UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 00-12567-WGY
v.	)	
HOYTS CINEMAS CORPORATION	)	
Defendant.	)	

OPPOSITION OF THE UNITED STATES
TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

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INTRODUCTION

This case is about the rights of persons with disabilities not to be treated as second-class citizens. A decade after the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., was signed into law, Hoyts Cinemas Corp. ("Hoyts") is designing and constructing multi-million dollar cinema complexes, featuring highly touted "stadium-style" seating, that deny individuals who use wheelchairs access to the theaters' stadium seats. Instead, Hoyts has relegated such individuals to the few remaining rows of traditional, non-stadium seats located at the front of its theaters – seats that are uncomfortably close to the screen and that constitute the cinematic equivalent of the "back of the bus."

The United States has brought this ADA enforcement action to halt Hoyts' pattern and practice of discrimination. Count I of the Complaint asserts that Hoyts has violated section 303 of the ADA, 42 U.S.C. § 12183(a) and its implementing regulation, 28 C.F.R. Subpart D and Section 4.33.3 of the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("the Standards"), by failing to design and construct its stadium-style theaters in a way that is "readily accessible to and usable by" individuals with disabilities. Hoyts has violated Standard 4.33.3, because, among other things, the company (a) does not provide people who use wheelchairs with "lines of sight comparable to those available to the rest of the public", and (b) has not made wheelchair seats an "integral part" of the fixed stadium theater seating plan. Complaint ¶ 20.

Count II contends that Hoyts has violated section 302 of the ADA, 42 U.S.C. § 12182 and its implementing regulation, 28 C.F.R. §§ 36.201, 36.202 and 36.203, because denying access to stadium seats denies individuals with disabilities the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" that Hoyts provides for the rest of the general public. 42 U.S.C. §§ 12182(a) and 12182(b)(1)(A). Complaint ¶ 24.

Because both counts of the Complaint state cognizable claims under the ADA, Hoyts' motion to dismiss should be denied.

FACTS

Since 1997, Hoyts has offered its customers the opportunity to attend movies in "stadium-style" theater complexes. Complaint ¶ 2. Hoyts currently operates more than 25 such complexes in the

United States and is reportedly building more. ¶¶ 10-11. In these newly constructed cinemas, most of the seating is "stadium-style," which means that the seats in each auditorium are placed on a series of tiers or risers, with each row generally elevated 12 to 18 inches above the row in front of it, as in a sports stadium. The seats also tilt backwards. The result is to provide patrons in stadium seats with elevated, comfortable, unobstructed lines of sight to the screen. ¶¶ 2, 12.

In the vast majority of Hoyts' stadium-style theaters, the stadium seats can be reached only by climbing up the risers via steps. As a result, the stadium seats cannot be accessed by persons who use wheelchairs. Instead, patrons in wheelchairs are relegated to a limited number of "traditional" seats, which are located at the front of the theater, close to the screen, on a flat or sloped floor. Because the traditional seats are significantly closer to the screen and at a lower elevation than the stadium seats, they provide inferior lines of sight to the screen than do the seats in the stadium section. ¶¶ 2-3, 13-15. Put simply, individuals who are relegated to the frontmost "traditional" seating areas must crane their necks and/or swivel their heads to look at the giant screen that is suspended high on the wall immediately in front of them. They are denied the comfortable lines of sight afforded patrons who are able to access the elevated stadium seats, which are located substantially farther back from the screen.

STATUTORY AND REGULATORY FRAMEWORK

A. The Americans with Disabilities Act of 1990

In enacting the ADA, Congress acted to eliminate the discrimination that individuals with disabilities "continually encounter" in the form of "architectural barriers," "segregation," and "relegation to lesser services." 42 U.S.C. §§ 12101(a)(5), 12101(b)(1). Title III of the ADA prohibits discrimination by public accommodations and commercial facilities, including movie theaters.[1] 42 U.S.C. §§ 12181-12189. Congress entrusted enforcement of title III to the U.S. Department of Justice (the "Department"), including the responsibility to promulgate regulations interpreting and implementing the statute, to issue technical assistance materials explaining rights and obligations under

[1] "Public accommodations" include "a motion picture house, theater, ... or other place of exhibition or entertainment." 42 U.S.C. §§ 12181(7)(B) - (D). "Commercial facilities" means facilities "intended for nonresidential use ... whose operations will affect commerce." 42 U.S.C. § 12181(2). Hoyts' movie theaters thus qualify as both public accommodations and commercial facilities. See also 28 C.F.R. § 36.104.

the statute and regulations, and to file lawsuits in federal court enforcing compliance with the statute and regulations. 42 U.S.C. §§ 12186(b), 12206, 12188(b).

Section 302 of the ADA unambiguously expresses Congress' intent that persons with disabilities who use public accommodations have an equal opportunity to enjoy the experience provided to other people. 42 U.S.C. § 12182. Section 302 makes it illegal to subject persons with disabilities "to a denial of the opportunity ... to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations" of the entity. Id. § 12182(b)(1)(A)(i); see also id. § 12182(a). It also is illegal to provide to persons with disabilities a good or service that "is not equal to that afforded to other individuals." Id. § 12182(b)(1)(A)(ii); see also id. § 12182(a). In addition, section 302 requires that "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting ...." Id. § 12182(b)(1)(B). Finally, Congress made it illegal to provide persons with disabilities with goods, services, or accommodations that are different and/or separate from those provided to other people. Id. §§ 12182(a), 12182(b)(1)(A)(iii).

Section 303 of the ADA governs new construction and alteration.[2] It mandates that all places of public accommodation and commercial facilities constructed after January 26, 1993, be "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a)(1). It also requires all such facilities altered after January 26, 1992, to be "readily accessible to and usable by" individuals with disabilities, including persons who use wheelchairs, to the maximum extent feasible. Id. § 12183(a)(2).

The requirement that facilities be "readily accessible to and usable by individuals with disabilities" is intended to enable persons with disabilities "to get to, enter and use a facility." H.R. Rep. No. 101-485(III), at 499-500 (1990). It requires "a high degree of convenient accessibility," id., as well as access to the same services that are provided to members of the general public. "For new construction and alterations, the purpose is to ensure that the service offered to persons with disabilities is equal to the service offered to others." Id. (emphasis added). To meet section 303's accessibility

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[2] Section 303(a) applies to all places of public accommodation and commercial facilities designed and constructed for first occupancy after January 26, 1993, and to all alterations to these facilities made after January 26, 1992. Because Hoyts did not design and construct theaters with stadium-style seating until 1997, Complaint ¶ 2, all of these theaters must comply with ADA new construction and/or alteration requirements.

requirements, a facility must be designed and constructed "in accordance with standards" issued by the Department. 42 U.S.C. § 12183(a)(1).

B. The Department of Justice's Title III Regulation

The Department's title III regulation was promulgated on July 26, 1991. It includes a general prohibition of discrimination against individuals with disabilities by places of public accommodation such as movie theaters. 28 C.F.R. § 36.201(a). It also prohibits specific activities, such as denying persons with disabilities the opportunity to "benefit from" the goods, services, advantages, and accommodations of a place of public accommodation, id. § 36.202(a); affording individuals with disabilities goods, services, advantages, or accommodations that are unequal to those provided to other individuals, id. § 36.202(b); and providing individuals with disabilities goods, services, advantages, or accommodations that are separate or different from those provided to other individuals, id. § 36.202(c). The regulation requires public accommodations to provide goods, services, advantages, and accommodations in "the most integrated setting appropriate." Id. § 36.203(a).

The regulation also includes detailed standards for new construction and alterations of public accommodations and commercial facilities. 28 C.F.R. Subpt. D. These standards were promulgated pursuant to a two-step process. First, in 1991, following notice-and-comment rulemaking procedures, the Architectural and Transportation Barriers Compliance Board (the "Access Board") promulgated its Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). See 36 C.F.R. pt. 1191. The Access Board's guidelines do not have the binding force of law under section 303(a). Second, on the same day, also in accordance with notice-and-comment procedures, the Department promulgated its title III regulation, including its Standards for Accessible Design (the "Standards"). The Department's Standards adopted the language of ADAAG and established architectural requirements that newly constructed and altered places of public accommodations and commercial facilities must meet in order to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. §§ 12186(b) & (c). The Standards are legally binding, see 42 U.S.C. § 12183(a), and can exceed the minimum guidelines issued by the Access Board, as long as they are consistent with them. 42 U.S.C. § 12186(c).

In addition to prohibiting unequal goods and services, the Department's title III regulation

contains three provisions detailing accessibility requirements for wheelchair seating in movie theaters. The provision most relevant to this case is Standard 4.33.3, which sets out five separate requirements for the placement of wheelchair spaces in new or altered assembly areas. Only two of those requirements are put in issue by Hoyts' motion to dismiss: (1) that wheelchair areas "be an integral part of any fixed seating plan"; and (2) that wheelchair areas "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.

ARGUMENT

In reviewing a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), "the Court 'must take the allegations in the complaint as true and grant all reasonable inferences in favor of the plaintiff.' The Court may grant dismissal only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Heinrich v. Sweet, 49 F.Supp.2d 27, 32 (D. Mass. 1999)(internal citations omitted). Pursuant to this standard, Hoyts' motion should be denied.

I. COUNT I OF THE COMPLAINT STATES A COGNIZABLE CLAIM THAT HOYTS HAS VIOLATED SECTION 303 OF THE ADA.

Count I of the Complaint asserts that Hoyts has violated section 303 of the ADA and its implementing regulation by, among other things: (a) not making wheelchair seats an "integral part" of the fixed stadium theater seating plan, and (b) not providing people who use wheelchairs with "lines of sight comparable to those available to the rest of the public." Complaint ¶ 20. Both allegations state cognizable claims.

A. Hoyts' Failure to Make Wheelchair Seats an "Integral Part" of the Fixed Stadium Theater Seating Plan Violates Section 303 and Standard 4.33.3.

Congress passed the ADA in part because "historically, society has tended to isolate and segregate individuals with disabilities, and such forms of discrimination ... continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress found that this discrimination included "segregation [] and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." Id. § 12101(a)(5). In its Preamble to the title III regulation, the Department recognized

that "Individuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends." Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (hereinafter, "Department's Preamble"), 28 C.F.R. pt. 36, App. B, § 36.308 (1991) ("Persons in wheelchairs should have the same opportunity to enjoy movies, plays, and similar events with their families and friends, just as other patrons do."). The Department further recognized that "[p]roviding [such] segregated accommodations and services relegates persons with disabilities to the status of second-class citizens." 28 C.F.R. pt. 36, App. B, § 36.203. To eliminate such segregation, Standard 4.33.3 requires that wheelchair seating locations be "an integral part of any fixed seating plan." "Integral" means "essential to completeness" or "integrated." Webster's Ninth New Collegiate Dictionary 628 (1990).[3]

Under this plain language definition, to be integrated into the "fixed seating plan" of a stadium-style auditorium, a wheelchair space not only must be located inside the auditorium and next to another seat but also must be part of the auditorium seating where members of the general public routinely sit. As the name suggests, in "stadium-style" theaters, the vast majority of seats are stadium-style seats. Complaint ¶ 12. When wheelchair locations are placed only in the non-stadium-style section of these auditoriums, the result is the segregation and isolation of persons who use wheelchairs from the majority of the general public and, indeed, often from their own families and friends. To comply with the integration requirement of Standard 4.33.3, therefore, wheelchair spaces must be located in the stadium section of the auditorium. Any other interpretation of Standard 4.33.3 would result in the very segregation and inequality that the ADA and Standard 4.33.3 intended to prevent.[4]

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[3] "Integral" is a common term and the Court, therefore, must apply its ordinary meaning. See Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 183 (3d Cir. 1995) (a court interprets terms in a regulation "in accordance with [their] ordinary or natural meaning").

[4] If any question exists about the meaning of "integral," the clear purpose of the ADA to eliminate the segregation and differential treatment of persons with disabilities cements its meaning. "[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements. Courts must construe regulations in light of the statutes they implement." Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 320 (D.C. Cir. 1990) (internal brackets and quotations omitted). Courts construe remedial legislation such as the ADA broadly to effectuate its purposes. Arnold v. United Parcel Service, Inc., 136 F.3d 854, 861 (1st Cir. 1998).

Count I of the Complaint alleges that Hoyts has violated this "integration" requirement by denying persons in wheelchairs access to the stadium sections of its theaters. For the reasons set forth above, this allegation states a cognizable claim.

B. Hoyts' Failure to Provide People Who Use Wheelchairs with Lines of Sight Comparable to Those Provided the Rest of the Public Violates Section 303 and Standard 4.33.3.

The plain language of Standard 4.33.3 also requires persons who use wheelchairs to be provided "lines of sight comparable to those for members of the general public." Webster's dictionary defines "line of sight" as "a line from an observer's eye to a distant point toward which he is looking." Webster's Ninth New Collegiate Dictionary 695 (1990). In a movie theater, the observer is the seated patron. The points at which a patron looks are the areas on the screen at the front of the theater where the film is projected. Thus, in a movie theater, lines of sight are lines from the patron's eye to the various points on the screen where the film is projected.

Webster's further defines the term "comparable" as "capable of or suitable for comparison; equivalent; similar." Id. at 267 (emphasis added).[5] Thus, using a plain language approach to interpreting the requirements of Standard 4.33.3 in a movie theater, "comparable" lines of sight means that the lines of sight provided to a patron from his or her seat – as measured from that patron's eye to the various points on the screen where the film is projected – must be equivalent or similar to the lines of sight provided other patrons in other seats.

Under this plain language interpretation of Standard 4.33.3, wheelchair locations do not have to be provided the best lines of sight in the house, but neither can they be relegated to the worst. Instead, persons who use wheelchairs should be provided equal access so that their viewing experience equates to the experience provided to other members of the general public. In other words, the lines of sight provided for wheelchair locations must be "equivalent" or "similar" to the lines of sight provided other members of the public. They cannot be on the extremes of the range offered to the general public.

Count I of the Complaint alleges that Hoyts has violated this "comparability" requirement. It is

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[5] Courts also define "comparable" to signify a close equivalence in a variety of contexts. See, e.g., Ratliff v. Benefits Review Bd., 816 F.2d 1121, 1125 (6th Cir. 1987) ("comparable" work means requiring "similar" or "equivalent" skills and abilities); Reilly v. Cisneros, 835 F. Supp. 96 (W.D.N.Y. 1993) (using "comparable" and "substantially similar"

neither equivalent nor similar for Hoyts to deny persons in wheelchairs the elevated and enhanced lines of sight afforded moviegoers who are physically able to climb the steps to Hoyts' stadium seats. On these grounds, among others, the government's allegations state cognizable claims under section 303.

C. Hoyts' Motion to Dismiss Count I Is Without Merit.

In its motion to dismiss, Hoyts advances five separate grounds in support of its argument that Count I of the Complaint fails to state a claim. Each of these grounds is meritless.

1. Count I is based on the plain language of Standard 4.33.3, not on some "new" standard requiring "particular" viewing angles in stadium theaters.

Contrary to Hoyts' contentions, the United States does not base its claims in Count I on some "new" standard requiring Hoyts to provide persons who use wheelchairs with a "particular" viewing angle in stadium theaters. (Hoyts Br. 2). Rather, the government premises Count I on the plain language of Standard 4.33.3. See pages 5 - 8, above. As set forth above, the government nowhere alleges that Standard 4.33.3 requires a "particular" viewing angle. It simply requires integration and comparability – requirements that have been in place since long before Hoyts began constructing stadium theaters.[6]

2. Hoyts' interpretation of Standard 4.33.3's "integration" provision is incorrect.

Hoyts argues erroneously that it cannot be found in violation of Standard 4.33.3's integration requirement so long as it places wheelchair locations anywhere within the outer boundaries of a theater's seating plan. (Hoyts Br. 7). Hoyts' assertion flies squarely in the face of the legislative and regulatory history of the ADA, which makes clear that one of the core purposes of the statute was to outlaw the continued segregation and isolation of individuals with disabilities. See pages 2 - 6, above. Pursuant to Standard 4.33.3, it is not enough to place wheelchair locations anywhere within the outer parameters of an assembly area's fixed seating plan. The Standard specifically requires that wheelchair locations be an "integral part of" – i.e., integrated into – that seating plan. Denying persons who use

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interchangeably), aff'd, 44 F.3d 140 (2d Cir. 1995).

[6] "Comparable" may equate to "comparably good" in auditoriums, such as stadium theaters, that generally offer superior lines of sight. It may also, however, equate to "comparably bad" in theaters containing uniformly poor lines of sight. In either event, the government does not contend that a "particular" line of sight (or viewing angle) is required – simply a comparable one.

wheelchairs access to the stadium seats that constitute the *raison d'etre* for the construction of stadium-style theaters in the first place (and where the majority of the seats are located), and instead relegating them to the very front of the theater – the equivalent of the "back of the bus" – violates this requirement because it results in precisely the type of segregation that the ADA makes unlawful.

3. Hoyts' interpretation of Standard 4.33.3's "comparability" requirement also is wrong.

Hoyts next contends that Standard 4.33.3's "comparability" requirement mandates nothing more than the absence of obstructions physically blocking the view from wheelchair seating areas to the screen. In other words, as long as an individual in a wheelchair is not forced to sit behind a pole, a column or some other physical obstruction, Hoyts deems that individual's lines of sight to be "comparable." Following through on this reasoning, Hoyts asserts that the Complaint does not allege the existence of any physical viewing obstructions in the company's stadium theaters, and therefore Count I fails to state a claim. (Hoyts Br. 10-12).

In making this argument, Hoyts relies heavily on the Fifth Circuit's recent decision in Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000), an ADA action filed by private plaintiffs against a stadium-style cinema in Texas. In Lara, the Fifth Circuit reversed the district court's judgment for the plaintiffs, which had found a violation of Standard 4.33.3's comparability requirement, based on the Fifth Circuit's conclusion that the only factor relevant in assessing comparability is the extent of any physical obstruction blocking a moviegoer's view of the screen. Lara, 207 F.3d at 789. For the following reasons, the Fifth Circuit's reasoning – and Hoyts' contentions – are fundamentally flawed.

First, contrary to the Fifth Circuit's holding, a plain language/dictionary reading of Standard 4.33.3's text does provide adequate guidance concerning the meaning and application of the terms "comparable" and "lines of sight." See pages 7 - 8, above. Such a reading runs squarely counter to the Fifth Circuit's "obstruction-only" interpretation. To suggest that the analysis of comparable lines of sight begins and ends with the existence of physical viewing obstructions disregards other factors that relate just as directly to the equivalence or similarity of the lines of sight afforded from different seats – such as proximity of a seat to the screen, height and size of the screen, elevation of the seat, and the like. See Bartlik v. U.S. Dept of Labor, 62 F.3d 163 (6th Cir. 1995) (regulation should be read in

straightforward, common sense manner). Particularly when the quality of the viewing experience in a movie theater is a motivating force behind a patron's choice of seat (and an advertised feature or benefit of stadium seating), it would be irrational to reduce the comparison of line of sight only to "obstruction." Such an interpretation ignores the fact that patrons sitting in wheelchairs in the very front of a theater, who are craning their necks and/or swiveling their heads to look at a huge screen suspended high on a wall immediately in front of them, are not being provided lines of sight comparable to those afforded patrons who are able to access elevated stadium seats located substantially farther back from the screen. See Lara v. Cinemark USA, Inc., District Court's Order Regarding Motions for Summary Judgment at 4-5 (Appendix, Tab 1).

The violence that the Fifth Circuit's interpretation does to the plain language meaning of Standard 4.33.3's terms also can be seen by examining the irrational practical consequences that would flow from the court's interpretation. Under the Fifth Circuit's (and Hoyts') 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. Wheelchair spaces adjacent to the front wall of the theater directly beneath the screen and wheelchair spaces facing sideways would meet this requirement of an "unobstructed" view under the Fifth Circuit's reasoning. At a minimum, the Fifth Circuit's ruling would allow a theater owner repeatedly to offer only the worst seats in its auditoriums to persons with disabilities, as long as there were no pole, column or other physical obstruction in front of their seats. Such a result would eviscerate the ADA's mandate that buildings be "readily ... usable by" individuals with disabilities.

Second, even if the meaning of Standard 4.33.3 were ambiguous – and the government contends that it is not – the Fifth Circuit's holding ignored the substantial deference that is owed the Department of Justice's interpretation of that Standard. If a court finds the language of a regulation ambiguous, it must defer to an agency's interpretation of its own regulation. Christensen v. Harris County, 529 U.S. 576, 588 (2000); Auer v. Robbins, 519 U.S. 452, 461 (1997) (an agency's interpretations of its own

regulation is controlling unless plainly erroneous or inconsistent with the regulation).[7] No grounds exist for departing from that deference here.[8]

Third, to the extent that the Fifth Circuit thought it necessary to look beyond the plain or ordinary meaning of the term "lines of sight," "comparable" and "integral" in interpreting Standard 4.33.3 – and, again, the government asserts that it is not -- the appropriate references are the Department's Preamble to its title III regulation, the structure and requirements of the title III regulation of which Standard 4.33.3 is just one part, and the dictates of the statute that Standard 4.33.3 implements.[9] An examination of these sources fully supports the Department's interpretation. See pages 2 - 7, above.

Rather than examining these sources, the Fifth Circuit erred by looking instead to regulations issued in connection with wholly unrelated statutes. Lara, 207 F.3d at 788-789 (citing 47 C.F.R. § 73.685 (FCC antennae regulation); 46 C.F.R. § 13.103 (Coast Guard safety regulations); and 36 C.F.R. § 2.18 (National Park Service snowmobile regulations)). Obviously, these regulations were drafted and

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[7] See also Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584-85 (D.C. Cir. 1997).

[8] Hoyts contends that: (a) the Department's view of Standard 4.33.3 has constantly shifted, and (b) the Department stood silent on its interpretation of Standard 4.33.3 while Hoyts and other owners built their stadium theaters. (Hoyts Br. 5, 12-14). These contentions suffer from three fatal deficiencies. First, they rest on factual allegations outside the Complaint that cannot be considered on a motion to dismiss. Second, the allegations are incorrect. The government consistently has articulated the same interpretation of Standard 4.33.3: among other forums, in an *amicus* brief that it filed in Lara v. Cinemark USA, Inc., Civ. No. EP-97-CA-502 (W.D. Tex.); as *amicus curiae* in a brief filed in the Lara case before the Fifth Circuit; in a lawsuit filed by private plaintiffs, and in which the government intervened, in the Central District of California: John Lonberg v. Sanborn Theatres, Inc., Civ. No. 97-6598AHM(BQRx) (C.D. Cal.); and in two lawsuits the Department has filed against theater companies AMC Entertainment, Inc. in California and Cinemark USA, Inc. in Ohio. The Department's settlement agreement with United Artists ("UA") also is not to the contrary. "Median or better" was a negotiated settlement position to amend an existing Order. Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 752 n.68 (D. Ore. 1997) (settlement agreement with the Atlanta Olympics organizers is not a reliable expression of the Department's interpretation of the law because it is, by definition, a compromise). The UA agreement also did not mandate any particular numerical viewing angle. Finally, any suggestion that DOJ "stood silent" on its interpretation of Standard 4.33.3 not only is incorrect – as fact discovery in this case will demonstrate – but also is irrelevant as a matter of law. See 42 U.S.C. § 12206(e)("[An entity] covered under [the ADA] shall not be excused from compliance with the requirements of [the ADA] because of any failure to receive technical assistance...").

[9] See Martin v. American Cyanamid Co., 5 F.3d 140, 145 (6th Cir. 1993) (proper to consult a regulation's preamble to determine its intended meaning); Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 321 (D.C. Cir. 1990) (regulation must be interpreted so as to harmonize with and further, not conflict with, the objective of the statute it implements); McCuin v. Secretary of HHS, 817 F.2d 161, 169 (1st Cir. 1987) (same); Campesinos Unidos, Inc. v. U.S. Dep't of Labor, 803 F.2d 1063, 1069 (9th Cir. 1986) (court's task is to interpret a regulation as a whole, in light of overall statutory and regulatory scheme).

implemented in entirely different contexts. They have no bearing here.[10]

In choosing to examine these unrelated statutes and regulations, the Fifth Circuit also erroneously stated that: "[u]nlike questions of 'viewer obstruction' which the DOJ and Access Board explicitly considered before issuing section 4.33.3, see 56 Fed. Reg. 2296, 2314 (1991); 56 Fed. Reg. 35408, 35440 (1991), questions regarding viewing angle did not arise until well after the DOJ promulgated section 4.33.3." Lara, 207 F.3d at 788; see also Hoyts Br. 11. In fact, an examination of the Federal Register sections cited by the court reveals that factors relating to viewing angles (i.e., height of screen and distance between rows) – and the requirement that sight lines for persons in wheelchair spaces be comparable to those for the general public – were specifically discussed and addressed. In explaining how these concepts are applied to theaters in ADAAG, the Access Board explicitly stated: "Sightlines 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. 35408, 35440 (1991).[11] The Access Board also specifically addressed this issue in a technical assistance publication discussing ADAAG section 4.33.3.[12]

Fourth, the Fifth Circuit erred in construing a November, 1999 Notice of Proposed Rulemaking ("NPRM") by the Access Board as somehow constituting a concession by the Board that Standard 4.33.3's comparability language relates only to obstructions. Lara, 207 F.3d at 788. More accurately,

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[10] Hoyts similarly errs in listing different ADA provisions that contain precise physical measurements and then arguing that the absence of such measurements in Standard 4.33.3 somehow undercuts the Department's interpretation. (Hoyts Br. 7-8). The fact that the provisions cited by Hoyts contain precise measurements – all, not coincidentally, relating to the physical dimensions of wheelchairs, the human body and associated paths of travel – has little relevance to the proper interpretation of other provisions, such as Standard 4.33.3, which are necessarily worded as more general principles in order that they could continue to be coherently applied if and when new architectural designs came to be developed.

[11] Notably, the Access Board did not say those were the only factors to be considered.

[12] See ADAAG Manual: A Guide to the Americans with Disabilities Act Accessibility Guidelines (July 1998), which provides, in pertinent part:

> Sight Lines
>
> > Both the horizontal and vertical viewing angles must be considered in the design of assembly areas. A variety of factors determine the quality of 'vertical' sightlines, such as the distance from performance areas, row spacing, staggering of seats, and floor slope. Sightlines are calculated according to certain industry conventions and practices.

the Board was simply using the notice and comment rulemaking process to obtain input from the public on whether clarification was needed on what Standard 4.33.3 requires. See 64 Fed. Reg. 62248, 62277 (November 16, 1999). An agency's consideration of the possible need to clarify a regulation does not nullify the regulation's existing requirements. Smiley v. Citibank, 517 U.S. 735, 743 (1996).

Moreover, the commentary in the 1999 proposed rule clearly shows that the Access Board was addressing this issue because members of the industry had professed "uncertainty" over the requirements of Standard 4.33.3. 64 Fed. Reg. 62277 ("design professionals have expressed some uncertainty over how to measure their compliance with this requirement") (emphasis added). Notably, the Board itself did not express the same uncertainty. In fact, the Board proposed to leave the "comparable lines of sight" language in Standard 4.33.3 unchanged. In making this proposal, the Board specifically discussed the advent of stadium-style theaters and concluded that the theaters provided persons in wheelchairs with "inferior lines of sight." Id. at 62278. The Board's analysis used the same definition of "lines of sight" employed by the Department in its interpretation of Standard 4.33.3.

Fifth, the Fifth Circuit incorrectly concluded that no court had previously determined whether Standard 4.33.3's requirement for comparable lines of sight involved any issue other than an unobstructed view. See Lara, 207 F.3d at 789. Although no prior cases address how the "comparable lines of sight" language applies to stadium-style theaters, the few decisions that have addressed the comparable lines of sight requirement of Standard 4.33.3 have at least implicitly recognized that "comparable" means similar or equivalent.[13] Most of these cases have involved the question of whether

[13] Indeed, the first case in which a court recognized the principle that an assessment of "comparable lines of sight" involves viewing angles specifically involved the interpretation and application of Standard 4.33.3 in movie theaters. See Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994). Predating stadium-style theaters, the Fiedler case involved the proper interpretation and application of the Department's regulation to traditional movie theaters (i.e. those where all seating is located on a sloped floor). The Department filed an amicus brief stating its view that Standard 4.33.3's dispersal provision required the theater to provide wheelchair spaces in more than one row of the auditorium, at different distances from the screen. The district court deferred to that view, holding that Standard 4.33.3 is "a criterion of visual vantage" intended to afford persons with disabilities access to good seats, not only bad ones. See Fiedler, 871 F. Supp. at 38. The Fiedler court further held that the language in Standard 4.33.3 that permits clustering and which is inapplicable in traditional movie theaters, "speaks to the angle of vision between spectator and spectacle, or, more precisely, the angular distance a spectator must drop or raise the line of sight below or above the horizontal to observe what he came to see." Id. Thus, the very first court to interpret Standard 4.33.3 recognized not only that persons who use wheelchairs cannot be relegated to bad seats but also that viewing angles are an integral part of lines of sight. See id.

the ADA requires stadiums and similar assembly areas to provide to people who use wheelchairs comparable lines of sight over standing spectators. None of these decisions expresses any uncertainty regarding the fundamental principle that sightlines for those patrons who use wheelchairs, and those not in wheelchairs, have to be similar, and that people who use wheelchairs cannot be relegated to isolated and inferior seating areas.[14] The more narrow question presented in these cases was whether wheelchair sightlines had to be over spectators in the row ahead when those spectators were standing.[15]

For all of the foregoing reasons, the Fifth Circuit's reasoning in Lara is flawed, as is Hoyts' reliance on that reasoning, and the Court should not adopt it.

4. The Department of Justice has not violated the Administrative Procedure Act.

Hoyts next contends that the Department's position with respect to the meaning of Standard 4.33.3 – and its conduct in bringing actions to enforce that Standard – violate the Administrative Procedure Act ("APA"). (Hoyts Br. 12-16). This argument fails also, for two reasons.

First, as a threshold matter, the APA only applies where there has been "final agency action." 5 U.S.C. § 704. Agency action is not "final action" unless it is "one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 179 (1997) (quotations omitted). Here, there has been no final agency action with respect to the application of Standard 4.33.3 to stadium-style theaters. On precisely this ground, the APA argument that Hoyts is raising has been rejected each and every time that it has been asserted by stadium theater owners in

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[14] Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, 950 F. Supp. 393, 398, 404 (D.D.C. 1996), aff'd, 117 F.3d 579, 583-86 (D.C. Cir. 1997), cert. denied sub nom., Pollin v. Paralyzed Veterans of Am., 523 U.S. 1003 (1998) (deferring to the Department's view that Standard 4.33.3 requires unobstructed views over standing spectators); Caruso v. Blockbuster-Sony Music Entm't Centre, 193 F.3d 730, 732 (3rd Cir. 1999) (recognizing that Standard 4.33.3 may be read to require that "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."); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 709, 732-747 (D. Or. 1997) (Standard 4.33.3 includes a requirement for comparable lines of sight, and an arena design that places the majority of wheelchair spaces in undesirable viewing areas violates Standard 4.33.3); United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262, 1268-1269 (D. Minn. 1997) (Standard 4.33.3's requirement for comparable lines of sight includes a mandate for wheelchair spaces with unobstructed lines of sight over standing spectators).

[15] The varying outcomes reached by the cases on this narrow issue result from the courts taking different views of the regulatory history of Standard 4.33.3 as it relates to lines of sight over standing spectators – a question not raised in the instant case. See generally Paralyzed Veterans, 117 F.3d at 581-582; Caruso, 193 F.3d at 736.

ADA enforcement actions filed by the United States.[16] For the same reasons, the Court should reject Hoyts' APA argument here.

Second, even if the Court were to conclude that final agency action occurred – which it did not – the Department's conduct has not run afoul of the APA because it has not engaged in substantive rulemaking.[17] The APA requires that an agency follow notice-and-comment procedures only when promulgating a substantive rule. A substantive rule is one "which creates law, usually implementary to an existing law." Board of Trustees of Knox County Hospital v. Shalala, 135 F.3d 493, 500 (7th Cir. 1998) (citations and quotations omitted). An agency need not follow notice-and-comment procedures when announcing "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). An interpretive rule is "a statement as to what the administrative officer thinks the statute or regulation means." Knox, 135 F.3d at 501; see also Warder v. Shalala, 149 F.3d 73, 79-80 (1st Cir. 1998).

Hoyts relies principally on language from Hoctor v. United States Department of Agriculture, 82 F.3d 165 (7th Cir. 1996), to argue that the Department's interpretation of Standard 4.33.3 is a substantive rule and should have been subject to notice-and-comment rulemaking. Unlike in Hoctor, however, the Department's interpretation of Standard 4.33.3 flows naturally from both the regulatory and statutory language. Moreover, a different interpretation – such as the "obstruction-only" interpretation that Hoyts advances -- would undermine the purpose of the ADA and Standard 4.33.3.

The more applicable precedent is from this circuit. In Warder, the court held that HHS had not engaged in rulemaking subject to notice-and-comment requirements because it simply had clarified the definitions in the statute and regulation and did not "stake out any ground the basic tenor of which was not already outlined in the law itself." Warder, 149 F.3d at 80-81 (citation omitted).

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[16] See United States v. AMC Entertainment, Inc., Case No. CV 99-1034 MMM (Shx), Order dated Dec. 16, 1999 (Appendix, Tab 2); United States v. AMC Entertainment, Inc., Case No. CV 99-1034 FMC (SHx), Order dated June 23, 2000 (Appendix, Tab 3); United States v. Cinemark USA, Inc., Case No. 1:99 CV 0705, Memorandum Opinion and Order at 11, March 22, 2000 (Appendix, Tab 4). See also Cinemark v. Department of Justice, No. 99-CV-0183, 2000 WL 915091, at *7 (N.D. Tex. July 6, 2000) (Appendix, Tab 5).

[17] If this Court agrees that the Department engaged in no final agency action, Hoyts' APA arguments must be rejected on jurisdictional and/or ripeness grounds. The Court need not reach the issue of the lack of substantive rulemaking.

As to Hoyts' argument that the Department's interpretation of Standard 4.33.3 was subject to notice and comment because it "changes" the defendant's obligations pursuant to the regulation, the Department's interpretation of Standard 4.33.3 as applied to stadium-style theaters has not changed. See Footnote 8, above. Because the Department's interpretation does not alter the obligations imposed by Standard 4.33.3, the Department was not required to conduct notice-and-comment rulemaking. See, e.g., Aviators for Safe and Fairer Regulation, Inc. v. Federal Aviation Assoc., 221 F.3d 222, 226-27 (1st Cir. 2000); Warder, 149 F.3d at 80.

5. Neither the ADA nor the Department's regulations are unconstitutionally vague.

Finally, Hoyts argues that its due process rights will be violated if the Court does not dismiss Count I of the Complaint.[18] In essence, Hoyts contends that the United States has changed its position as to the meaning of Standard 4.33.3, and that the alleged variations in interpretation make Standard 4.33.3 unconstitutionally vague. (Hoyts Br. 16). This argument lacks merit.

First, contrary to Hoyts' contention, the Department has not changed its interpretation of Standard 4.33.3 and its application to stadium-style theaters. The Department consistently has sought – and continues to seek – to enforce nothing more than the plain language meaning of Standard 4.33.3. See footnote 8, above. Although theater designs have changed, the Department's interpretation of its regulations has remained consistent.

Second, there is nothing about that plain language meaning, as applied to stadium theaters or otherwise, that is unconstitutionally vague. A person of ordinary intelligence need not resort to speculation or conjecture to know that the conduct asserted in the Complaint – namely, denying persons who use wheelchairs access to the stadium sections of stadium theaters – runs afoul of the ADA, generally, and of Standard 4.33.3's "comparability" and "integration" requirements, specifically.

[18] Hoyts' argument on this point is perfunctory, but it appears to be making a substantive due process argument under the Fifth Amendment to the Constitution.

II. COUNT II OF THE COMPLAINT STATES A COGNIZABLE CLAIM THAT HOYTS HAS VIOLATED SECTION 302 OF THE ADA.

A. Hoyts Has Violated Section 302 by Denying Persons with Disabilities the Full and Equal Enjoyment of Its Theaters.

Section 302(a) of the ADA bars a "place of public accommodation" from "discriminat[ing] against [an individual] on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" that it provides for the general public. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a). Section 302(b) identifies various acts or omissions[19] that constitute discrimination for the purposes of section 302(a), and specifically makes it unlawful either to provide individuals with disabilities with an "unequal benefit," or to relegate individuals with disabilities to a "different or separate" benefit. 42 U.S.C. §§ 12182(b)(1)(A)(ii)-(iii); 28 C.F.R. § 36.202(b)-(c). Additionally, section 302(b) requires that goods, services, and accommodations be provided to individuals with disabilities in "the most integrated setting appropriate." 42 U.S.C. § 12182(b)(1)(B); 28 C.F.R. § 36.203(a).

The United States alleges that Hoyts has literally "deni[ed]" persons who use wheelchairs "the opportunity ... to participate in or benefit from [Hoyts'] goods, services, and accommodations" because it has denied people who use wheelchairs the option of enjoying the stadium seating the general public can enjoy. 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 26.202(a).[20] The United States alleges that Hoyts has forced persons who use wheelchairs to accept a separate, different, and unequal good, service, and accommodation, and has failed to afford them that good, service, and accommodation in the "most

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[19] According to the legislative history, § 302(b) "provides principles of construction for the general rule [of § 302(a)], divided between general prohibitions against discrimination set forth in paragraph (1) and specific prohibitions set forth in paragraph (2)." H.R. Rep. No. 101-485(IV), at 57 (1990). The "general prohibitions" contained in § 302(b)(1) are "patterned after provisions contained in other civil rights laws protecting women and minorities." H.R. Rep. No. 101-485(III), at 58 (1990). The "specific prohibitions" of § 302(b)(2) serve a different function. Congress recognized that "[i]n order to provide effective protections for persons with disabilities ... additional specific prohibitions" beyond those necessary to address discrimination based upon sex or race are provided by § 302(b). Id.

[20] If the Court finds section 302 and its implementing regulations ambiguous, it should defer to the Department's interpretation. See pages 10 - 11, above.

integrated setting." 42 U.S.C. §§ 12182(b)(1)(A)(ii) and 12182(b)(1)(B); 28 C.F.R. §§ 36.202(b)(c) and 36.203(a).

These allegations are supported by both the language and legislative history of the ADA. See pages 2 - 5, above. Count II, accordingly, states a cognizable claim.

B. The United States May Assert Claims Under Both Section 302 and Section 303.

Notwithstanding the language and legislative history of section 302, Hoyts contends that it need not comply with section 302's comprehensive mandate against discrimination because stadium-style seating entails an architectural design and construction component. Hoyts argues that if a movie theater meets the architectural design and building requirements of section 303 and its implementing regulation, no viable claim can be asserted under section 302. (Hoyts Br. 18).

As a threshold matter, the United States has stated a cognizable claim that Hoyts has not complied with section 303 and Standard 4.33.3. Even putting that aside, however, Hoyts cannot ignore the mandate of section 302 – to provide persons who use wheelchairs with the full and equal enjoyment of a good, service, or accommodation – merely because that good, service, or accommodation involves an architectural design or building component. The plain reading of section 302 and the broad remedial goals of the ADA prohibit Hoyts from denying individuals with disabilities access to, or enjoyment of, the enhanced movie-going experience that it offers others. Compare Martin v. PGA Tour, Inc., 204 F.3d 994 (9th Cir. 2000) (disabled golfer granted a reasonable accommodation under section 302 enabling him access to a public accommodation).

Further, sections 302 and 303 are independent and distinct provisions, with independent obligations and liabilities. Section 302(a) bars a public accommodation from discriminating on the basis of disability in the "full and equal enjoyment" of goods, services, and accommodations that it provides to the general public. See 42 U.S.C. § 12182(a). Section 303 addresses only the design and construction of inaccessible facilities.

A cardinal principle of statutory construction is to give effect "if possible, to every clause and word of a statute." United States v. Menasche, 348 U.S. 528, 538-39 (1955); Moskal v. United States, 498 U.S. 103, 109-110 (1990). A corollary to this principle is that a statute should not be read to render

a portion of the statute meaningless. See Colautti v. Franklin, 439 U.S. 379, 392 (1979). Yet, that is precisely what would happen if Hoyts' arguments regarding Count II of the Complaint were accepted. Under Hoyts' reading of the ADA, it would be permitted to violate the anti-discriminatory principles of section 302 at will so long as its theaters complied with the technical architectural guidelines set forth in section 303 and its implementing regulation. Such a reading would eviscerate key provisions of section 302 and lead to absurd results. For example, Hoyts' reading would require a facility to be designed and constructed in full compliance with all relevant technical guidelines under the ADA, but allow an owner or operator simply to deny persons who use wheelchairs access to the facility.

The Court should reject Hoyts' attempt to restrict the ADA to a building code. The ADA permits the United States to assert a claim against Hoyts under section 302, Count II alleges such a claim, and the Court should deny Hoyts' motion to dismiss it.[21]

III. THE COMPLAINT COMPLIES WITH FED. R. CIV. P. 8

Contrary to Hoyts' argument, the United States has complied fully with the notice pleading requirements contained in Fed. R. Civ. P. 8(a)(2), which require only a short and plain statement of the claims against Hoyts.[22]

The Complaint plainly and succinctly sets forth the legal and factual bases for its claims under the ADA. It includes a factual description of Hoyts' typical stadium theater designs; the placement of wheelchair seating in those designs; and the legal and factual deficiencies associated with that

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[21] The cases cited by Hoyts do not support its claim that the court should dismiss Count II. In Caruso v. Blockbuster-Sony Music Entertainment Centre, 968 F. Supp. 210, 211-12 (D.N.J. 1997), aff'd in part, rev'd in part,174 F.3d 166 (3d Cir.), opinion vacated and superceded on panel reh'g, 193 F.3d 730 (3d Cir. 1999), plaintiffs alleged that the defendant violated the ADA when it failed to provide persons who use wheelchairs with unobstructed lines of sight over standing spectators. The district court granted summary judgment based on its conclusion that there was explicit regulatory history indicating that Standard 4.33.3 was not intended to encompass the provision of lines of sight over standing spectators, and that it would be impermissibly inconsistent with that history to allow the plaintiffs' claims to proceed. See Caruso, 968 F. Supp. at 215-216. Other courts have reached different conclusions regarding the same issue. See footnotes 14 and 15, above. In any event, no such contradictory history exists with respect to the Department's interpretation and application of the ADA and its implementing regulation to stadium-style movie theaters in this case. Caruso is thus inapposite. See Caruso, 968 F. Supp. at 215 n.14 (court noted that it rendered "no opinion" concerning what its holding would have been had it not found contradictory legislative history).

[22] See Connecticut General Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 622 (1st Cir. 1988) (refusing to dismiss

placement. Rule 8 does not require that the Complaint exhaustively review each of Hoyts' hundreds of stadium-style auditoriums or provide an auditorium by auditorium breakdown of specific wheelchair locations. (Hoyts Br. 19).[23] Indeed, until the United States inspects Hoyts' stadium theaters as part of discovery in this case, it cannot accurately create such a list. That is why rules of notice pleading and Rule 8 do not require such proof at the earliest stages of a case.

CONCLUSION

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). All buildings constructed or altered after January 26, 1993 were required to be accessible. Today, a decade later, persons with disabilities should no longer be forced to sit where no one else wants -- or is required -- to sit. Congress intended that this relegation to lesser goods, services, and accommodations would end soon after the ADA became law. See H.R. Rep. No. 101-485(III), at 56 (1990).

Unfortunately, it has not ended at Hoyts' stadium-style movie theaters. The United States has filed this enforcement action to stop Hoyts' pattern and practice of discrimination. For the reasons set forth above, Counts I and II of the Complaint state cognizable claims. Hoyts' motion to dismiss should be denied.

Respectfully submitted,

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complaint because it set out the facts underlying the dispute).

[23] Hoyts erroneously relies upon DM Research, Inc. v. College of American Pathologists, 170 F.3d 53, 58 (1st Cir. 1999) in which the court dismissed the complaint because the plaintiff did not adequately allege all of the elements of its claims. Here, in contrast to DM Research, the United States has alleged all elements of its claims. See id. at 55 (the complaint "need not include evidentiary detail").