Oregon Area Corp., 982 F. Supp. 698, 712 (D.C. Or. 1997).

[111] *AMC Entertainment Inc.,* 232 F. Supp. 2d at 1112.

[112] *Id.* at 1113.

[113] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

[114] *AMC Entertainment Inc.,* 232 F. Supp. 2d at 1113.

[115] United States v. Cinemark USA, Inc., 348 F.3d 569 (6th Cir. 2003).

ance with Standard 4.33.3.[116] The Court of Appeals held once again that the "lines of sight comparable" aspect of 4.33.3 was not satisfied simply by providing unobstructed views of the screen; rather, it also required that those unobstructed views be "comparable" to those of other patrons.[117] Cinemark's wheelchair areas were ordinarily located not in the stadium-style seats, which provided approximately eighty percent of the available seating, but within the flat areas that were towards the front of the auditoria.[118] These areas were usually behind the two foremost rows of seats, although another wheelchair area was often located towards the rear of larger venues.[119] These too were not in the stadium-style of seating.[120] Once again, this configuration resulted in uncomfortable viewing angles. The district court adopted the *Lara* approach and granted summary judgment for the defendant. It ruled that, as a matter of law, providing wheelchair areas with uninterrupted views located amidst or adjacent to the seating for the general public was all that 4.33.3 required.[121] However, the Court of Appeals found *Lara* to be unpersuasive, at least partly because *Lara* failed to sufficiently take into account the purpose of Title III.[122]

Instead, the *Cinemark* court took the view that the regulation "appears plainly to require that wheelchair patrons have something more than a merely unobstructed view in seating adjacent to other patrons. . . . The regulation is plain in its requirement that the wheelchair lines of sight be similar, or at least roughly similar, to those of other patrons. The criteria for evaluating similarity, while not explicit in the regulation, doubtless include viewing angle."[123] The appellate court noted that this interpretation was similar to that adopted by the Ninth Circuit and other district courts since *Lara* and, again, that the Justice Department's position was "neither plainly erroneous nor inconsistent with the regulation. Nor is it inconsistent with views advocated by [the Department] in earlier cases."[124] Furthermore, there was no notice and comment requirement because "an agency's enforcement of a general statutory or regulatory term against a regulated party cannot be defeated on the ground that the agency has failed to promulgate a more specific regulation."[125]

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[116] *Id.* at 584.

[117] *Id.* at 575.

[118] *Id.* at 572.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 576.

[122] *Id.* at 578.

[123] *Id.* at 575-76 (citing United States v. Hoyts Cinemas Corp., 256 F. Supp. 2d 73, 88 (D. Mass. 2003); Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126, 1132-33 (9th Cir. 2003)).

[124] *Cinemark*, 348 F.3d at 579.

[125] *Id.* at 580 (citing SEC v. Chenery Corp., 332 U.S. 194, 201-02 (1947)).

The *Cinemark* case was complicated by the fact that, prior to the facility's construction, Cinemark's auditorium design had been certified under the local ADA building codes for accessible design, which on this occasion were contained in the Texas Accessibility Standards (TAS), a provision promulgated under Article 9012 of the now-repealed Architectural Barriers Act.[126] Certification amounted, *inter alia*, to rebuttable evidence that the facility was in compliance with Title III of the ADA.[127] The TAS came into force in 1994 and was certified by the Justice Department as meeting or exceeding ADA Title III requirements in 1996.[128] Cinemark had relied upon its certification of compliance when building new cinemas in Texas and elsewhere.[129] Cinemark thus argued that the Department should be estopped from asserting an interpretation of 4.33.3 that invalidated the approvals given pursuant to TAS.[130] The difficulty, as the Court of Appeals noted, is that:

> With the possible exception of "affirmative misconduct," equitable estoppel does not run against the government. On the other hand, due process concerns may warrant denial of enforcement of an agency determination when conduct previously approved by a regulatory agency is retroactively branded as a statutory violation. . . . A decision branding as "unfair" conduct stamped "fair" at the time a party acted raises judicial hackles.[131]

In remanding the case for the district court to determine the extent to which lines of sight were to be "comparable" for wheelchair users, the Court of Appeals stated that:

> Cinemark's reliance on TAS and [the Department's] statements with respect to the state building code the certification process weigh strongly in favor of making any relief that the district court grants the government on remand apply only on a prospective basis. We do not go so far as to hold that any relief *must* be prospective to comport with due process but note that . . . prospective relief will often be most appropriate.[132]

The Court of Appeals went on to note that "the [Department] has assured us that any remedial measures they will request on remand will take into account the cost and feasibility [of implementation] . . . and that

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[126] *Id.* at 574. *See also* TEXAS ACCESSIBILITY STANDARDS (1993), *available at* http://www.license.state.tx.us/ab/tas/tascomplete.pdf.

[127] *Cinemark*, 348 F.3d at 574.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 581.

[131] *Id.* (citing NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1996)).

[132] *Id.*

it would 'work with [Cinemark] to come up with a reasonable approach.'"[133]

Ultimately, the parties filed a Consent Order in November 2004; this made provision for alterations to be made to Cinemark's existing cinemas over a period of between one and five years and specified the standards for cinemas that may be built in the future.[134] The alterations usually required Cinemark to move existing wheelchair areas, add new wheelchair areas, and/or raise the height of existing areas (with concomitant provision for companion seating).[135]

C. *U.S. v. Hoyts Cinemas*

The most recent "cinema sightlines" case also resulted in a consent order after the court criticized the Department for its handling of the dispute. In *United States v Hoyts Cinemas*,[136] the defendants sought summary judgment on the *Lara* ground that "lines of sight" required only a lack of obstruction.[137] The Massachusetts district court not only rejected the defendants' application but granted *sua sponte* summary judgment for the plaintiffs. The court held that Standard 4.33.3 clearly compelled cinema owners to place all wheelchair areas in the stadium sections of the auditorium in order to provide "comparable" lines of sight, in all cases and regardless of the size of the stadium section.[138] The court went on to say that, as a matter of due process and given the lack of clarity in Standard 4.33.3, its ruling would only be applied to those cinemas where the defendant commenced construction or refurbishment after the date the lawsuit commenced (December 2000).[139]

The defendants appealed both aspects of the ruling. The Court of Appeals for the First Circuit remarked that Standard 4.33.3 had been "intended to provide guidance and it would have been child's play for the drafters to make clear that the 'lines of sight' requirement encompassed not only unobstructed views . . . but also angles of sight. Yet the Department and the Access Board apparently took no such position until 1998."[140] The court accepted that the drafters may not have thought at all about angles of sight, "[b]ut judges constantly read statutes and regulations in light of language, purpose, and other policy considerations to

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[133] *Id.* at 582.

[134] United States v. Cinemark USA, Inc., No: 1:99CV-705 (N.D. Ohio Nov. 15, 2004) (consent order), *available at* www.ada.gov/cinemark/cinemark4main.htm.

[135] *Id.*

[136] United States v. Hoyts Cinemas Corp., 380 F.3d 558 (1st Cir. 2004).

[137] *Id.* at 565.

[138] *Id.* at 564.

[139] *Id.*

[140] *Id.* at 566.

solve problems that the drafters may not have squarely considered."[141] The interpretation of the phrase offered by the Department, to the effect that it encompassed comparability of angles, were "at least as good" as those favoring the defendants and "the balance [was] easily tipped by the underlying policy of the statute. . . . [which] place[d] substantial emphasis on equality of access."[142]

The Court of Appeals, however, had more difficulty with the Department's approach to the requirement in Standard 4.33.3 that wheelchair areas should be "integral." The Department argued that "integral" meant wheelchair areas always had to be located in the stadium-style section of a cinema, but the Court of Appeals noted that the Department had argued on some occasions before the district court that placing wheelchair areas in the stadium section was a factual matter, to be undertaken whenever the view from the other areas was inferior.[143] The court noted that "[n]o circuit court has adopted a reading of the word 'integral' that automatically compels wheelchair siting (*sic*) in all stadium sections regardless of slope-seating quality,"[144] and stated that such an interpretation "appears to us not to gloss the word but to rewrite the regulation in a fashion that could not reasonably be anticipated. . . . [d]eference to the [Department's] view does not mean abdication."[145] While the Court of Appeals recognized that reasonably interpreting an existing regulation without formally amending it was within the Department's prerogative, the court nonetheless reverted to a *Lara* perspective.[146] It stated "where, as here, the interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment – is the proper course."[147]

Having explained why the district court's decision was "multiply flawed," the Court of Appeals confirmed that "standard 4.33.3 is vague as to whether it embraces angles," criticized the Justice Department for being "slow in providing more precise guidance by regulation," and pointed out that "the belated amicus brief in *Lara* and the differing conclusions of the courts have impaired predictability."[148] That said, the cinema chain did not escape criticism either:

> [A]nyone who read the ADA's own broader language and took account of the underlying policy might well have understood that

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[141] *Id.* (citing Versyss, Inc. v. Coopers & Lybrand, 982 F.2d 653, 654-57 (1st Cir. 1992)).

[142] *Id.* at 567.

[143] *Id.* at 568 n.7.

[144] *Id.*

[145] *Id.* at 568-69.

[146] *Id.* at 569.

[147] *Id.* at 569 & n.9 (citing Shahala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)).

[148] *Hoyts Cinemas Corp.*, 380 F.3d at 573.

> imposing truly bad viewing angles on wheelchair patrons – say, angles of the kind described in the Ninth Circuit's *Regal Cinemas* decision – would not be a whole-hearted implementation of the statute and that the phrase "lines of sight" *could* be read to cover more than an obstructed view. Theater chains can afford able counsel.[149]

As had been the case in *Cinemark*, the court remanded but exhorted the parties to work out a settlement, "bearing in mind that no solution as to existing theaters will be perfect and that prompt improvements may matter more than theoretical perfection."[150] Consequently, in June 2005 the parties filed a Consent Order which established, *inter alia,* the general requirements for all existing and future stadium-style auditoria owned or operated by the defendants, together with specific provisions for certain named venues.[151] The Consent Order ensured that wheelchair areas would be dispersed throughout the auditorium, including the stadium areas. The Consent Order provided that all wheelchair spaces have unobstructed views of the whole screen, that there be at least one companion seat adjacent to every wheelchair space, and that there be no wheelchair spaces in the front row.[152] While the Consent Order disposed of all the claims between the parties, it stipulated somewhat ominously that "it does not resolve the United states' claims [against] Northeast Cinemas, LLC or National Amusements, Inc."[153]

VI. The Amended Guidelines

Even before the Court of Appeals handed down its ruling in *Hoyts Cinemas*, steps were being taken to clarify the guidelines for lines of sight and wheelchair dispersal. The process is ongoing at the time of writing but has undergone notice and comment. This process will, perhaps, finally lay to rest the matter of APA compliance while clarifying precisely what is required of facilities owners.

In July 2004, new Accessibility Guidelines were published, with the Justice Department "extensively involved"[154] in their drafting. With respect to lines of sight for and dispersion of wheelchairs, the new Accessibility Guidelines state (at 221.2.3) that:

> Wheelchair spaces shall be an integral part of the seating plan . . . [and] shall provide lines of sight complying with 802.2. . . . In provid-

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[149] *Id.*

[150] *Id.* at 575.

[151] United States v Hoyts Cinemas Corp., No. 00 CV 12567 (WGY) (D. Mass. June 13, 2005) (consent order), *available at* www.ada.gov/regal.

[152] *Id.* at 15-16.

[153] *Id.* at 13.

[154] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34510 (proposed June 17, 2008) (to be codified at 28 C.F.R. pts. 35, 36).

> ing lines of sight, wheelchair spaces shall be dispersed. Wheelchair spaces shall provide spectators with choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to all other spectators.[155]

The accompanying advisory to 221.2.3 states that "consistent with the overall intent of the ADA, individuals who use wheelchairs must be provided equal access so that their experience is substantially equivalent to that of other members of the audience. Thus while individuals who use wheelchairs need not be provided with the best seats in the house, neither may they be relegated to the worst."[156] Paragraph 802.2 provides that "where spectators are expected to stand during events, spectators in wheelchairs shall be afforded lines of sight . . . over the heads of standing spectators in the first row in front of wheelchair spaces."[157]

The Justice Department subsequently published an Advanced Notice of Proposed Rulemaking which addressed the "lines of sight comparable" issue in great depth.[158] It invited comment in order to "begin the process of adopting the Access Board's 2004 ADAAG by soliciting public input"[159] (the Department subsequently revealed that it received over 2,500 comments from the public).[160] By the summer of 2008, the Department completed this process and issued a Notice of Proposed Rulemaking under which it proposed to adopt the 2004 ADAAG provisions on comparable lines of sight *in toto*. This would require horizontal and vertical dispersal of seats in cinemas,[161] a requirement that is clearly independent of the provisions on unimpeded lines of sight. The new rules would "recognize the importance of viewing angles" in movie theaters specifically.[162] The provisions in paragraphs 221.2.3.1 and 221.2.3.2 of the 2004 Guidelines contain lines of sight requirements that are specific to cinemas and "will apply independently of any line of sight requirements of the

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[155] AMERICANS WITH DISABILITIES ACT AND ARCHITECTURAL BARRIERS ACT ACCESSIBILITY GUIDELINES § 221.2.3 (2004), *available at* http://www.access-board.gov/ada-aba/final.pdf.

[156] *Id.*

[157] *Id.* § 802.2.2.

[158] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 69 Fed. Reg. 58768, 58775-58777 (proposed Sept. 30, 2004) (to be codified at 28 C.F.R. pts. 35, 36).

[159] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34511 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

[160] *Id.*

[161] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 69 Fed. Reg. 58776.

[162] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 69 Fed. Reg. 58775-58778.

1991 standards at 4.33.3."[163] In comparison, the (comparatively) less exacting provisions of 221.2.3:

> Frames the basic comparability requirement in terms of viewing angles providing that "wheelchair spaces shall provide spectators with . . . viewing angles that are substantially equivalent to, or better than, the . . . viewing angles available to all other spectators." This applies to all types of assembly areas, including stadium-style movie theaters, sports arenas, and concert halls.[164]

The Notice of Proposed Rulemaking, Appendix A goes onto say that the proposed revisions to sections 221.2.3 and 802.2 will:

> [A]dd specific technical requirements for providing sightlines over seated and standing spectators; and require wheelchair spaces to provide individuals with disabilities choices of seating locations and viewing angles that are substantially equivalent to, or better than, the choices of seating locations and viewing angles available to other spectators. The proposed changes also clarify the dispersion requirements. Wheelchair spaces must be dispersed horizontally and vertically. The revisions include exceptions for assembly areas that have 300 or fewer seats, where the wheelchair spaces are located in the 2nd or 3rd quartile of the total row length and provide viewing angles that are equivalent to, or better than, the average viewing angle provided in the facility. The revisions are expected to have minimal impact since they are consistent with the Department's interpretations of the 1991 Standards.[165]

And the Notice of Proposed Rulemaking itself thus provides (at s. 36.308):

> The Department is proposing to revise this section to be consistent with revisions in the proposed requirements applicable to new construction and alterations. The purpose of the section is unchanged: To establish the barrier removal requirements for assembly areas. Sections 36.308(a)(1) and (b) have been revised to include an express requirement to provide companion seats and designated aisle seats.
>
> Section 36.308(a)(1)(ii)(A) and (B) have been revised to provide that wheelchair and companion seats must be an integral part of the seating area, dispersed to all accessible seating levels, and that the locations must provide viewing angles to the screen, performance area, or other focal point that are equivalent to or better than the average viewing angles provided to all other spectators.

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[163] DEPARTMENT OF JUSTICE, NOTICE OF PROPOSED RULEMAKING: PROPOSAL TO REVISE ADA REGULATIONS UNDER TITLE II AND TITLE III, APPENDIX A, *available at* http://www.ada.gov/NPRM2008/appanprm08.pdf.

[164] *Id.* at 33.

[165] *Id.* at 36.

> Proposed § 36.308(a)(1)(iii) provides that companion seats may be fixed or movable and that they shall be equivalent in size, quality, comfort, and amenities to the other seats in the assembly area.
>
> A new § 36.308(c)(1) has been added to provide that when an assembly area has designated seating sections that provide spectators with distinct services or amenities that are not generally available to other spectators, the facility must ensure that wheelchair seating spaces and companion seating are provided in each specialty seating area. The number of wheelchair seating spaces and companion seating provided in specialty seating areas shall be included in, rather than being additive to, wheelchair space requirements set forth in table 221.2.1.1 in the proposed standards.
>
> Proposed § 36.308(c)(2) requires that wheelchair users shall be permitted to purchase companion tickets on the same terms that tickets are made available to other members of the public. In assembly areas with seating capacities exceeding 5,000, each of five designated wheelchair spaces shall have at least three companion seats (i.e., five groups of four seats, each group including a wheelchair space) in order to provide more flexible seating arrangements for families and other small groups. The group companion seats required by this section may be located adjacent to either the wheelchair location or other companion seats. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.[166]

Finally, the Advanced Notice of Proposed Rulemaking contains proposals for a new provision, § 36.406(f), which is an important and farsighted addition to the provisions dealing with disability access to sports and other venues. It merits far more detailed consideration than can be provided here. Briefly, the new provision's purpose is to supplement the assembly areas requirements for wheelchair seating and "reiterate the longstanding requirement that wheelchair and companion seating must be integrated in the seating area."[167] The Notice of Proposed Rulemaking confirms that it will "provide more precise guidance for designers of stadium-style movie theaters" by stipulating with greater clarity where the wheelchair areas should be in located in the stadium section.[168] More generally, it will require "wheelchair and companion seating locations to be dispersed so that some seating is available on each level served by an

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[166] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34539 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

[167] *Id.* at 34546.

[168] *Id.*

accessible route . . . ensuring a choice of ticket prices, services and amenities offered in the facility."[169]

The new § 36.406(f) would also prohibit both the placing of wheelchair seats on temporary platforms or other movable structures that covered standard seats, and the use of platforms, which contain standard seats that could be installed over wheelchair locations which are not being used. The Department had noted that this practice represented a "growing trend in large sports facilities" but took the view that "both of these designs violate both the letter and the intent of this regulation. . . . [and] have the potential to reduce the number of wheelchair seating spaces below the level required."[170] "Reducing the number of wheelchair spaces is likely to result in reducing the opportunity for people who use wheelchairs to have the same choice of ticket prices and access to amenities that are available to other patrons,"[171] and facilities managers may not be able to accommodate last-minute requests from wheelchair users. However, it will be acceptable to use movable seats that do not eliminate whole blocks of wheelchair seating.

VII. Conclusion

It is a truism that the social model of disability has had a considerable impact on disability discrimination law and policy in common law countries (including the UK, the U.S., Canada, and Australia) and on the Convention,[172] and its impact is apparent in the provisions discussed here. Outside the United States, it seems that the social model's influence on the wider physical environment of sport in terms of, for example, access to and egress from venues, the adequacy of transport facilities, lines of sight, and emergency exit provisions, has hardly been considered at all. But these aspects are no less important than the issues of employment, education, and active participation. The social model has illustrated that the crucial disabling factors in the lives of many people with impairments are not the "internal" factors of mental or physical ability, but the "external" factors of socio-political structures and man-made physical environments, such as sports stadia and cinemas. If "disability" is thus recognized to be a consequence of society's failure to remove "barriers" (broadly defined to include debilitating social environments or flawed architectural design), the 'disabling' experience is as likely to arise through the inherent limitations of the design and construction of a facility as from the perceptions and attitudes of other "participants." For

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169 *Id.* at 34545.

170 *Id.* at 34546.

171 *Id.*

172 Elise C. Roy, *Aiming for Inclusive Sport: The Legal and Practical Implications of the United Nations' Disability Convention for Sport, Recreation and Leisure for People with Disabilities*, Ent. & Sports L.J., Aug. 2007, http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number1/roy/roy.pdf.

these activities providers, facility administrators, coaches, and sports officials, Article 30.5 makes separate provision.

The Convention, like the ADA and the corresponding legislation in the United Kingdom, Australia, and elsewhere, explicitly recognizes that the responsibility for managing wheelchair dependency does not rest solely with the individual. Rather, wheelchair dependency is a responsibility for wider society. Society has in effect "created" disabilities through the provision of facilities that are not conducive to wheelchair access. The liberal concept[173] of formal equality requires all individuals to be treated consistently, so that disabled spectators are treated so far as possible consistently with non-disabled spectators. This concept has sparked debates in these cases about what is meant by "lines of sight comparable" and illustrates the difficulty some courts have had in grasping the idea that providing wheelchair areas with unimpeded sightlines does not of itself mean the provision is "comparable." Judicial acceptance of the positive, anticipatory element in the ADA, and the reinforcing of it in the new regulations, establishes that facilities owners are expected to anticipate the specific needs of disabled people and provide accordingly. "Comparable" thus connotes more than providing a putative "level playing field" in which both able-bodied and wheelchair spectators equally have occasional restricted views. Because wheelchair spectators cannot take the self-help steps to ameliorate a restricted view that an able-bodied viewer can, such a level playing field is not appropriate.

Perhaps the attraction of the ADA approach, as epitomized in the "sightlines" cases and the Convention itself, is that it advances a model of social inclusion which does not have as its objective an amorphous notion of equality.[174] Instead, it seeks to endow the concept of "participation" in sport with real meaning. Ultimately, the Convention, the ADA, and equivalent legislation in other jurisdictions oblige the juridical field to make choices about the desirability of transforming the social and physical structures of sport to facilitate more extensive (and higher quality) opportunities for participation by disabled people.[175]

But for those interested in a pragmatic understanding of what the ADA affords and the Convention may have to offer, it should be said that the concept of "access," to have any worthwhile meaning, must require facilities owners to insure (within reason) that wheelchair users have "access" to all, or substantially all, areas within a venue. This involves making accommodation available throughout the venue (at every admis-

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[173] For a discussion of equality as a liberal egalitarian concept and the moral status of human beings with impairments, see Jeff McMahan, *Challenges to Human Equality*, 12 J. ETHICS 81 (2008).

[174] *Id.*

[175] Richard Terdiman, *Translator's Introduction* to Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805-13 (Richard Terdiman trans., 1987).

sion price level), with views no worse than those afforded to patrons without such disabilities. A less demanding approach – for example, requiring only that there be "somewhere we can put wheelchair users" – would be insufficient. Even if the access to the bathroom, catering, and other facilities which the ADA regulations demand is properly provided, and even if there is prompt, reliable and safe egress, including in emergencies, from a venue,[176] "access" has not been meaningfully achieved. Wheelchair users will not pay to attend events they cannot actually watch because their view is restricted by other patrons. Nor will they attend if they are compelled to view the event from an area of the arena designated for them by the owners, or if they cannot sit with family and friends.

Restricted or non-existent access to stadia and the facilities and equipment therein - to the "sports environment" broadly defined – substantially inhibits mobility impaired people from accessing sport. The dismantling of discriminatory physical barriers is no less an imperative than is the removal of other discriminatory practices that militate against active participation. Both the "sightlines" litigation discussed herein and the language of the ADA itself (which speaks of "full and equal enjoyment" and the "most integrated setting appropriate to the needs of the individual" as means of achieving the overall "prohibition of discrimination") go far beyond the historical concept of a "wheelchair accessible stadium" as being one which provides an area where wheelchair users can be wheeled in and out. Sadly, the minimalist approach still pertains at many sports venues even when domestic law demands something better. Convention Rights do not offer a panacea, and only time will tell whether Article 30.5 can truly facilitate change. But when Article 30.5 is read in conjunction with the ADA and other progressive domestic legislation, it becomes apparent that the article has much to offer ratifying states, lobbying groups, and disability activists. The possibility that domestic provisions and Article 30.5(c) may be simultaneously asserted and thus renew one another's vigor – developing what Parker and Clements term "a form of legal 'combination therapy' where two imperfect provisions combine to produce an effective treatment"[177] – could bring an invaluable impetus to this vitally important, but hitherto under-considered, aspect of disability discrimination law.

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[176] John Grady & Damon Andrew, *Equality of Access to Emergency Services for People with Disabilities Under the Americans with Disabilities Act*, 17 J. LEGAL ASPECTS SPORT 1 (2007). The Stade de France in Paris incorporates a brilliant but simple system of angled vomitories to facilitate egress from the stands. Guide Accueil Accessibilité: Visites Stade de France, http://www.stadefrance.com/images/stories/documents/accessibilite_visites.pdf.

[177] Camilla Parker & Luke Clements, *The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living?* 4 EUR. HUM. RTS. L. REV. 508, 514 (2008).