The Worst Seats in the House: Stadium-Style Movie Theaters and the Americans with Disabilities Act

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Stadium-style seating, first introduced in the mid-1990s, gives moviegoers a dramatically improved viewing experience, offering better sightlines and larger screens than traditional movie theaters. Because the steep incline of stadium-style rows prevents ramping, wheelchair seating is often placed in the very front rows of theaters. This configuration denies wheelchair patrons the superior viewing experiences that their able-bodied counterparts enjoy and, in the view of many courts, violates the Americans with Disabilities Act (ADA).

The ADA requires that places of public accommodation (which include movie theaters) provide “full and equal enjoyment of . . . services” to disabled persons. To implement and enforce this requirement, the Department of Justice, pursuant to statutory mandate, issued regulations construing “equal enjoyment” to require that seating plans in places of public accommodation offer wheelchair users “lines of sight comparable” to those of their able-bodied counterparts.

The Justice Department’s interpretation of its own regulations concludes that most stadium-style theaters do, in fact, violate the ADA. It contends that, in the movie theater context, comparability of lines of sight encompasses viewing angles to the screen, and that

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1 See United States v Hoyts Cinemas Corp, 256 F Supp 2d 73, 78 (D Mass 2003), appeal pending, No 03-1646 (1st Cir argued Feb 6, 2004) (presenting a factual overview of stadium-style seating in American movie theaters).

2 Americans with Disabilities Act, 42 USC § 12101 et seq (2000) (stating that the statute’s purpose is, among other things, “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities”).

3 42 USC § 12181(2), (7)(C) (including “a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment” within the scope of “public accommodations”).

4 42 USC § 12182(a) (“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 by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

5 See 42 USC § 12186(b) (requiring the Attorney General to enact regulations to enforce the ADA).

wheelchair seating, when confined to the front, non-stadium sections of the theater, provides universally poor and uncomfortable viewing angles. Because able-bodied patrons have a choice of seats, the vast majority of which provide excellent viewing angles, the Justice Department argues that stadium-style movie theaters do not provide comparable lines of sight and thus violate the ADA.

Courts adopting this interpretation have done so on the basis of deference to the Justice Department's interpretation of its own regulation rather than the "plain" meaning of the language "lines of sight comparable." Other courts have been reluctant to adopt this argument, pointing to a different interpretation of the same regulation by the Justice Department in the context of wheelchair seating in athletic arenas. The first court of appeals to rule on this issue, relying on these athletic arena cases, determined that wheelchair users need only be afforded unobstructed views of the screen to comply with the "lines of sight comparable" requirement. Recent decisions, however, have repudiated this "unobstructed view" rationale, finding both that the Justice Department's interpretation is truer to the ADA's purpose and that its interpretation is entitled to deference from the courts.

This Comment attempts to resolve the current split between the circuits by expanding on the rationale underlying the Justice Department's interpretation of the ADA. The design of many stadium-style theaters severely disadvantages disabled movie patrons vis-à-vis able-bodied patrons, in many instances providing able-bodied customers

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7 See Brief for the United States as Appellee/Cross-Appellant, United States v Hoyts Cinemas Corp, Civil Action Nos 03-1646, 03-1787, 03-1808, *25 (1st Cir filed Oct 2, 2003) (Justice Department Hoyts Brief). Generally accepted theater design principles indicate that viewing angles of greater than 30 degrees cause viewer discomfort and thus a less enjoyable viewing experience; wheelchair seats in many stadium-style theaters have viewing angles of greater than 30 degrees, where the general seating has viewing angles that are far less steep. Id at *9-20.

8 Id.

9 See, for example, Oregon Paralyzed Veterans of America v Regal Cinemas, Inc, 339 F3d 1126, 1133 (9th Cir 2003), cert denied as Regal Cinemas, Inc v Stewmon, 72 USLW 3310 (2004).

10 See, for example, Lara v Cinemark USA, Inc, 207 F3d 783, 789 (5th Cir 2000) (rejecting an ADA challenge to stadium-style theaters on the ground that only unobstructed views, not qualitatively similar viewing angles, are required). In the context of wheelchair seating in athletic stadiums, several courts have considered whether the Justice Department regulations require that wheelchair users have lines of sight over standing spectators. See, for example, Paralyzed Veterans of America v DC Arena, LP, 117 F3d 579, 583-85 (DC Cir 1997) (finding that wheelchair seats must have lines of sight over standing spectators in athletic arenas because the phrase "lines of sight comparable" is reasonably interpreted as requiring an unobstructed view). See Part II.B.2.

11 Lara, 207 F3d at 789 (holding that because there was no evidence that the Justice Department's regulations imposed a viewing angle requirement at the time they were promulgated, the court would not read such a requirement into the regulation).

12 See, for example, Regal, 339 F3d at 1132-33 (rejecting the Lara decision); Hoyts, 256 F Supp 2d at 87-88; United States v AMC Entertainment, Inc, 232 F Supp 2d 1092, 1110-12 (CD Cal 2002).
viewing experiences vastly superior to those offered to wheelchair users." Part I of this Comment discusses the background and purpose of the ADA (specifically Title III, the public accommodations provision), and describes the statutory and regulatory scheme that landed the Justice Department in an implementation and enforcement role. Part II focuses on the recent conflicting decisions on the legality of stadium-style theaters, concentrating on the main arguments posed by the litigants: whether the Justice Department is entitled to deference for its interpretation of its regulations implementing the ADA; whether placement of wheelchair seats in the front of stadium-style auditoriums isolates and segregates wheelchair users, a further violation of the ADA and the Justice Department’s regulations; and whether the Justice Department is justified in pressing its interpretation of the regulations through litigation rather than rulemaking. Part III proposes that the Justice Department’s argument should prevail, and grapples with the issue of whether this interpretation should be applied retroactively, requiring the retrofitting of existing theaters that are in violation of the ADA. Finally, the Comment considers the effect that the Justice Department’s method of promoting its interpretation (through litigation rather than rulemaking) has and will have on this issue and area of law, and suggests that courts should hold the Justice Department to its rulemaking obligation rather than allow it to define the legal standard through a litigation campaign.

I. STATUTORY SCHEME: THE ROLE OF THE JUSTICE DEPARTMENT

The statutory scheme underlying the ADA is key to understanding the controversy surrounding wheelchair seating in stadium-style theaters and the conflicting interpretations of the ADA’s implementing regulations. Regulatory authority and enforcement of the ADA lies with the Justice Department, and its role in formulating these regulations, its interpretive stance, and its attempts to enforce the ADA are all central to this issue.

13 Note that the theater companies have in a way created this problem for themselves. In the absence of these improved stadium-style auditoriums, the comparability bar would not be so high—challenges to wheelchair seating placement in traditional theaters historically failed. See, for example, Fiedler v American Multi-Cinema, Inc, 871 F Supp 35 (D DC 1994) (denying a challenge by a wheelchair user to the placement of wheelchair seating entirely in the back row of a theater). It is only because of the “stark contrast between stadium and traditional seating” that this question has become pressing. Hoyts, 256 F Supp 2d at 79 n 5. Theater owners contend that ADA compliance required them to develop stadium-style theaters: the maximum slope allowed by the regulations was too gradual to provide optimum viewing angles in traditional theater configurations, thus the move to stadium-style auditoriums. Petition for Writ of Certiorari, Cinemark USA, Inc v United States, Civil Action No 03-1131, *4 n 2 (filed Feb 4, 2004) (available on Westlaw at 2004 WL 239389) (Cinemark Petition).
A. Statutory and Regulatory Authority: The ADA and the Justice Department

The ADA was enacted on July 26, 1990 to combat discrimination against persons with disabilities. Congress held lengthy hearings and made detailed findings as to the pressing need to integrate the disabled into the workforce and public accommodations of society. Title III of the ADA, which addresses public accommodations, provides that "[n]o 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." Challenges to the design of stadium-style movie theaters allege that these theaters violate the ADA by failing to design and construct theater auditoriums "that are readily accessible to and usable by individuals with disabilities," namely wheelchair users.

Implementation of Title III of the ADA was delegated by Congress to the Justice Department. The Attorney General was instructed to set forth regulations to carry out the provisions of the Act by July 26, 1991, one year after its enactment. At minimum, these regulations were required to be consistent with guidelines that the Architectural and Transportation Barriers Compliance Board (Access Board) was to issue within nine months of the enactment of the ADA. Rather

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14 See 42 USC § 12101(a)(6) (finding that disabled Americans were "severely disadvantaged socially, vocationally, economically, and educationally" by discrimination, and stating a purpose of remedying the isolation and segregation suffered by the disabled).
15 See 42 USC §§ 12181–83. Public accommodations include movie theaters. 42 USC § 12181(2), (7)(C).
16 42 USC § 12182(a).
17 42 USC § 12183(a)(1) (defining discrimination by public accommodations to include "a failure to design and construct facilities...that are readily accessible to and usable by individuals with disabilities" except where structurally impracticable). While many people with disabilities obviously face more serious obstacles than bad seats in movie theaters, the experience of wheelchair users in stadium-style theaters is representative of the stigma the ADA seeks to eliminate. Wheelchair users "suffer from a sense of embarrassment and isolation from being relegated to a section of the theater where no one else is sitting...[and] have described feelings of anger and humiliation, or report a feeling of being watched because everyone else in the audience is behind them." United States v AMC Entertainment, Inc, 232 F Supp 2d 1092, 1104 (CD Cal 2002). For further discussion of the role of stigma, see Note, Civil Rights—Americans with Disabilities Act—Ninth Circuit Holds That Movie Theaters Must Provide Comparable Viewing Angles for Patrons in Wheelchairs,—Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003), 117 Harv L Rev 727, 730–33 (2003); Samuel R. Bagenstos, Subordination, Stigma, and "Disability," 86 Va L Rev 397, 436–45 (2000).
18 42 USC § 12186(b).
19 42 USC § 12186(c). The Access Board was established in 1968 to ensure compliance with the precursor to the ADA, the Architectural Barriers Act of 1968, 42 USC § 4151 et seq (2000). The Access Board is charged with establishing and maintaining minimum guidelines and requirements for carrying out the Architectural Barriers Act, the ADA, and other laws providing greater accessibility for the physically disabled. See 29 USC § 792(b) (2000). The guidelines the Access Board issued to enforce the ADA supplemented the existing "Minimum Guidelines and Requirements for Accessible Design" already in place pursuant to the Architectural Barriers
than creating its own distinct set of regulations, the Justice Department adopted the Access Board guidelines (the Americans with Disabilities Act Accessibility Guidelines (ADAAG)) in their entirety as its regulations implementing the ADA. The Justice Department regulations are entitled the "Standards for Accessible Design" (Standards).

Standard 4.33.3 is the genesis of the controversy about stadium-style theaters. It states that "[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public." In the context of stadium-style theaters, the question is whether the "lines of sight comparable" language of Standard 4.33.3 requires that viewing angle be taken into account in seat placement such that wheelchair-accessible seats in the theater have viewing angles comparable in quality to the majority of non-wheelchair seat placements, or whether comparability is achieved by situating wheelchair seat placements anywhere in the auditorium so long as they are among the general seating. The Justice Department and disabled patrons who have brought lawsuits challenging the design of stadium-style theaters argue that placing wheelchair seating at the very front of theaters does not provide comparable lines of sight because of the disparity in viewing angles; theater owners argue that current placements comply with the Standards because wheelchair-accessible seats need only be among the general seating and have unobstructed views.

The resolution of these conflicting interpretations turns on the question of deference to the Justice Department's interpretation of Standard 4.33.3. The Justice Department interprets Standard 4.33.3 "to require, inter alia, that a theater operator provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons in the theater." The Justice Department also contends that

Act. See 42 USC § 12204(a).
20 Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed Reg 7452, 7478–79 (Feb 22, 1991) (providing notice of the Justice Department's intent to adopt the ADAAG in toto, including commentary).
21 28 CFR Part 36, Appendix A. Because the Standards adopted the ADAAG in toto, these two regulations are often referred to interchangeably by courts and commentators. There are, however, important differences between the Standards and the ADAAG, see Part III.A.4; this Comment will differentiate between the two as appropriate.
22 28 CFR Part 36, Appendix A § 4.33.3 (emphasis altered).
23 See Lara v Cinemark USA, Inc, 207 F3d 783, 788 (5th Cir 2000) (describing theater owners' contention that the comparability requirement is met because "wheelchair areas are . . . located in the midst of general seating and do not suffer from any obstructions").
24 Justice Department Hoyts Brief at *25 (cited in note 7) (emphasis added). The Access Board reads this argument to require wheelchair seats' viewing angle to be "equivalent to or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium." Architec-
many older stadium-style theaters, which place wheelchair seating exclusively in the front of the auditorium, violate another provision of Standard 4.33.3 that requires that "[w]heelchair areas shall be an integral part of any fixed seating plan."25 This "integrality provision" ensures that wheelchair placements will not be isolated from the general seating, a safeguard that the Justice Department contends is thwarted by placement of wheelchair seating only at the front of the auditoriums:

The Department construes the "integral" seating mandate of Standard 4.33.3 to require that theater operators provide wheelchair seating in the area of the theater where most members of the general public usually choose to sit. In the typical stadium-style movie theater, a large majority of the patrons can be expected to sit in the stadium section.26

Finally, the Justice Department contends that its interpretation of Standard 4.33.3 has been consistent and known to the theaters since the Standard's promulgation in 1991, or at least since it publicized this interpretation in the first case considering this question. Thus, theaters must retrofit noncomplying auditoriums, as they knew that these auditoriums were not in compliance with Standard 4.33.3 when the auditoriums were constructed.27

B. Factual Background: "Older" and "Newer" Stadium-Style Theaters

Stadium-style theaters are designed to mimic the superior viewing angles provided in athletic arenas and stadiums, where rows are placed on risers at intervals of twelve to eighteen inches. This design both eliminates the problem of obstruction of views by other patrons

26 Justice Department Hoyts Brief at *45 (cited in note 7) (arguing that the term "integral" justifies this interpretation).
27 Id at *49–57. The Justice Department contends that the requirement of comparable viewing angles for wheelchair seats is clear from the language of Standard 4.33.3 and thus must be applied to all theaters built after 1991. See the discussion of the Justice Department’s notice argument in Part III.B.
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and provides a better viewing angle to the screen, giving moviegoers a more direct view of the screen than traditional movie theaters. As designs evolved, theaters adopted different seating configurations.

Older stadium-style theaters contain both stadium-style and "traditional" seating (located on a sloped floor or less dramatically tiered risers). The traditional seating is invariably placed in the very front of the theater, with the stadium-style seating occupying the majority of the auditorium (on average, more than 70 percent). The two different types of seating are separated by an access aisle that provides the means of ingress and egress from the theater. These older stadium-style theaters place the wheelchair accessible seating in the front rows, relegating wheelchair users to an inferior viewing experience because of the steep viewing angles from these rows. This arrangement also isolates wheelchair users in a section of the theater that no able-bodied patron would choose to sit in unless accompanying a wheelchair user or unable to find a more desirable seat.

Many newer stadium-style theaters provide better options for wheelchair users. Some provide elevator access to the stadium-style section of the theater, while in others the access aisle intersects an upper and lower section of stadium-style seating, allowing wheelchair placements in the top tier of the lower section of stadium seating. Under the Justice Department's interpretation, these theaters comply with the requisites of the ADA because they provide wheelchair seating options with viewing angles comparable to those of the general seating.

28 This factual overview is drawn in large part from the excellent description of the history and configuration of stadium-style theaters provided by the court in United States v Hoyts Cinemas Corp, 256 F Supp 2d 73, 78-80 (D Mass 2003).
29 Id at 78-79.
30 See Justice Department Hoyts Brief at *19 (cited in note 7) (finding through seat-selection surveys that 99.7 percent of moviegoers chose to sit in the stadium-style seats when choosing a seat in an auditorium comprised of both stadium- and traditional-style seats). See also AMC Entertainment, Inc, 232 F Supp 2d at 1103 (finding that "most members of the public can, and do, sit in the stadium-style seats"). Some wheelchair seating in older stadium-style theaters is placed in the access aisle itself, providing more desirable viewing angles than the front rows, but still inferior to the seats in the stadium-style section. See Hoyts, 256 F Supp 2d at 79-80.
31 See Proof Brief for the United States as Appellant, United States v Cinemark USA, Inc, Civil Action No 02-3100, *5-6 (6th Cir filed Mar 18, 2002) (Justice Department Cinemark Brief) (describing Cinemark's newer, wheelchair-friendly stadium seating areas); Brief for United States as Amicus Curiae Supporting Appellants and Urging Reversal, Oregon Paralyzed Veterans of America v Regal Cinemas, Civil Action No 01-35554, *7 n 5 (9th Cir filed Oct 19, 2001) (Justice Department Regal Brief) (relating the Justice Department's findings in enforcing Title III that some newer theaters provide more desirable wheelchair seating through the above-mentioned designs).
II. CIRCUIT SPLIT: MAJORITY AND MINORITY VIEWS

The Justice Department's interpretation of Standard 4.33.3 has developed almost entirely through litigation; besides the initial Standards, the Justice Department has not undertaken to clarify this area of law through notice and comment rulemaking. As a result, the law in this area is murky, as evidenced by the current circuit split. One line of cases rejects the ADA challenge, declining to adopt the Justice Department's current interpretation of the Standard because the Access Board has not yet adopted this interpretation in its regulations, and instead finds that Standard 4.33.3 requires merely unobstructed views. Another line of cases accepts the Justice Department's contention that stadium-style theaters violate the ADA, finding that the Justice Department's interpretation of its own regulation warrants judicial deference, and rejecting the contention that this interpretation constitutes a violation of the Administrative Procedure Act's (APA) notice and comment requirement. These courts further disagree about whether wheelchair placements in older stadium-style theaters are so isolated as to violate the Standard's requirement that wheelchair placements be integrated in the general seating plan, and what, if any, retroactive effect should be given to the interpretation.

In *Lara v Cinemark USA, Inc*, the first major decision addressing the application of Standard 4.33.3 to stadium-style theaters, the Fifth Circuit held that the comparable-line-of-sight requirement of Standard 4.33.3 requires only that wheelchair patrons be afforded an *unobstructed* view of the screen, and does not require that wheelchair users be afforded a viewing angle comparable with other patrons', thus interpreting "line of sight comparable" to require that wheelchair and general seating be comparably unobstructed. Under this interpretation, placing wheelchair seating in the front rows of stadium-style theaters, where viewing angles are inferior to those afforded to the general public, does not violate the ADA.

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32 207 F3d 783 (5th Cir 2000).
33 Id at 789.
34 The theaters do not contest the Justice Department's and individual plaintiffs' contention that wheelchair seating located in the front of theaters provides inferior viewing angles to those afforded to patrons who are able to sit in the stadium-style seats. The conflict in these cases is focused not on the quality of the wheelchair users' experience but rather on the legal requirements imposed by the Standards. This style of theater has been heavily advertised by the theater chains as providing a far superior cinematic experience to traditional style theaters. *United States v Hoyts Cinemas Corp*, 256 F Supp 2d 73, 79 n 6 (D Mass 2003) (citations omitted):

National Amusements has stated in press releases touting its new stadium theaters that stadium-style seating is "one of the greatest advances in moviegoing in years" and that it "optimizes sight lines to the screen" and makes "every seat" the "best in the house." Hoyts has issued similar press releases extolling the virtues of stadium seating. According to Hoyts, stadium-style seating "[e]nsures moviegoers the ultimate cinematic experience" and guar-
More recent cases have rejected the *Lara* interpretation, however, finding that stadium-style theaters must provide wheelchair seats with viewing angles comparable to those in the general seating. In *United States v Hoyts Cinemas Corp*, the District of Massachusetts held that placing wheelchair seating in the traditional seating section of the theater not only violates the viewing-angle requirement of Standard 4.33.3, but also its integrality provision. In *Oregon Paralyzed Veterans of America v Regal Cinemas, Inc*, the Ninth Circuit expanded on *Hoyts*, rejecting the *Lara* court's reasoning, and holding that the "comparable" language in Standard 4.33.3 requires that viewing angles be "within the range of angles offered to the general public" in stadium-style theaters. Most recently, in *United States v Cine-mark USA, Inc*, the Sixth Circuit similarly rejected the *Lara* argument and found that "the plain meaning of 'lines of sight comparable to those for members of the general public' requires more points of similarity than merely an unobstructed view." None of the cases accepting the Justice Department's argument expressly approve retroactive application of the interpretation, however, and two counsel strongly against it.

These cases indicate a trend toward finding "comparable lines of sight" to require comparability of viewing angles. Both the majority (viewing angles must be comparable) and minority (lines of sight must be comparably unobstructed) views raise several issues, the most important of which is the weight given to the Justice Department's interpretation of the Standards. The majority view affords it deferential weight, while the minority view finds it both unsupported and contradicted by past precedent. Other issues considered include the requirement of "integrality" for seats allocated to wheelchair users, the

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These statements imply (if they do not expressly state) that stadium-style seats are far better than (and thus not comparable to) traditional seating. For the purposes of this Comment, the fact that wheelchair users in the older stadium-style theaters are afforded inferior viewing angles is assumed.

35 256 F Supp 2d 73 (D Mass 2003).
36 Id at 86.
37 339 F3d 1126 (9th Cir 2003), cert denied as *Regal Cinemas, Inc v Stewmon*, 72 USLW 3310 (2004).
38 Id at 1133.
40 Id at 578.
41 See id at 581; *Hoyts*, 256 F Supp 2d at 92–93.
strictures of the notice and comment rulemaking process under the APA, the import of an Access Board proposed rulemaking, and the import of cases considering the Standards as applied to athletic arenas.

A. **Majority View: Deference to the Justice Department's Interpretation, Integration Concerns, and APA Compliance**

1. Deference to the Justice Department's interpretation.

The first and most important issue in these cases is whether the Justice Department's interpretation of Standard 4.33.3 is entitled to deference from the courts. Agency interpretations of their own regulations are afforded deference unless "plainly erroneous or inconsistent" with the regulation; therefore only an interpretation that is inconsistent with the language of the Standard may be overruled. The deference afforded to agency interpretations of their own regulations may be even greater than that afforded to agency interpretations of statutes: because the agency itself drafts the regulation, its interpretation is considered even more authoritative.

Both circuits that have ruled on the question of deference to the Justice Department's viewing-angle interpretation of Standard 4.33.3 have found that it is entitled to deference. The Fifth Circuit, the lone appellate court adhering to the minority view, did not consider whether deference was due to the Justice Department's interpretation, and the Second Circuit remanded a case, instructing the district court

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43 *Thomas Jefferson University v Shalala*, 512 US 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (internal quotations and citations omitted); *Bowles v Seminole Rock & Sand Co*, 325 US 410, 414 (1945) (holding that "the ultimate criterion [for choosing between constructions of a regulation] is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

44 The standard of agency deference was articulated in *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842-43 (1984), where the Court set forth a two-part test establishing deference to agency interpretations of statutes on the rationale that Congress delegates interpretive authority to agencies. A case interpreting Standard 4.33.3 in another context indicated that agency interpretations of their own regulations may warrant even more deference from the courts, as Congress delegates not only interpretive but also drafting authority to agencies vis-a-vis their own regulations. See *Paralyzed Veterans of America v DC Arena, LP*, 117 F3d 579, 584 (DC Cir 1997) ("It is sometimes said that this deference is even greater than that granted an agency interpretation of a statute it is entrusted to administer."). This deferential standard was most recently affirmed by the Court in *Auer v Robbins*, 519 US 452, 461 (1997) ("Because the [provision at issue] is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.") (internal citations and quotation marks omitted).

45 See *Cinemark*, 348 F3d at 579 ("The DOJ position in this case is neither plainly erroneous nor inconsistent with the regulation."); *Regal*, 339 F3d at 1131-33.
to consider the deference question. The Ninth and Sixth Circuits found the deference issue dispositive in determining that the Justice Department should prevail.

2. Integrality requirement.

Courts addressing this issue have also considered whether placing wheelchair seating in the front rows of the theaters violates the integrality requirement of Standard 4.33.3. This challenge to stadium-style theaters was most recently posed in the First Circuit, where the Justice Department argued that by placing wheelchair seats in an area of the auditorium where able-bodied patrons sit reluctantly and infrequently, the layout of older stadium-style theaters effectively isolates wheelchair users, thus violating the requirement that “[w]heelchair areas shall be an integral part of any fixed seating plan.” The wheelchair seats are among at least some general public seating; however, few members of the general public voluntarily choose those seats. Thus, the Justice Department contends, this layout isolates wheelchair users and denies them the full enjoyment of public accommodations.

No appellate court has ruled on the integrality argument. The Hoyts court, however, found that placing wheelchair seating in the very front of stadium-style theaters, “where no-one would sit willingly,” violates this portion of the regulation. “Common sense dictates [ ] that seating located in a totally separate, and oftentimes sectioned-off, area in the front of the theater cannot be an ‘integral’ part of that [theater’s] ‘fixed seating plan.’”

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46 See Lara, 207 F3d at 786–89; Meineker, 69 Fed Appx at 22–25.
47 28 CFR Part 36, Appendix A § 4.33.3 (“Wheelchair areas shall be an integral part of any fixed seating plan.”).
48 Id.
49 See Justice Department Hoyts Brief at *19–20 (cited in note 7). The theater owners argue that such wheelchair seating cannot violate the integrality requirement because it is placed among general public seating. But this argument is dubious: Standard 4.33.3’s companion-seating provision requires theater owners to place wheelchair seats next to “at least one companion fixed seat” for wheelchair users’ able-bodied companions. See 28 CFR Part 36, Appendix A § 4.33.3 (“At least one companion fixed seat shall be provided next to each wheelchair seating area.”) (emphasis removed). A wheelchair seating placement does not become integrated by virtue of having one non-wheelchair companion seat placed next to it as required by law. If the two seats (wheelchair and companion) are isolated and segregated from the rest of the seating plan, the wheelchair seat placement is no more integrated when it is accompanied by a companion seat than it is on its own.
50 The Sixth Circuit in Cinemark, 348 F3d 569, did not rule on the question of whether the wheelchair placement violated the integrality requirement of Standard 4.33.3, although the Justice Department raised the issue in its appellate brief. See Justice Department Cinemark Brief at *8 (cited in note 31).
51 Hoyts, 256 F Supp 2d at 89.
52 Id.
3. APA compliance.

Some courts have also considered whether giving force to the Justice Department’s interpretation of Standard 4.33.3 violates the APA requirement that substantive regulations be subject to public notice and comment prior to becoming binding law. Notice and comment is not, however, required for interpretive agency actions, and the Justice Department argues that its interpretation of Standard 4.33.3 falls into this category. APA considerations have been largely rejected or ignored in the context of stadium-style seating in movie theaters, but warrant examination nonetheless.

B. Minority View: Access Board Rulemaking and Athletic Arena Cases

At the time of this writing, two circuits have adopted the Justice Department’s interpretation of the Standard as controlling and sensible, and another indicated that so long as the Justice Department’s interpretation of Standard 4.33.3 was reasonable, a district court on remand should adopt the viewing-angle requirement as well. The Lara decision, in contrast, rejected the Justice Department’s interpretation on two grounds: first, the Justice Department’s interpretation of Standard 4.33.3 has not yet been incorporated by the Access Board into the ADAAG, requiring the court to reject this interpretation “in the absence of specific regulatory guidance”; and second, prior litiga-

53 APA, 5 USC § 553(b)–(c) (2000) (“General notice of proposed rule making shall be published in the Federal Register...[T]he agency shall [then] give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”). An agency is not required to follow notice and comment procedures when it makes “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” or when “the agency for good cause finds...that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,” except when required by statute.

54 See Cinemark, 348 F3d at 580–81 & n 8 (rejecting an APA challenge because the Justice Department’s position falls into the interpretive rule exception); Regal, 339 F3d at 1130–33 (not considering any APA challenge).

55 It is not clear why APA considerations are absent from the stadium-style theater cases: the Justice Department’s failure to undertake notice and comment rulemaking was fatal to its challenge of wheelchair seating in athletic arenas in two of the three major cases. See Caruso v Blockbuster-Sony Entertainment Centre at the Waterfront, 193 F3d 730, 731–37 (3d Cir 1999); Independent Living Resources v Oregon Arena Corp, 982 F Supp 698, 743 (D Or 1997). Theaters have challenged the Justice Department’s interpretation of Standard 4.33.3 on APA grounds. See, for example, Brief for Appellees Regal Cinemas, Inc and Eastgate Theater, Inc, Oregon Paralyzed Veterans v Regal Cinemas Inc, Civil Action No 01-35554, *34–37 (filed Apr 13, 2002) (available on Westlaw at 2002 WL 32154039). They continue to do so. See Cinemark Petition (cited in note 13) (raising, among other things, an APA challenge to the Justice Department’s interpretation of Standard 4.33.3).

56 See Cinemark, 348 F3d at 575–79; Regal, 339 F3d at 1131–33.


58 Lara, 207 F3d at 789.
tation concerning Standard 4.33.3's application to athletic arenas defined comparable lines of sight as requiring unobstructed views, and the same definition should apply to stadium-style theaters.

1. The Access Board's notice of proposed regulation.

The Lara decision made much of a Notice of Proposed Regulation submitted by the Access Board in 1999, in which the Board contemplates amending the ADAAG to clarify that viewing angle is an element of comparability of lines of sight. The proposed regulation notes that stadium-style theaters afford wheelchair users "inferior lines of sight to the screen," and requests feedback from wheelchair users and theater owners on a proposed modification that would bring the language of ADAAG § 4.33.3 in step with the Justice Department's interpretation of Standard 4.33.3:

[The] DOJ has asserted in attempting to settle particular cases that wheelchair seating locations must: (1) Be placed within the stadium-style section of the theater, rather than on a sloped floor or other area within the auditorium where tiers or risers have not been used to improve viewing angles; (2) provide viewing angles that are equivalent to or better than the viewing angles (including vertical, horizontal, and angle to the top of screen) 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 (e.g., a clear view over the heads of other patrons), that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters.

The Lara court found this Access Board proposal dispositive in deciding that "lines of sight comparable" need not include comparability of viewing angles. The court determined that the Access Board would amend its regulations through appropriate means if the Justice Department's understanding was indeed a valid interpretation of the language. This Notice of Proposed Regulation, the court

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59 Id at 788–89.
60 See 64 Fed Reg at 62277–78 (cited in note 24). The Access Board issued the final version of this regulation on January 14, 2004. The text of the final regulation will not be available until the Office of Management and Budget approves the regulation.
61 Id at 62278.
62 Id.
63 Lara, 207 F3d at 789.
64 Id.
concluded, indicated that the Access Board had not yet decided whether to adopt the Justice Department's interpretation of Standard 4.33.3, and until such time, the Justice Department's interpretation is not controlling.  

2. Athletic arena cases.

The Lara decision also relied on the athletic arena cases, which considered whether Standard 4.33.3 requires that wheelchair users be provided lines of sight over standing spectators, and also ended in a stalemate circuit split. 65 Two of these cases declined to adopt the Justice Department's interpretation of Standard 4.33.3, finding that its interpretation (that "comparability" requires wheelchair seat placements such that views remain unobstructed even when other spectators stand) was too radical to be considered an "interpretive" rule for the purposes of APA compliance. 66 Deference to the Justice Department's interpretation of its own regulation was not considered. The D.C. Circuit, in finding that lines of sight over standing spectators are required, based its decision on purposive grounds, reading Standard 4.33.3 with the broad purposes of the ADA in mind. 67 This decision, while holding that the Standard requires that wheelchair users have lines of sight over standing spectators, required only substantial compliance (that is, if "substantially all" of the wheelchair seating provides lines of sight over standing spectators, the ADA requirements are met). 68

The Lara court relied upon these cases to interpret the "lines of sight comparable" language as requiring that wheelchair users in stadium-style theaters be provided unobstructed views of the screen, rather than viewing angles comparable with those provided to mem-

65 See id (internal citations omitted):
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. Congress granted the DOJ, in conjunction with the Access Board, the authority to promulgate regulations under the ADA in order to provide . . . clear guidelines for accommodating disabled patrons. Accordingly, in the absence of specific regulatory guidance, we must hold that section 4.33.3 does not require movie theaters to provide disabled patrons with the same viewing angles available to the majority of non-disabled patrons.

66 Compare DC Arena, 117 F3d at 588 (requiring sightlines over standing spectators), with Caruso, 193 F3d at 735–37 (declining to require sightlines over standing spectators on APA notice and comment grounds).

67 Caruso, 193 F3d at 735–37; Independent Living Resources, 982 F Supp at 743.

68 See DC Arena, 117 F3d at 583.

69 Id at 589. The court required only substantial compliance because of the "hazy" positions of the Justice Department and the good faith of the stadium designers. Id at 582. See the discussion of the impact of the government's failure to codify its position on this matter in Part III.C.
members of the general public.\textsuperscript{70} The court also found persuasive a Technical Assistance Manual Supplement (TAM) published by the Justice Department in 1994, which required "lines of sight over spectators who stand" and did not mention viewing angles.\textsuperscript{71} in coming to its conclusion that the Standard requires unobstructed views and no more.

III. RESOLUTION OF THE SPLIT: THE JUSTICE DEPARTMENT'S CONTROLLING INTERPRETATION, RETROACTIVE EFFECT, AND ABDICATION OF RULEMAKING ROLE

The Justice Department should prevail in the courts and, ultimately, in its quest to eradicate the more egregious disparities between wheelchair users and the general public in stadium-style theaters. Principles of agency deference, as well as the strength of the Justice Department's arguments vis-à-vis the minority view, dictate that, one way or the other, comparable lines of sight will encompass viewing angles in stadium-style theaters. Questions remain as to whether retroactive effect can or should be given to this interpretation (requiring retrofitting of existing noncompliant theaters), and if so, for what group of theaters retroactive effect is warranted. Finally, and most importantly, the progression of these cases raises questions about the Justice Department's piecemeal approach to resolving the confusion in Standard 4.33.3, and demonstrates why courts must discourage this method of enforcement and encourage notice and comment rulemaking.

A. Stadium-Style Theaters Must Provide Comparable Viewing Angles for Disabled Patrons

Standard 4.33.3 requires stadium-style theaters to provide wheelchair seating that affords viewing angles comparable to those of the general seating. This conclusion is mandated by the strong principle of agency deference articulated by courts accepting the Justice Department's interpretation, as well as a recognition that the arguments levied against this interpretation (posed by theater companies and accepted by the Fifth Circuit in \textit{Lara}) are erroneous. This means that placing wheelchair seating in the front rows of a stadium-style theater, where the viewing angles are inferior, violates the Standard and, accordingly, the ADA.

\textsuperscript{70} \textit{Lara}, 207 F3d at 788.
\textsuperscript{71} Id (quoting the TAM).
1. Deference to the Justice Department’s interpretation.

The Justice Department’s interpretation of Standard 4.33.3, that wheelchair seating must provide viewing angles comparable to the general seating, is entitled to deference because it is neither “plainly erroneous [n]or inconsistent with the regulation.” The Access Board characterized this position as requiring wheelchair seats to have viewing angles “equivalent to or better than the viewing angles ... provided by 50 percent of seats.” This interpretation stretches neither the plain language nor the apparent purpose of the regulation, and as such is entitled to deference. Indeed, as noted by both the Sixth and Ninth Circuits, the Justice Department’s interpretation of Standard 4.33.3 controls both on principles of agency deference and because it is most consistent with the plain import of the regulation.

Deference would not be appropriate to an agency’s “convenient litigating position”; post hoc justifications adopted by an agency for the purposes of a particular case or cases are not the product of the “fair and considered judgment” that underlies the agency deference principle. However, the fact that this interpretation has been posited in the context of litigation does not make the Justice Department’s interpretation of Standard 4.33.3 entitled to any less deference. The D.C. Circuit presents the following formula for deferring to agency interpretations of their own regulations:

There are at least three preconditions for applying [this] deference. First, the language of the regulation in question must be ambiguous, lest a substantively new rule be promulgated under the guise of interpretation. Second, there must be no reason to...

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73 64 Fed Reg at 62278 (cited in note 24). The “better” language begs the question of who decides what constitutes a better viewing angle, and what entity is best equipped to determine this. See discussion in Part III.C.

74 The Justice Department in its appellate briefs on this matter demonstrates that “lines of sight” is a term of art in the theater design industry, and encompasses viewing angles. See generally Justice Department Hoyts Brief (cited in note 7) (citing various theater industry documents and reports that contend that optimal vertical viewing angles are vastly exceeded by the vertical viewing angles that the wheelchair seating in the older stadium-style theaters provides).

75 See Cinemark, 348 F3d at 576 (finding that adopting the Justice Department’s interpretation “furthers the central goals of Title III of the ADA”); Regal, 339 F3d at 1132–34.


77 Auer, 519 US at 453 (deferring to an agency interpretation that was put forth in an amicus brief because it was not “a position adopted in response to litigation”). See also Bowen v Georgetown University Hospital, 488 US 204, 212–13 (1988) (declining, on the ground that Congress delegated interpretation and enforcement power to the agency rather than appellate counsel, to give deference to an agency attorney’s interpretation of a statute when the agency itself had articulated no position on the question).
suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question. Finally, the agency’s reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself. ⁷⁸

The “lines of sight comparable” language of Standard 4.33.3 is unquestionably ambiguous: the Justice Department itself construes the language in at least two different ways. ⁷⁹ Further, the theaters have not been successful in characterizing the Justice Department’s interpretation as anything but a “fair and considered judgment”: the theaters contest the medium through which the Justice Department has asserted this interpretation, but cannot demonstrate that the substance of the interpretation is specious. ⁸⁰ Finally, the theater industry adopts the reading of “lines of sight” as encompassing viewing angles in its own design specifications, ⁸¹ definitively proving that this interpretation “is contained within the rule itself.” Thus, deference to the Justice Department’s interpretation is appropriate.

2. Integrality concerns.

It is less clear that Standard 4.33.3’s integrality requirement, which requires that wheelchair seating be incorporated with general seating, applies with equal force. Unlike the term “lines of sight,” the proposition that relegating wheelchair users to the front of the auditorium violates the integrality requirement is not self-evident from industry standards and publications, but rather is a recent creature of the Justice Department’s own interpretation. ⁸² This does not fully discredit the integrality argument—the Justice Department’s interpretation is entitled to deference unless “plainly erroneous or inconsistent with the regulation,” ⁸³ and presenting an interpretation for the first time in an amicus brief is not ipso facto illegitimate. ⁸⁴ It does, however,

⁷⁸ Drake, 291 F3d at 68 (internal citations and quotation marks omitted) (giving deference to the Federal Aviation Administration’s interpretation of a regulation regarding disclosure of drug-testing information).
⁷⁹ Compare Paralyzed Veterans of America v DC Arena, LP, 117 F3d 579, 583 (DC Cir 1997) (construing the Standard to require unobstructed views), with Cinemark, 348 F3d at 576 (construing the Standard to require comparable viewing angles).
⁸⁰ The theater industry design specifications adopt an understanding of “lines of sight” as encompassing viewing angles, indicating that the Justice Department’s interpretation is reasonable. See Justice Department Hoyts Brief at *9–15 (cited in note 7).
⁸¹ Id.
⁸² See id at *54 & n 14 (cited in note 7) (asserting that wheelchair seating violates the integrality requirement as of July 1998, upon filing of the amicus brief in the Lara district court case). See also id at *45 n 11 (explaining that the United States does not intend to raise the integrality issue for auditoriums constructed prior to 1998).
⁸³ Auer, 519 US at 461.
⁸⁴ Id at 462–63 (accepting an interpretation presented by an agency in an amicus brief).
lend credence to the theater companies’ argument, at least with regard to the integrality provision, that the Justice Department is attempting to gain judicial deference to a “convenient litigating position” rather than to a “fair and considered” agency determination.

The language of Standard 4.33.3 may also defeat the government’s integrality argument. The Standard creates an exception to the integrality requirement, allowing for “clustering” of wheelchair seat placements in “bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent.” This exception was designed for seating areas that are high above the spectacle being observed and typically only accessible by steps, and allows public accommodations to provide wheelchair seating without “fundamentally alter[ing] the nature” of their facilities.

The clustering exception is inapplicable to a traditional single-level movie theater. Stadium-style theaters, however, have both lines of sight far in excess of 5 percent (degrees above or below horizontal) and access to seats via steps rather than ramps. In *Lara*, the court indicated that the clustering exception was applicable to stadium-style theaters, but noted that it does not exempt theaters from the comparable-line-of-sight requirement. Even if stadium-style auditoriums need not comply with the integrality requirement of Standard 4.33.3 because of the clustering exception, the comparability requirement nonetheless prevents theaters from locating all wheelchair seating in

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See also Part III.B.


86 28 CFR Part 36, Appendix A § 4.33.3 (emphasis removed).


88 See *Fiedler v American Multi-Cinema, Inc*, 871 F Supp 35, 38–39 (D DC 1994) (holding that the clustering exception does not allow the defendant to locate wheelchair placements solely in the back of the theater, but denying relief to the wheelchair user on other grounds).

89 See *Hoys*, 256 F Supp 2d at 78.

90 See *Lara*, 207 F3d at 787 & n 3 (indicating that the 5 percent slope exception permits clustering of wheelchair seating in stadium-style theaters, but that theaters must still comply with the comparable-line-of-sight requirement). But see *Caruso v Blockbuster-Sony Music Entertainment Centre*, 968 F Supp 210, 219 n 21 (D NJ 1997), revd on other grounds, 193 F3d 730 (3d Cir 1999) (reading the 5 percent slope exception of 4.33.3 as “somewhat confusing” but finding that it “allow[s] clustering of wheelchair seats within a sloped area on the levels that have accessible egress”). The clustering exception in Standard 4.33.3 may be removed from the regulation—the Access Board’s proposed new regulations remove it. See 64 Fed Reg at 62276 (cited in note 24) (“As recommended by the advisory committee, the exception in ADAAG 4.33.3, that permits wheelchair spaces to be clustered in seating areas with sight lines that require slopes greater than 5%, has been removed.”). The final version of these new regulations was approved by the Access Board on January 14, 2004, but will not be publicly available until the Office of Management and Budget has approved the regulations. See http://www.access-board.gov/ada-aba/status.htm (visited May 15, 2004). Even once the ADAAG update is finalized, however, the Justice Department’s Standards are still separate and legally binding. If the clustering exception is to be removed from the Standards, the Justice Department will need to formally amend them. For a discussion of the relationship between the ADAAG and Standards, see Part III.A.4.
3. APA compliance.

Although the APA has not played a major role in the courts' decisions, theaters continue to argue that the Justice Department's interpretation of Standard 4.33.3 violates the notice and comment requirement. In cases considering sightlines over standing spectators in athletic arenas, several courts ruled that the Justice Department's interpretation did not comply with the APA. These cases relied upon the fact that the Justice Department's interpretation of Standard 4.33.3 contradicted the intent of the Access Board in promulgating the regulation because the Access Board intended to leave unresolved the question of whether the Standard required sightlines over standing spectators. This logic dictates that APA notice and comment requirements should be followed when an agency issues a new interpretation of a regulation that "repudiates or substantially departs from the agency's previous interpretation."

In contrast, in the context of stadium-style theaters, the Justice Department's interpretation of "lines of sight comparable" as requiring comparability of viewing angles is not a substantial departure from a previous interpretation or understanding; there is no previous interpretation. Unlike the question of sightlines over standing spectators, and as noted by the Lara court, stadium-style theaters and the accompanying line-of-sight controversy were not at issue in 1991 when the...
Standards were promulgated. The Justice Department's interpretation is just that, an interpretation, the quintessential exception to the APA notice and comment requirement.

In a case finding that the Justice Department's interpretation of Standard 4.33.3 as requiring lines of sight over standing spectators did not violate the APA, one court noted that "there was no uniformly understood construction of the language [of Standard 4.33.3] prior to the time it was picked up by the [Access] Board and the [Justice] Department." Thus the "new" interpretation did not contradict previous understandings and therefore need not go through the APA notice and comment process. This logic applies with even greater force in the stadium-style theater context: unlike lines of sight over standing spectators, where courts disagree about the understanding of the Standard in 1991, there is no question that sightlines in stadium-style theaters were not addressed in 1991. If anything, the Justice Department's interpretation is consistent with the understanding of "lines of sight," a term of art in the theater industry that includes viewing angle. Either way, this interpretation presents no conflict with the APA.


The argument that the Access Board's notice of proposed rule-making demonstrates that the Justice Department's interpretation is inconsistent with the text of Standard 4.33.3 misconstrues the relationship between the Access Board's ADAAG and the Justice Department's Standards. The ADA expressly delegates to the Justice Department the power and duty to promulgate regulations that will be used to enforce and carry out the purposes of the statute. These regulations must at minimum be consistent with the ADAAG, which the Access Board was required to promulgate three months prior to the Justice Department's deadline for promulgating its own regulations.

Notably, while the Justice Department regulations must meet the minimum standards of the ADAAG, nothing restricts it from promulgating guidelines exceeding these minimum standards. It is irrelevant whether interpreting "lines of sight comparable" is within the scope of the language as understood by the Access Board when it promulgated the ADAAG. The Justice Department is entitled (and statutorily empowered) to interpret this language to encompass com-

96  DC Arena, 117 F3d at 583.
97  Id.
98  42 USC § 12186(b).
99  42 USC § 12186(c).
100  42 USC §§ 12186(b), 12204(a) (requiring the Attorney General to promulgate regulations one year from the date of the ADA's enactment, and requiring the Access Board to do so nine months from the date of the ADA's enactment).
parable viewing angles. More importantly, it is the Justice Department’s regulations and interpretations thereof that are binding on the theaters—not the Access Board’s ADAAG. The Lara court’s approach, finding the fact that the Access Board had not yet adopted the Justice Department’s interpretation fatal to the Justice Department’s argument, directly contradicts the regulatory scheme that the ADA contemplates. It is the Justice Department’s interpretation of the ADA that controls, not the Access Board’s.

In the athletic arena cases, the D.C. Circuit made this distinction clear: “Once the Board’s language was put out by the Department as its own regulation, it became, as the statute contemplates, the Justice Department’s and only the Justice Department’s responsibility.”

Courts show deference to agency interpretations of their own regulations not only because of the agency’s perceived expertise in drafting the regulation, but also in recognition of Congress’s decision to delegate lawmaking and interpretive authority to the agency (and in this case, not to the Access Board). “[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. . . . Nothing prevent[s] the Department from imposing a greater burden [than that imposed by the Access Board] on those entities covered by its regulation.”

When the Access Board issues its final rule addressing whether viewing angles are a component of comparable lines of sight in the ADAAG, the Justice Department will have to revisit its own Standards if the amended language raises the minimum standard of accessibility. The actual content of the ADAAG is only instructive as a baseline for the Justice Department’s Standards, and is not binding on the public.

5. Justice Department’s previous gloss on Standard 4.33.3 in athletic arena cases.

The final argument against adopting the Justice Department’s interpretation of Standard 4.33.3 is its previous interpretation of the Standard to require unobstructed views (relied upon by the Lara court). But comparability is necessarily a situational determination: lines of sight must be similar as compared with other seating in that fixed seating plan, not as compared with lines of sight in public ac-

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101 See Parts II.B.2 and III.A.5.
102 DC Arena, 117 F3d at 585.
103 Id at 585, 587.
104 See Access Board, Proposed ADA and ABA Accessibility Guidelines: An Overview, online at http://www.access-board.gov/ada-aba/ruleoverview.htm (visited May 15, 2004) (“The Board’s guidelines do not directly impact the public but instead serve as a baseline for enforceable standards (which do) issued by other Federal agencies.”).
commodations around the country. Even if the Justice Department’s interpretation of Standard 4.33.3 as requiring unobstructed views in the context of athletic arenas is fundamentally at odds with its interpretation of the Standard as requiring comparable viewing angles in the context of stadium-style theaters (it is not clear that both interpretations cannot apply), it is comparability to seating in the theaters, and not athletic arenas, that matters.

The TAM relied upon by the Lara court was published before stadium-style theater design became popular, and applies only to arenas where “spectators can be expected to stand,”

105 demonstrating that it was issued to provide guidance in connection with the athletic arena cases and is not instructive as to stadium-style theaters. More importantly, obstructions are not an issue in movie theaters, and the Lara court’s application of this definition to stadium-style theaters is ill-considered. In the context of movie theaters, comparability of lines of sight has little to do with obstruction of views and everything to do with quality of views.”

The Lara reasoning, depending largely on the athletic arena cases, is inapt as applied to stadium-style seating in movie theaters—the problem is simply not the same.


Additionally, both logic and evidence indicate that, regardless of the outcome of pending cases, going forward the question of the proper interpretation of Standard 4.33.3 for stadium-style theaters will be rendered moot. The Justice Department has demonstrated its commitment to this issue by participating as an amicus in cases brought by private litigants and by launching a coordinated enforcement campaign, signaling to theater companies that, in the future, they should design new construction and remodeling projects so as to avoid further litigation. Regardless of the final resolution of this issue (whether the Justice Department prevails in its litigation campaign or revises the Standard through notice and comment rulemaking), new theaters will be configured in a way that complies with the Justice Department’s interpretation. Further evidence of this mootness is the fact that stadium-style theaters are now being designed consistent


106 Contrast athletic stadiums, where obstructed views—whether temporary (standing spectators) or permanent (poles)—are a reality. Boston’s Fenway Park and its famous obstructed-view seats come to mind as an example of the prevalence of obstructions in athletic arenas and stadiums.

107 Indeed, the Sixth and Ninth Circuits accordingly indicated that the Lara reasoning was flawed on this ground. See Cinemark, 348 F3d at 577 (“The arguments relied upon by the Fifth Circuit in Lara are . . . not persuasive.”); Regal, 339 F3d at 1132 n 9 (finding the Lara court’s reasoning “specious”).
with the Justice Department’s interpretation of the requirements of Standard 4.33.3 and the ADA, locating wheelchair seating in the midst of the stadium section.\footnote{See, for example, United States v AMC Entertainment, Inc, 232 F Supp 2d 1092, 1096 & n 4 (CD Cal 2002) (noting that theater companies began constructing theater complexes with “full stadium” seating” in 2001).}

B. Retroactivity

The issue of whether any retroactive effect should be given to the Justice Department’s interpretation of Standard 4.33.3 is one of due process—if the theater companies had no way of knowing what Standard 4.33.3 requires in demanding comparability of viewing angles, then it violates due process to mandate expensive retrofitting of the noncompliant theaters.\footnote{See Grayned v City of Rockford, 408 US 104, 108 (1972) (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”); Rock of Ages Corp v Secretary of Labor, 170 F3d 148, 156 (2d Cir 1999) (judging the adequacy of notice from the perspective of “a reasonably prudent person” who is “familiar with the conditions the regulations are meant to address” and the underlying statutory “objectives the regulations are meant to achieve”). The fact that “lines of sight” is a term of art encompassing viewing angle, although insufficient on its own to demonstrate notice, is helpful in that it demonstrates that requiring comparable viewing angles is a tenable interpretation of the regulation as applied to theater companies who are familiar with the meaning of the phrase. See, for example, Thomas Jefferson University, 512 US at 525 (Thomas dissenting) (“[A]gency rules should be clear and definite so that affected parties will have adequate notice concerning the agency’s understanding of the law.”); Satellite Broadcasting Co v FCC, 824 F2d 1, 3 (DC Cir 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”).}

The Sixth Circuit recommended that the district court, on remand, grant relief only prospectively. “We do not go so far as to hold that any relief must be prospective to comport with due process, but note that, given the [ ] facts, prospective relief will often be most appropriate.”\footnote{See Cinemark, 348 F3d at 581; Hoyts, 256 F Supp 2d at 92–93.} Similar statements were made by the District of Massa-
chusetts and the Second Circuit. These courts expressed exasperation with the Justice Department for articulating its position through litigation rather than rulemaking, and for failing to codify that position and thereby provide irrefutable notice to theater companies of what the Standard requires.

For a regulated party to have notice of an agency's interpretation of a regulation, objective considerations of the agency's statements and communications of its position, coupled with subjective determinations of what the party knew or understood about the regulation, are instructive. "We thus ask whether 'by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.'" An agency has provided adequate notice of its interpretation when the noncompliant party demonstrates, through later compliance, that it is able to understand its obligations. In this context, theater companies are discredited both because they were later able to comply with the Justice Department's interpretation (of which they purport to have had no notice) and because the companies made no reasonable effort to comply with the Justice Department's articulated interpretation when it was initially presented. The theater companies, upon the filing of the Justice Department's amicus brief in *Lara* in July 1998, were on notice as to the Justice Department's interpretation, and soon thereafter learned of the agency's commitment to furthering this interpretation through affirmative enforcement actions.

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112 See *Hoyts*, 256 F Supp 2d at 92–93 (stating that the federal government's failure to act quickly on the longstanding issue of stadium seating "argues strongly in favor of making the relief... prospective"); *Meineker v Hoyts Cinemas Corp*, 69 Fed Appx 19, 25 (2d Cir 2003) (suggesting that retroactive relief would be appropriate only if Hoyts had reasonable notice of the Justice Department's interpretation of the ADA regarding theater sight lines). In *Regal*, the court did not advise the district court whether relief should or could be retroactive, but the dissent intimated that the decision would be retroactive, though the district court would retain leeway to apply the decision prospectively only on remand. 339 F3d at 1134 (Kleinfield dissenting).


114 *21st Century Telesis Joint Venture v FCC*, 318 F3d 192, 201–02 (DC Cir 2003) (holding that a broadband licensee could not use the FCC's clerical error to avoid a payment rule it had successfully complied with for more than a year).

115 Id at 202. Indeed, the theater companies' actions evidence far more bad faith than good. Many theaters continued to be built in the older configuration, relegating wheelchair users to the front rows up until May 2002, see Justice Department *Hoyts* Brief at Schedule B (cited in note 7) (listing theaters not in compliance with the Justice Department interpretation that were built after the amicus brief was filed with the *Lara* district court in 1998), while clearly the technology and wherewithal existed to build auditoriums with wheelchair seating in the stadium sections. See, for example, *AMC Entertainment*, 232 F Supp 2d at 1096 & n 4 (noting that theater companies began constructing theater complexes with "full stadium seating" in 2001).

116 See Justice Department *Hoyts* Brief at *54–55 (cited in note 7) (noting that Justice De-
Moreover, between 1998 and 2000, the only decision concerning stadium-style theaters was the *Lara* district court decision, finding that the older configuration violated the ADA. Even after *Lara*'s reversal in the Fifth Circuit, the Justice Department continued to press its argument in other circuits. The Justice Department asserts several arguments to demonstrate that theaters had adequate notice of its interpretation, the most convincing of which illustrate that theaters were aware of, but chose to ignore, the Justice Department’s interpretation.

The Justice Department first argues that Standard 4.33.3 itself provides notice of the requirements for placement of wheelchair seating in stadium-style theaters, because “lines of sight” is a term of art in the theater industry that encompasses viewing angles. If this is true, then in 1991, at the time Standard 4.33.3 was promulgated, theater companies were well aware that “comparable lines of sight” meant comparable viewing angles. Although this argument is convincing to a degree, Standard 4.33.3 applies to all places of public accommodation, not just movie theaters; thus, the fact that “lines of sight” is a term of art in this industry does not necessarily mean that the term was used in the same way in the regulation. While it is not unreasonable to think that theaters could understand the term “lines of sight” to encompass viewing angles, neither is it persuasive to read a specific industry’s term of art definition into a regulation applicable to many different industries with different perspectives on viewing angles. The plain language of the regulation alone cannot have provided notice of the viewing-angle requirement.

The Justice Department next contends that, from the promulgation of the Standards in 1991, theater companies had actual notice that extreme vertical viewing angles detract from the quality of viewing experience based on industry understandings of acceptable viewing angles. Again, this argument standing alone does not demonstrate that theater companies had notice of the requirements of Standard 4.33.3. Having actual notice that a certain viewing angle produces a

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117 See *United States v One Parcel of Real Property with Buildings, Appurtenances, and Improvements, Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, R.I. — C.A.1 (R.I.), 960 F2d 200, 211 (1st Cir 1992) (explaining that it is “well-settled that the government need not acquiesce, on a nationwide basis, in one circuit’s construction of federal law adverse to the government’s interpretation of the law”).

118 See generally Justice Department Hoyts Brief (cited in note 7).

119 See id at *9–12 (referencing the Society of Motion Picture and Television Engineers (SMPTE) guidelines issued in 1989 and adopted by National Association of Theater Owners, which include viewing angle in the definition of lines of sight).

120 See id at *49–57.

121 See id at *49–53.
markedly inferior viewing experience has nothing to do with whether or not an auditorium is in compliance with the ADA. Indeed, the Justice Department has admitted that it does not assert a qualitative requirement for what the viewing angle should be, as long as angles are comparable for disabled and able-bodied patrons:

\[ \text{[T]he Department does not adopt [a] 30- or 35-degree measurement as a maximum for wheelchair spaces. If most members of the audience have seats with vertical viewing angles exceeding 35 degrees, then wheelchair areas also can have viewing angles greater than 35 degrees. The standard, as the language of Standard 4.33.3 states, is whether viewing angles are "comparable."} \]

This statement expressly contradicts the contention that theaters had actual notice of the Justice Department's interpretation of Standard 4.33.3 because they knew that, empirically, the wheelchair placements provided less desirable viewing angles. It is comparability, and not quality, that the Standards require. Theater companies cannot be required to retrofit theaters on this logic.

The Justice Department poses two more compelling arguments in support of retroactive application, asserting that its amicus brief filed in the Lara district court provided notice of its interpretation in 1998, and that architects designing these theaters recommended that stadium seating be constructed with mid-level entries for wheelchair patrons in 1997 and 1998.

While it may seem suspect that the Justice Department's first definitive articulation of this issue comes in the form of a legal brief, this fact is not fatal to its validity. So long as the interpretation reflects the Justice Department's fair and considered judgment, it is entitled to deference. As stated by the Supreme Court under similar circumstances, "the [fact that] the [ ] interpretation comes to us in the form of a legal brief [ ] does not, in the circumstances of this case, make it unworthy of deference."

Similarly, the Justice Department's articula-
tion of its viewing-angle argument in a legal brief was not an attempt "to defend past agency action against attack," but rather was required by the circumstances. When the Justice Department submitted its amicus brief in the *Lara* district court upon learning of the theater company’s “unusual interpretation” that Standard 4.33.3 required only unobstructed lines of sight for wheelchair seating in stadium-style theaters, the Justice Department stated that it was “reaffirming” what it contends was the generally understood viewing-angle requirement imposed by Standard 4.33.3.\(^{127}\)

The architects’ recommendations of alternatives to older stadium-style designs in 1997 and 1998\(^{128}\) further support the contention that as of late 1998, theaters understood what the language of Standard 4.33.3 required in the eyes of the Justice Department. Of course, the fact that architects told theater owners that wheelchair seating should be placed in the stadium-style section, while prescient, does not indicate that the theaters were acting illegally.\(^{129}\) This is especially true in light of the method by which the Justice Department chose to assert this interpretation (namely, litigation). While the Justice Department prevailed in some district courts,\(^{130}\) it was not until August of 2003 that any appellate courts accepted the Justice Department interpretation as controlling. Until that time the most persuasive authority indicated that the older stadium-style theaters were in compliance with Standard 4.33.3.\(^{131}\) However, the Justice Department’s asserted interpretat

doubt” on the continuing vitality of *Auer*. Id at *16–19, citing *United States v Mead Corp*, 533 US 218, 238 n 19 (2001). See also *Keys v Barnhart*, 347 F3d 990, 993–94 (7th Cir 2003) (noting that while *Christensen* does not expressly overrule *Auer*, “little is left of *Auer*” after *Christensen*).

However, even if *Auer* has been gutted, the unique character of the Justice Department (an agency that communicates primarily through litigation) indicates that deference may still be appropriate to its briefs. As compared with most cases considering the force of agency briefs, the Justice Department itself is responsible for both the briefs and the underlying rationale, weighing against Cinemark’s contention that, in this scenario, deference to an interpretation posed in a brief is inappropriate. Indeed, in *Mead* itself the Court declined the invitation to defer to an agency interpretation posed in a brief because the approval of “central management at the highest level” did not occur until after the litigation began. *Mead*, 533 US at 238 n 19. Unlike other governmental agencies, however, the Justice Department’s central management approves the interpretations in briefs each time a brief is filed: no separation exists between the interpretation and the brief.

\(^{126}\) *Auer*, 519 US at 462. Compare *Bowen*, 488 US at 213 (“Defereence to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”).

\(^{127}\) Justice Department *Hoyts* Brief at *33–34 (cited in note 7).

\(^{128}\) Id at *55–56.

\(^{129}\) See *Hoyts*, 256 F Supp 2d at 92.

\(^{130}\) The court in *Hoyts* erroneously stated that there was no decision accepting the government’s proffered interpretation of Standard 4.33.3 until *Meineker v Hoyts Cinemas Corp*, 216 F Supp 2d 14 (ND NY 2002). *Hoyts*, 256 F Supp 2d at 92. In fact, there was a decision favorable to the Justice Department as the only precedent on the books from 1998 until 2000—the Western District of Texas ruling in *Lara* that the placement of wheelchair seating in the front rows was a violation of the ADA. See *Lara v Cinemark USA, Inc*, 1998 US Dist LEXIS 14447, *6 (WD Tex).

\(^{131}\) See *Hoyts*, 256 F Supp 2d at 92.
tion was certainly apparent to the theater companies as of 1998, even if the courts paid it little heed. The theaters would have been well-advised to begin all new construction in a manner consistent with this interpretation instead of proceeding with the older layout of stadium-style theaters on the assumption that the theaters would prevail in a court challenge.\[132\]

As of July 1998, theater companies were on notice as to the Justice Department’s interpretation of Standard 4.33.3, and took the risk that continuing to build stadium-style theaters with wheelchair seating only in the front rows would later be found a violation of the ADA. The athletic arenas took the same risk, and suffered the consequences:

\[N\]or is there any basis for concluding that defendant relied “in good faith” upon an earlier interpretation of the law or that the government “led [defendant] down the garden path.” On the contrary, the undisputed evidence demonstrates that defendant was well aware that the law might be interpreted to require lines of sight over standing spectators but chose to ignore that possibility and proceed with construction notwithstanding.\[133\]

The theaters cannot argue that they had no knowledge of the Justice Department’s interpretation merely because they chose the wrong horse in the race. Instead, theater owners continued to construct what are now noncompliant theaters in seeming disregard of the Justice Department’s officially articulated position.\[134\] In fact, these theater owners were acting contrary to private architectural recommendations that “handicap[ped] seating should be included within the stadium riser seating area for the benefit of the physically challenged patron. The availability of equal, optimum site lines [sic] to every theater patron should be the goal of any plan.”\[135\] This disregard for the recommendations of both government and private actors suggests a bad-faith refusal to consider feasible alternatives to the noncompliant theaters. In light of the clear knowledge of the theaters, retroactive application to theaters built on or after the filing of the *Lara* amicus brief in July 1998 does not violate due process.\[136\]

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132 See id (referencing a theater executive’s statement that “there was enough precedent to argue in court” that cost reduction was a sufficient justification for “eliminat[ing] wheelchair-accessible seating in the stadium sections”).

133 Independent Living Resources, 982 F Supp at 747 (explaining why, if its decision on APA noncompliance were overturned on appeal, the court would determine that stadium owners should be required to retrofit).

134 See Justice Department Hoyts Brief at Schedule B (cited in note 7) (listing theater complexes constructed after July 1998 that were not in compliance).

135 Id at *55–56.

136 Further inquiry is necessary to determine which of the contested theaters should be subject to this retroactive application. At what point in the design or construction phase would it have been reasonable to require the theater companies to cease work and recalibrate based on
C. The Justice Department’s Abdication of Its Rulemaking Role

"In a regime in which a regulation may be interpreted in several permissible ways, regulated parties may find it difficult, if not impossible, to plan their affairs with confidence until the regulation has been definitively interpreted by the agency."137 Almost all of the courts that have grappled with this question have come to the same begrudging conclusion:138 although the Justice Department is entitled to deference to its interpretation, and is not required to commit it to code,139 it would save a great deal of time, money, and judicial resources if the Justice Department undertook notice and comment rulemaking to clarify the meaning of Standard 4.33.3. It is nearly impossible for the theater companies to comply with their obligations under the regulation when the Justice Department is allowed to assert its interpretations piecemeal (through litigation, sometimes only as amicus). Furthermore, the courts have done little to clarify matters, imposing their own viewing-angle and seat-placement requirements.140 Moreover, the decisions and briefs frequently cite informal seat-selection surveys, decades-old theater design treatises, and highly specialized viewing-angle data,141 presenting very technical considerations that are neither the province nor expertise of the judiciary.142

This piecemeal approach has made at least one theater company (and likely more, given the national scope of many theater companies)...
beholden to varying requirements in different judicial districts. Further, these determinations are simply too fact-specific and tied too closely to individualized preferences to be dealt with by the courts. Indeed, several opinions have pointed to this problem as requiring that courts decline to apply the Justice Department standards until the regulations are amended. What is really required is a deliberative, comprehensive process, with input from the industry, patrons (both disabled and able-bodied), architects, and the like, about cost, feasibility, and seating preferences. Until that time, both wheelchair users and theater owners will be constantly in conflict over what the ADA and the Standards require.

As noted, this problem will eventually be rendered moot by theater companies’ constructing stadium-style theaters that now integrate wheelchair seating into the stadium-style section (through either elevators or different configurations), meeting the Justice Department’s viewing-angle and integrality concerns. The older theaters that must be retrofitted to comply with these requirements are a very discrete

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143 Cinemark USA owns and operates theaters that are in the jurisdiction of both the Fifth and Sixth Circuits, currently on opposite sides of the circuit split.

144 See Lara, 207 F3d at 789 (declining to require district courts to “interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers”); Regal, 339 F3d at 1137 (Kleinfeld dissenting) (noting that the Standards contain to-the-millimeter specifications for knee space under desks and the like, which are clearly not rivaled by the majority’s intimations about comparability).

145 The Access Board began such a process in 1992 for sightlines over standing spectators in athletic arenas, Architectural and Transportation Barriers Compliance Board, Proposed Rule for Americans with Disabilities Act (ADA) Accessibility Guidelines for Building and Facilities; State and Local Government Facilities, 57 Fed Reg 60612, 60618 (Dec 21, 1992) (amending 36 CFR § 1191), and later for comparability of viewing angles in stadium-style theaters, 64 Fed Reg at 62277-78 (cited in note 24), and will issue its final amended regulation in mid-2004. See Access Board Approves New Guidelines under the ADA and ABA, online at http://www.access-board.gov/news/ADA-ABA-update.htm (visited May 16, 2004). While the Access Board cannot be lauded for swift action, it nonetheless took some action. In contrast, the Justice Department has initiated no rulemaking process, despite the decade of controversy that surrounds Standard 4.33.3. It first pressed a contested interpretation of Standard 4.33.3 in the 1994 TAM Supplement requiring lines of sight over standing spectators, see note 105, and the first case challenging that interpretation was filed in July 1996. See Paralyzed Veterans of America v Ellerbe Becket Architects & Engineers, PC, 950 F Supp 393 (D DC 1996), affd as DC Arena, 117 F3d 579. In 1998, the Justice Department first publicly advocated that comparable lines of sight required comparable viewing angles in Lara. Nonetheless, no rulemaking has been mentioned. The Department of Transportation, which serves the same function for public transportation facilities as the Justice Department does for public accommodations, 42 USC § 12186(a)(1), published a notice of its intention to adopt the Access Board’s revised ADAAG in August 2000. See DOT Moves to Update Its ADA Standards, online at http://www.access-board.gov/ada-aba/dot.htm (visited May 16, 2004). The Justice Department still has not undertaken any rulemaking on this issue, even in the face of an express request to do so from the theater industry. See Steven John Fellman, The ADA: A Crying Example of the Need for Regulatory Reform, In Focus (June 2003), online at http://www.infocusmag.com/03June/washreport.htm (visited May 16, 2004) (discussing the National Association of Theater Owner’s Citizens Petition requesting that the Attorney General issue a rule clarifying Standard 4.33.3).
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category—those constructed after July 1998. However, in light of the Justice Department’s inability to commit a definitive statement of this issue to code, theater companies will remain at the mercy of the Justice Department’s changing will. Until the Justice Department fulfills its statutory role of assisting affected entities in understanding their responsibilities under the ADA, this Standard (and indeed the Standards as a whole) will continue to be disputed in litigation across industries, disadvantaging all involved.

There is no question that the Justice Department’s interpretation of the Standard through adjudication is within the bounds of current doctrine. However, courts would be well-advised to consider holding the Justice Department to its rulemaking obligations in situations like this. Currently, the Justice Department has no incentive to undertake the lengthy and laborious process of notice and comment rulemaking because it has succeeded in articulating its interpretation through a litigation campaign. There is no doubt that the Justice Department is achieving the right results (albeit to some disadvantage to the theaters) by pressing the viewing-angle requirement for stadium-style theaters. However, while in some instances interpretation through adjudication is appropriate and necessary, initiating a calculated litigation campaign in lieu of rulemaking is an abuse of the Justice Department’s role.

CONCLUSION

The placement of wheelchair seating in older stadium-style movie theaters violates the ADA because it does not provide wheelchair users with lines of sight comparable to able-bodied patrons.

However, important questions remain unanswered: What viewing angles are acceptable? Which auditoriums require retrofitting? And do theaters that comply with the viewing-angle requirement but segregate wheelchair seating from the rest of the auditorium violate the ADA and the Standards? Only the Justice Department—by clarifying the Standards’ meaning through notice and comment rulemaking—can produce a definitive answer invulnerable to revision by a change in sentiment or development of superior theater design. Until that time, courts will revisit this issue again and again, and these questions will remain unsatisfactorily resolved.

146 42 USC § 12206(a)(1).

147 See SEC v Chenery Corp, 332 US 194, 201–02 (1947) (setting forth the principle that agencies have substantial leeway in choosing between proceeding by rulemaking or adjudication).