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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No.: CV-99-01034-FMC (SHx)
	)	
Plaintiff,	)	MEMORANDUM OF PLAINTIFF
	)	UNITED STATES IN OPPOSITION
	)	TO AMC'S MOTION FOR [PARTIAL]
v.	)	SUMMARY JUDGMENT
	)	
	)	DATE: Nov. 18, 2002
AMC ENTERTAINMENT, INC.,	)	TIME: 10:00 a.m.
et al.,	)	JUDGE: Hon. Florence-Marie Cooper
	)	
	)	
Defendants.	)	

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INTRODUCTION

The recently-filed motion for partial summary judgment by defendants AMC Entertainment, Inc. and American Multi-Cinema, Inc. [hereinafter collectively referred to as "AMC"] largely proves an exercise in legal and factual fiction. In this motion, AMC seeks to have this Court enter a partial summary judgment order in its favor on three separate aspects of this action: (i) the "enforceability" of the Department's interpretation of 28 C.F.R. Part 36, App. A, § 4.33.3 ("Standard 4.33.3"), a regulation mandating that, among other things, movie patrons who use wheelchairs "be provided . . . lines of sight comparable to those for members of the general public"; (ii) the constitutionality of the Department's allegedly retroactive application of an interpretation of Standard 4.33.3 that was "first promulgated in July 1998 in the amicus brief the Department filed with the District Court in Lara v. Cinemark, 207 F.3d 783 (5th Cir. 2000)"; and (iii) the authority of this Court to render judgment with respect to AMC's stadium-style theaters located in the Fifth Circuit in light of the Lara decision. See Memorandum of Points and Authorities In Support of AMC's Motion for Summary Judgment (filed Sept. 26, 2002) (Docket # 346) ("AMC SJ Mem.").

Each of AMC's summary judgment arguments lack merit and should, therefore, be rejected by this Court. AMC's memorandum is littered with faulty legal reasoning, factual misstatements, and mischaracterizations of both the Department's interpretation of Standard 4.33.3 and its position in this action. Indeed, the primary "factual" support for AMC's summary judgment claims rests not on deposition testimony or declarations offered by AMC officials but, rather, the statements of AMC's lead trial counsel. See Motion to Strike Declaration of Attorney Gregory F. Hurley (filed Oct. 28, 2002) (Docket # 371). Read in the proper legal and factual context, it is plain that the Department has reasonably and consistently interpreted Standard 4.33.3's comparable-lines-of-sight requirement as requiring movie theater operators to provide patrons who use wheelchairs with a view of a movie screen -- including such factors as obstructions, viewing angles, and distance from the screen -- that is similar or equal to the views offered to most other patrons in the theater. Such an interpretation, moreover, suffers from no constitutional infirmities since it is neither impermissibly vague nor violative of the due process

clause. Finally, the Fifth Circuit's Lara decision (which the Department believes is seriously flawed) does not, in any event, preclude this Court from exercising its own independent judgment in this action.

ARGUMENT

A. AMC's Summary Judgment Memorandum Misrepresents the History and Caselaw Underlying Standard 4.33.3's Comparable-Lines-of-Sight Requirement

1. *Deconstructing AMC's "Revisionist" View of the Regulatory History of Standard 4.33.3 and Its Purported "Compliance" With DOJ "Guidance"*

AMC's memorandum in support of its motion for partial summary judgment begins with a discussion of the purported "evolution" and "origins" of Standard 4.33.3's comparability requirement. See AMC Mem. at 1- 4; see also id. at 11, 13 - 15. AMC's memorandum also makes much of its alleged "compliance" with settlement agreements, speeches, briefs, or other materials authored by the Department or Department officials that addressed Standard 4.33.3 in the context of movie theaters. Id. AMC's discussion on these topics, however, amounts to a "revisionist" view of history that cannot be squared with actual events.

a. Standard 4.33.3's Regulatory Heritage Provides No Support for AMC's "Obstruction Only" Interpretation of the Regulation's Comparable-Lines-of-Sight Requirement

First, the regulatory history of Standard 4.33.3 fails to support AMC's contention that the phrase "lines of sight" has been used in other federal accessibility regulations since 1980 to "refer[] to obstruction, not viewing angle." AMC SJ Mem. at 14. As an historical matter, it appears true that, as AMC contends, the text of Standard 4.33.3's comparable-lines-of-sight requirement can be traced back to private accessibility guidelines published by the American National Standards Institute ("ANSI") in 1980. See ANSI A117.1-1980, § 4.33.3 & App. 1 (copy attached as Exhibit 9 to Plaintiff United States' Appendix In Opposition to AMC's Motion for [Partial] Summary Judgment (filed Nov. 4, 2002) ("US SJ Opp. App.")). ANSI A117.1-1980 provided, in pertinent part, that wheelchair locations in assembly areas

> shall be an integral part of any fixed seating plan and shall be dispersed throughout the seating area. They shall adjoin an accessible route that also serves as a means of egress in case of emergency and ***shall be located to provide lines of sight comparable to those for all viewing areas***.

ANSI A117.1-1980, § 4.33.3 (emphasis added). ANSI A117.1-1980's language was subsequently adopted with some modification by the Architectural and Transportation Barriers Compliance Board ("Access Board") when issuing its accessibility guidelines for federal buildings – the "Minimum Guidelines and Requirements for Accessible Design" (commonly referred to as "MGRAD"). See, e.g., 45 Fed. Reg. 55,010, 55019, 55,044 (Aug. 18, 1980) (MGRAD notice of proposed rulemaking regarding placement of wheelchair locations in assembly areas) (US SJ Opp. App., Ex. 10); 46 Fed. Reg. 4,270, 4,281, 4,304 (Jan. 16, 1981) (final MGRAD rule regarding placement of wheelchair locations in assembly areas) (US SJ Opp. App., Ex. 11); 47 Fed. Reg. 33, 862, 33, 893 (Aug. 4, 1982) (MGRAD amendments) (US SJ Opp. App., Ex. 12).[1] MGRAD, in turn, served as the basis (again with some modification) for the "Uniform Federal Accessibility Standards" ("UFAS") issued by four federal standard-setting agencies to provide uniform accessibility standards for use by all federal agencies. See 49 Fed. Reg. 31,528, 31, 593 (Aug. 7, 1984) (UFAS final rule regarding placement of wheelchair locations in federal assembly areas) (US SJ Opp. App., Ex. 13). Finally, the Access Board's "ADA Accessibility Guidelines for Buildings and Facilities" ("ADAAG") issued in 1991 built on this regulatory heritage -- ANSI, MGRAD, and UFAS – when establishing its minimum guidelines for the placement of wheelchair locations in assembly areas. See 56 Fed. Reg. 35,408, 35,408 - 35, 411, 35, 424 - 35, 425, 35, 514, 35,540-41 (July 26, 1991) (ADAAG final rule) (US SJ Opp. App., Ex. 15).

Careful review of this underlying history, however, reveals no support for AMC's theory that Standard 4.33.3's predecessor regulations and guidelines -- ANSI, MGRAD, UFAS, and ADAAG – were written in such a way that the phrase "lines of sight" referred only to obstruction. Nowhere do these historical sources discuss obstructions or, for that matter, any other factor affecting the nature and quality of the "lines of sight" beyond the requirement that

[1] For the Court's convenience, a compendium of the regulations and guidelines forming the historical roots of Standard 4.33.3 is provided in Exhibits 9 - 18 of Plaintiff United States' Appendix In Opposition to AMC's Motion for [Partial] Summary Judgment accompanying this memorandum.

there be comparability between the sight lines offered spectators who use wheelchairs and those offered to most other members of the audience. That is, while the phraseology changed slightly over the years, these sources neither explained nor discussed their respective uses of the comparable-lines-of-sight requirement in the text or preamble of any of the various documents, either as proposals or final standards. Instead, the language appears simply to have been handed down from one accessibility guideline to another. AMC thus cannot credibly claim that these historical regulatory sources suggest, let alone compel, a finding that Standard 4.33.3's comparability requirement should be read as referring only to visual obstructions. See Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 583 (D.C. Cir. 1997) (examining the regulatory origins of Standard 4.33.3, including ANSI A117.1-1980, and declining to hold that the phrase "'lines of sight comparable' had developed a universally accepted linguistic meaning contrary to the one Justice asserts" concerning lines of sight in sports arenas), cert. denied, 523 U.S. 1003 (1998).

b. AMC's "Compliance" Argument Finds No Support In the Record And, In Any Event, Raises Disputed Factual Issues That Are Not Amenable to Summary Judgment

AMC's claim that it has purportedly "complied" with alleged directives or guidance issued by the Department or Department officials over the years regarding the application of Standard 4.33.3 to movie theaters proves to be yet another exercise in historical fiction. See AMC SJ Mem. at 2- 4, 11. As discussed below, AMC's "compliance" argument is largely erected on either mischaracterizations of Departmental guidance, or factual misstatements by counsel for AMC which find no support in the record, or both. Moreover, to the extent AMC raises this argument in order to establish that it has, in fact, complied with Standard 4.33.3's comparable-lines-of-sight requirement, such an argument presents disputed issues of material fact that are not appropriate for summary judgment.

As an initial matter, it is unclear whether AMC intends its purported "compliance" argument to support its affirmative defenses (such as equitable estoppel) or, rather, whether AMC offers this argument as substantive "evidence" that its stadium-style theaters at issue in this litigation do in fact comply with Standard 4.33.3's comparability requirement. Pinpointing the

legal basis for AMC's "compliance" argument proves unnecessary, however, since neither of these arguments affords any basis for granting AMC's instant motion for partial summary judgment. First, as discussed in the United States' memorandum in support of its motion for partial summary judgment on AMC's affirmative defenses, AMC cannot erect a legally viable equitable estoppel defense both because estoppel rarely (if ever) lies against the federal government, and because none of the DOJ statements or guidance with which AMC allegedly "complied" were in any way contradictory to the Department's consistent and longstanding interpretation of Standard 4.33.3's comparable-lines-of-sight requirement. See Plaintiff United States' Memorandum In Support of Motion for Partial Summary Judgment on Defendants' Affirmative Defenses 11-14 (filed Sept. 30, 2002) ("US SJ Affirm. Def. Mem."); see also Plaintiff United States' Reply Memorandum In Support of Motion for Partial Summary Judgment on Defendants' Affirmative Defenses 5-11 (filed Oct. 15, 2002) (Docket # 361).[2]

Moreover, to the extent AMC offers "evidence" of "compliance" with DOJ guidelines as substantive evidence of its purported satisfaction of Standard 4.33.3's comparable-lines-of-sight requirement, such an argument is equally misplaced on several accounts. As discussed below, AMC's "compliance" argument finds no support in the factual record. Such an argument, moreover, raises disputed issues of material fact that are inappropriate for summary adjudication.

Turning to the substance of AMC's "compliance" argument, this claim is premised on a widely-divergent collection of events and documents. In summary, AMC alleges that: (i) based on Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994) in which the Untied States participated as an *amicus curiae*, as well as on a 1994 Supplement to the Department's ADA Technical Assistance Manual, AMC placed its wheelchair locations in the front of its

[2] To the extent AMC's "compliance" argument can be read as suggesting that the Department has taken inconsistent positions over the years regarding the interpretation and application of Standard 4.33.3 to stadium-style movie theaters, AMC's claim is meritless. Indeed, Magistrate Judge Hillman already reached quite the opposite conclusion when limiting AMC's APA-related discovery in this action to the administrative record underlying the regulation: "Defendant has not shown inconsistent interpretations by plaintiff of § 4.33.3 with regard to commercial stadium style movie theaters." Minute Order Denying Defs.' Mot. to Compel 3 (June 5, 2000) (Docket #134).

stadium-style theaters; (ii) based on a 1996 multi-party settlement agreement in Arnold v. United Artists Theater Circuit, Inc., Case No. 93-0079 THE (N.D. Cal.) to which the United States was a signatory, AMC placed its wheelchair locations in the fourth row of its stadium-style theaters; and that (iii) within "three months" of learning of the Department's *amicus* brief filed in July 1998 in Lara v. Cinemark, U.S.A., Inc., C.A. No. EP-97-CA-502-H (W.D. Tex. July 24, 1998), AMC amended the design criteria for its stadium-style theaters "so that wheelchair spaces provided vertical viewing angles in the range provided most of the general public in the stadium seating." See AMC SJ Mem. at 2-4, 11.[3]

None of these documents or events, however, provides any support for AMC's "compliance" argument. Rather, review of the factual record underlying each of these matters reveals that AMC's claims are so lacking in support as to border on frivolity. Since the United States' Statement of Genuine Issues In Opposition to Defendant AMC's Motion for [Partial] Summary Judgment (filed Nov. 4, 2002) ("US SJ Opp. Facts") contains a detailed discussion of the factual inaccuracies underlying AMC's "compliance" argument, these matters will not be discussed at length in this memorandum. However, a few examples will illustrate the dubious nature of AMC's "compliance" claims.

First, while AMC claims that the Fiedler litigation (and the United States' *amicus* brief therein) prompted it to place wheelchair locations at the front of its stadium-style theaters, neither the United States nor the plaintiff in that action made any such argument.[4] Rather, Mr.

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[3] AMC also cites to a speech given by a DOJ staff attorney (Mr. Joseph Russo) at a panel presentation before a Florida ADA workshop in March 1997 as further "evidence" that the Department "was unable . . . to determine what § 4.33.3 required with respect to stadium style auditoriums." AMC SJ Mem. at 11. As with so many other aspects of AMC's memorandum, this assertion is both misleading and factually mistaken. Review of the transcript for this workshop makes plain that, rather than professing ignorance regarding Standard 4.33.3, Mr. Russo was instead emphasizing the commonsense principle that he -- as a DOJ staff attorney -- lacked authority to issue authoritative policy statements concerning the application of this Standard to stadium-style movie theaters. See US SJ Opp. App., Ex. 23; US SJ Opp. Facts at 6-8; see also US SJ Affirm. Def. Mem at 7-8.

[4] At issue in Fiedler was AMC's placement of wheelchair seating at the back of each theater at the Avenue Grand Theater, a theater complex leased by AMC at Union Station in Washington, D.C.. See US SJ Affirm. Def. Mem at 21-23; see also Fiedler v. American Multi-

Fiedler alleged in his complaint that all of the traditional, sloped-floor theaters at the AMC Union Station theater complex in Washington, D.C. impermissibly relegated wheelchair patrons to the back rows (or behind the back rows) of the theaters farthest from the screen, and that he "wished to sit near the ***middle*** of the theater[s]." (Emphasis added.) See US SJ Opp. App., Ex. 19; US SJ Opp. Facts at 2-3. Thus, contrary to AMC's after-the-fact re-creation of history, AMC could not have placed its wheelchair locations at the front of its stadium-style theaters as a result of Fiedler. Instead, according to one former senior AMC official who helped develop the AMC Grand 24 theater complex – AMC's first stadium-style theater complex – the placement of wheelchair locations in the front row of these theaters was largely an afterthought because AMC was so focused on refining the stadium concept to provide enhanced sight lines for ambulatory patrons in the stadium-style seating section. See US SJ Opp. Facts at 3; see also Stmnt. of Uncontroverted Facts and Conc. of Law In Support of Pl. United States' Motion for Partial Summary Judgment Re: Lines of Sight Issues ¶¶ 86-88 (lodged Oct. 28, 2002) ("US SJ Facts").

Second, while AMC alleges that the 1996 Arnold agreement caused AMC to modify its plans for future stadium-style theaters so that wheelchair locations were no closer than the fourth row, in numerous instances AMC simply inserted an "extra" row or two of seats at the very front of its theaters in a cynical attempt to make it ***appear*** as if the wheelchair locations had been moved farther back from the screen when, in fact, the distance between the wheelchair locations and the screen never changed. See US SJ Opp. Facts at 6. In any event, the 1996 Arnold settlement

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Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994). Defendant AMC filed a motion for summary judgment contending that the ADA was inapplicable to its leased theaters at Union Station, that, even if the ADA did apply, that it did not require "dispersed" wheelchair seating at the Avenue Grand Theater, and that the ADA did not require equivalent treatment of disabled patrons when doing so would present a "direct threat" to the health or safety of other patrons. See Fiedler, 871 F. Supp at 36-37. With the permission of the court, the United States filed an *amicus* brief opposing AMC's motion for summary judgment. Id. In this *amicus* brief, the United States contended that AMC's Avenue Grand Theater was indeed subject to the ADA; that AMC was required to provide more than one wheelchair seating location in theaters with more than 300 seats; and that AMC had failed to demonstrate that seating patrons who use wheelchairs towards the front of the theater would constitute a "direct threat." Id. at 37-40. The district court denied AMC's motion for summary judgment. See Fiedler, 871 F. Supp. at 40.

agreement was primarily concerned with dispersal and integration issues – rather than "lines of sight" issues – since United Artists had not yet built any stadium-style theaters as of the date of this agreement. See id. at 4-5.

Finally, supported only by the statements of AMC's trial counsel, AMC alleges that "within three months" of learning of the Department's Lara *amicus* brief, AMC modified its design criteria so that wheelchair spaces in future stadium-style theaters would be provided the same vertical viewing angles as were provided to most of the general public in the stadium seating section. See AMC SJ Mem. at 11. This contention is factually incorrect on two accounts. First, AMC's 30(b)(6) representative stated in deposition that he had "no idea" when AMC received a copy of the Department's Lara brief, and that he would have been the person at AMC to have received the brief. See US SJ Opp. Facts at 13. Second, when AMC did eventually modify its design criteria to expressly account for vertical viewing angles (though apparently not in response to the Department's Lara's brief), there was no effort made to ensure that wheelchair patrons were afforded viewing angles that compared favorably with those offered to audience members seated in the stadium section or to any patrons in the theater. Id.

Taken together, the cumulative weight of these factual inaccuracies and misstatements dooms AMC's "compliance" argument. AMC's memorandum is replete with misrepresentations seeking to provide after-the-fact rationalizations for its placement of wheelchair seating in locations with inferior lines of sight in its stadium-style theater complexes. Indeed, several AMC officials have admitted that AMC was providing inferior, non-comparable lines of sight to its wheelchair patrons by locating these seats on the sloped-floor portion of the majority of its stadium-style theaters. See Mem. In Support of Pl. United States' Motion for Partial Summary Judgment Re: Line of Sight Issues 9, 18-20, 24 (filed Oct. 28, 2002) (Docket # 367) ("US SJ Mem."); US SJ Facts ¶¶ 42, 79-94. Over and over again, depositions and documents in the record demonstrate that, whether due to design, neglect, market forces, or other reasons, AMC placed wheelchair locations outside the stadium seating sections, lower and closer to the screen, in the overwhelming majority of its stadium-style theaters -- despite a flood of complaints by disabled patrons, their moviegoing companions, local building officials, and even, on occasion,

AMC officials themselves. See US SJ Mem. at 7-9; US SJ Facts ¶¶ 19-42, 79-94, 1-5-06. Yet regardless of whether AMC violated the ADA through negligence or knowing discrimination, its corporate decisionmaking relegated patrons who use wheelchairs to inferior seating locations at the vast majority of its stadium-style theaters, and the record suggests that these decisions had nothing to do with guidance from the Department of Justice.

Indeed, perhaps the greatest irony of AMC's "compliance" argument is that, prior to the filing of this enforcement action, AMC understood and agreed that Standard 4.33.3's comparability requirement referred to more than simply "obstructions." That is, when litigating the Fiedler case in January 1995, AMC confidently stated that the phrase "lines of sight" in Standard 4.33.3 encompassed viewing angles:

> Lines of sight for a patron in an auditorium are measured with reference to the horizontal and vertical angles of view the eye must encompass in seeing the screen. For vertical sight lines, the angular measurement extends from the horizontal line of sight vertically to the sight line directed to the top of the screen . . . It is self evident . . . that . . . . sight lines are steepest in the front and flatten out in moving to the rear[.]"

[AMC's] Memorandum of Points and Authorities In Support of Motion for Order of Certification and Stay 4-5 (dated Jan. 31, 1995) (U.S. SJ App., Vol. 3, Ex. 108). In light of this admission, it strains credulity for AMC to argue now that it was somehow confused or mislead by purported guidance or statements by DOJ officials.

2. *AMC Misstates the United States' Position With Respect to Standard 4.33.3's Comparability Requirement*

As with other inaccuracies in its brief, AMC's summary judgment memorandum also fundamentally mischaracterizes the United States' position with respect to Standard 4.33.3's comparability requirement. The United States does not, as AMC alleges, read Standard 4.33.3 as imposing a "specific numerical" vertical viewing angle requirement. AMC Mem. at 8, 13. Nor is the United States asking this Court to "adopt" its *amicus* brief filed in the Lara litigation. Id. at 4-6; see also Plaintiff United States' Statement of Genuine Issues In Opposition to AMC's [Partial] Motion for Summary Judgment, Response to AMC Fact No. 12 (filed Nov. 4, 2002) ("US SJ Opp. Facts"). Rather, as discussed in the United States' summary judgment memorandum, the relevant issue is whether the Department of Justice has reasonably construed

Standard 4.33.3's comparable-lines-of-sight requirement as requiring movie theater operators to provide wheelchair users with a view of the movie screen -- including such factors as physical obstructions, viewing angles, and distance from the screen -- that is similar or equal to the views offered to most other patrons in the theater. See US SJ Mem. at 10-11. For the reasons stated in its prior memorandum, the United States urges this Court to affirm this reading of Standard 4.33.3 since it not only best comports with the language of the regulation, but also materially advances the anti-discrimination goals underlying Title III of the ADA and its implementing regulations. See US SJ Mem. at 11-17.

3. AMC Ignores Relevant Caselaw Addressing Standard 4.33.3 In the Context of Stadium-Style Movie Theaters and Places Undue Reliance on the Fifth Circuit's Decision in Lara v. Cinemark

AMC's discussion of the federal caselaw addressing Standard 4.33.3 in the context of stadium-style movie theaters proves an exercise in legal obfuscation. AMC's summary judgment memorandum baldly asserts that "[t]o date, every court has rejected the Department's position as going beyond the plain language of § 4.33.3." AMC SJ Mem. at 1, 7. AMC, moreover, suggests that this Court should forsake its own independent legal judgment and simply defer to the Fifth Circuit's decision in Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000) ("Lara II") which held that Standard 4.33.3's comparability requirement only requires that movie patrons who use wheelchairs be provided "unobstructed" views of the screen. AMC is wrong on both accounts. First, AMC's cavalier assertion notwithstanding, several courts have indeed held that Standard 4.33.3's comparability requirement encompasses viewing angles and mandates a qualitative comparison between the lines of sight offered physically disabled and ambulatory movie patrons. Second, this Court need not defer to the Fifth Circuit's Lara decision since this ruling not only lacks precedential value in the Ninth Circuit, but also is seriously flawed.

a. AMC's Summary Judgment Memorandum Ignores Federal Cases Contrary To Its "Obstruction Only" View of Standard 4.33.3's Comparability Requirement

AMC's statement that "every court has rejected the Department's position" regarding Standard 4.33.3's comparability requirement is patently false. AMC SJ Mem. at 1, 7. As

discussed in the United States' memorandum in support of its motion for summary judgment, several federal courts – including the most recent court to address this issue (Meineker v. Hoyts Cinemas Corp.) – have indeed held that Standard 4.33.3's comparability requirement encompasses viewing angles and mandates a qualitative comparison between the lines of sight offered physically disabled and ambulatory movie patrons. See US SJ Mem. at 20-23 (collecting and discussing cases); Meineker v. Hoyts Cinemas Corp., 216 F. Supp. 2d 14 (N.D.N.Y. 2002) (holding that "[t]he requirement [in Standard 4.33.3] that a line of sight be 'comparable' clearly imposes a qualitative requirement that the sight line be 'similar' and not merely 'similarly unobstructed' . . . it would not be sufficient for defendant [Hoyts Cinemas] to merely provide lines of sight to the screen that are unobstructed"), appeal docketed, No. 02-9034 (2nd Cir. Aug. 26, 2002); Lara v. Cinemark U.S.A., Inc., C.A. No. EP-97-CA-502-H, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998) ("Lara I") (characterizing defendant's stadium-style movie theaters as "Headache City" and holding that these theaters did not offer disabled patrons comparable views of the screen due to excessive viewing angles), revs'd, 207 F.3d 783 (5th Cir.) ("Lara II"), cert. denied, 531 U.S. 944 (2000); see also Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36 & n.4 (D.D.C. 1994) (deferring to the Department's interpretation of Standard 4.33.3 and holding that this regulation and its "clustering" exception "afford[ed] AMC no warrant to consign its wheelchair patrons to the back of the Avenue Grand Theater"). Consistent with the history and purpose of Title III of the ADA, these courts properly concluded that Standard 4.33.3's comparability requirement refers to more than simply "obstructions" and requires a qualitative comparison of the views of the screen afforded disabled and ambulatory patrons.

The foregoing cases have been discussed at length in the United States' summary judgment memorandum and, therefore, will not be re-addressed herein. However, it bears emphasis that the district court in Meineker, like this Court, was asked by the defendant theater chain to adopt the Fifth Circuit's Lara II decision. The Meineker court recently rejected Lara II and expressly held that focusing solely on "obstructions" would "defy common sense" since such a reading of the regulation would permit theater operators to place wheelchair seating in locations which, albeit "unobstructed," nonetheless afforded wheelchair patrons "truly inferior viewing angles"

that amounted to the "absolute worst seats" at the front of the theater. See Meineker, 216 F. Supp. at 17-18 & n.4.[5]

b. The Fifth Circuit's Reading of Standard 4.33.3 in Lara II Is Seriously Flawed

The Fifth Circuit's Lara II decision, on the other hand, is legally and factually suspect due to its erroneous focus on "obstructions." By ignoring the Standard 4.33.3's plain language, imposing an improper and overly narrow construction on the phrase "lines of sight," and misconstruing the Access Board's 1999 notice of proposed rulemaking to amend the 1991 ADAAG, Lara II undermines both the letter and the spirit of Standard 4.33.3 and Title III of the ADA. The Lara II decision, therefore, warrants no deference from this Court. See Gunther v. Washington County, 623 F.2d 1303, 1319-20 (9th Cir. 1979) ("Although we look to the reasoning of other circuits and district courts for guidance, we are bound only by decisions rendered in this circuit."), aff'd, 452 U.S. 161, 101 S. Ct. 2242 (1981); Allstate Ins. Co. v. Stevens, 445 F.2d 845, 846 (9th Cir. 1971) (same).

At issue in Lara II was whether Cinemark violated the ADA by placing the wheelchair seating locations at its Tinseltown stadium-style theater complex outside the stadium section, on the sloped-floor portion of the theaters closest to the screen. In Lara I, the district court held that the Tinseltown theaters violated Standard 4.33.3's comparable-lines-of-sight requirement because they did not offer physically disabled patrons comparable lines of sight to the screen, in large part due to excessive vertical viewing angles that caused these theaters to be "Headache City" for disabled patrons. See US SJ Mem. at 16-17, 21. The Fifth Circuit reversed, holding that "we

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[5] Two district courts have subsequently followed Lara II and held that the phrase "lines of sight" in Standard 4.33.3 refers only to "obstructions." See United States v. Cinemark USA, Inc., Case No. 1:99 CV-705 (N. D. Ohio Nov. 19, 2001), appeal docketed, No. 02-3100 (6th Cir. Jan. 24, 2002); Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293 (D. Or. 2001), appeal docketed, No. 01-35554 (9th Cir. June 13, 2001); see also AMC SJ Mem. at 8-9 (discussing Cinemark and Regal decisions). Because the Cinemark and Regal courts largely adopted the Fifth Circuit's reasoning from Lara II, these district court decisions will not be separately addressed in this memorandum. It bears noting, however, that AMC's memorandum incorrectly states that the Department appeared as *amicus curiae* in the Regal action. Id. at 8. The United States neither appeared as an *amicus* in the Regal district court action, nor filed any briefs in that case.

cannot conclude that the phrase 'lines of sight comparable' requires anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen." 207 F.3d at 789. The Fifth Circuit's reasoning defies common sense, the language of the regulation, and the regulatory history of Standard 4.33.3.

As an initial matter, the Fifth Circuit's interpretation in Lara II of Standard 4.33.3's comparability requirement finds no support in the language of the regulation. Under the Fifth Circuit's reasoning, a wheelchair space placed anywhere in the theater, no matter how close or far from the screen, would comply with the comparable-lines-of-sight requirement so long as the patron in the wheelchair could somehow see the screen without obstruction. The regulation, however, requires that lines of sight be "comparable," not just unobstructed.

Second, the Fifth Circuit was also mistaken in suggesting that the phrase "lines of sight" had traditionally been understood to mean only an "unobstructed" view. See Lara, 207 F.3d at 788-789. As discussed in the United States' summary judgment memorandum, US Mem at 14-20, the term "lines of sight" in the context of theater design is a well-established term of art that encompasses factors affecting the nature and quality of the viewing experience – including visual obstructions, viewing angles, and distances from the screen. Yet rather than focusing on these relevant industry sources, the Fifth Circuit instead relied on three inapposite federal regulations concerning communications antennae, snowmobiles, and boating supervision requirements to conclude that the phrase "lines of sight" in Standard 4.33.3 should be read as encompassing only "obstructions." See Lara II, 207 F.3d at 788-89 (citing 47 C.F.R. § 73.685 (requiring antennae to have a "line-of-sight," without major obstruction, over the communities they serve); 46 C.F.R. § 13.103 (Coast Guard safety regulation defining "[d]irectly supervised" as "being in the direct line of sight of the person in charge" or in communication by radio); 36 C.F.R. § 2.18 (National Park Service regulation prohibiting the operation of a snowmobile by a person under 16 years of age "unless accompanied and supervised within line of sight by a responsible person 21 years of age or older")). These regulations cited by Lara II pertain to topics that have no relevance to the ADA, wheelchair seating, or movie theaters. More importantly, none of the regulations deals with the issue of whether lines of sight are "comparable." The United States does not dispute that

persons in wheelchairs who have unobstructed views will have lines of sight to the screen. However, those lines of sight will not be comparable if the viewing angles are inferior to those enjoyed by most other patrons.

Third, the Fifth Circuit's analysis in Lara II also placed undue reliance on the fact that neither the Attorney General nor the Access Board explicitly mentioned viewing angles in 1991 (when Standard 4.33.3 was promulgated pursuant to notice-and-comment rulemaking) or 1994 (when the Department issued the 1994 Supplement to the ADA Title III Technical Assistance Manual). Lara II, 207 F.3d at 788. But the absence of such explicit discussion in the early 1990s is understandable for at least two reasons. As previously discussed, the Department of Justice reasonably understood, when it promulgated the regulation and when it later issued the 1994 TAM Supplement, that the phrase "lines of sight" was a well-recognized term of art in the context of theater design and that architects and designers would naturally understand the term as encompassing viewing angles. See US SJ Mem. at 14-20. Second, inferior viewing angles for wheelchair users in movie theaters did not become a prominent problem until after the first stadium-style theater complex (AMC's Grand 24 in Dallas, Texas) opened for business in this country in May 1995. Although design experts have recognized for years that viewing angles effect lines of sight (Id.), the traditional-style theaters in existence prior to May 1995 lacked the elevated seating of the stadium-style cinemas and thus did not have the dramatic disparities in viewing angles that are commonly found in the majority of AMC's stadium-style theater complexes. See, e.g., Declaration of Douglas R. Seibert ¶¶ 5-21 & Ex. B (dated April 14, 1993) (declaration filed by AMC in the Fiedler litigation regarding its traditional, sloped-floor theaters at the Union Station Nine theater complex in Washington, D.C.) (US SJ Opp. App., Ex. 20); see also US SJ Facts ¶¶ 59-73 (summarizing correspondence, newsletters, and policy statements issued by the National Association of Theater Owners representing that wheelchair locations in traditional sloped-floor theaters generally were located in the back of movie theaters, and that such location had the "best" lines of sight in traditional sloped-floor theaters).

Lastly, the Fifth Circuit erred in assuming that the Access Board's post-1991 interpretation of Standard 4.33.3 could limit the authority of the Department of Justice to construe its own

regulation. The Department of Justice, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. § 12186(b). Those regulations must be "consistent with the minimum guidelines and requirements" issued by the Access Board. 42 U.S.C. § 12186(c). But the Access Board is not required to approve the Department's standards, and the Board's guidelines do not themselves have the force of law. They merely set minimum guidelines for the Attorney General's regulations to follow. As the Board itself has recognized, the Attorney General is free to issue rules that "exceed the Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991).

Thus, although the Access Board originally drafted the comparable "lines of sight" language that the Department of Justice adopted in Standard 4.33.3, it is the views of the Department of Justice – not the Access Board – to which the courts owe deference in determining the meaning of the Department's regulation. See, e.g., Paralyzed Veterans, 117 F.3d at 585 (courts must defer to the Department of Justice, not the Access Board, in interpreting Standard 4.33.3); Fiedler, 871 F. Supp. at 36 & n.4 (granting deference to Department's interpretation of Standard 4.33.3's "clustering" exception). As the D.C. Circuit cogently noted in Paralyzed Veterans when deferring to the Department of Justice's interpretation of Standard 4.33.3: "Once the [Access] Board's language was put out by the Department as its own regulation, it became, as the [ADA] contemplates, the Justice Department's and only the Justice Department's responsibility." 117 F.3d at 585.

At any rate, the Fifth Circuit mistakenly assumed that the Access Board does not interpret Standard 4.33.3, as currently written, to encompass viewing angles. See Lara II, 207 F.3d at 788-789. In fact, the Access Board has recognized that viewing angles are relevant in determining whether lines of sight in stadium-style movie theaters are "comparable" for purposes of Standard 4.33.3. For example, the Board has explained that

> [a]s stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt

> their heads back at *uncomfortable angles* and to constantly move their heads from side to side to view the screen. They are afforded *inferior lines of sight* to the screen.

64 Fed. Reg. at 62,278 (Nov. 16, 1999) (emphasis added) (US SJ Opp. App., Ex. 17); see also id. at 62,277 (emphasizing that 1999 NPRM was not altering the longstanding requirements for comparable lines of sight since the proposal merely "restate[d] the requirement in ADAAG 4.33.3 that individuals seated in wheelchairs be provided with lines of sight comparable to other spectators"). The Access Board also has published a technical assistance manual explaining, in a section titled "Sight Lines," that "[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas. A variety of factors determine the quality of 'vertical' sight lines, such as the distance from the performance area, row spacing, staggering of seats, and floor slope." ADAAG Manual 117 (July 1998) (US SJ Opp. App., Ex. 18).

It is true, as the Fifth Circuit emphasized in Lara II, that the Access Board stated in 1999 that it had not decided whether to amend its guidelines to expressly incorporate certain technical factors that the Department of Justice had used in some *settlement negotiations* to assess whether viewing angles were comparable. See 64 Fed. Reg. at 62,278 (discussing positions "DOJ has asserted in attempting to settle particular cases"). But positions advocated in the give-and-take of particular settlement discussions are not necessarily identical to the legal requirements that Standard 4.33.3 itself imposes, and thus the Board's comments about the Department's settlement negotiations has no bearing on the proper interpretation of the regulation. The Access Board's discussion of the Department's settlement positions does not detract in any way from the Board's clear position – reflected both in its 1999 notice-of-proposed- rulemaking and its 1998 technical assistance manual – that viewing angles are among the factors that determine whether lines of sight are comparable under the existing guidelines. See 64 Fed. Reg. at 62,278; ADAAG Manual at 117.

For these reasons, this Court should reject the flawed analysis in Lara II since the Fifth Circuit adopted an interpretation of Standard 4.33.3 that not only conflicts with the well-established meaning of the term "lines of sight" in the context of theater design, see supra pp. 12-14, but also thwarts the statutory goal of providing wheelchair users equal enjoyment of public

accommodations. A wheelchair user who is forced to sit close to the movie screen and to watch a film at viewing angles that make the screen appear distorted and cause physical discomfort will not have an equal opportunity to enjoy the benefits of the theater afforded to most other patrons who are allowed to sit in elevated, stadium-style seating that provides both comfortable viewing angles and an enhanced and distortion-free view of the screen. See US SJ Mem. at 8-9, 11-13; US App, Vol. I, Exs. 17-22 & Vol. II, Exs. 33-50. Adoption of the Fifth Circuit's strained interpretation of Standard 4.33.3 would allow theater owners to restrict wheelchair users to decidedly inferior seating. This Court should refuse to endorse a reading of Standard 4.33.3 that would so undermine the purposes of Title III of the ADA. See, e.g., Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002) ("[T]he ADA must be construed 'broadly in order to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.'") (quoting Hason v. Medical Bd. of Cal., 279 F.3d 1167, 1172 (9th Cir.), reh'g denied, 294 F.3d 1166 (9th Cir. 2002)); see generally Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S. Ct. 548, 553 (1967) (reaffirming "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes").

B. Standard 4.33.3 Provides a Sufficiently Precise Comparability Requirement And, Therefore, Is Neither Unconstitutionally Vague Nor Violative of Due Process

AMC's claim that Standard 4.33.3's comparable-lines-of-sight requirement is unconstitutionally vague and therefore in violation of the Due Process Clause of the Fifth Amendment is equally misplaced. See AMC SJ Mem. at 9-12. The terms of this regulation are sufficiently precise to afford AMC (and other movie theater operators) the ability to steer between lawful and unlawful conduct when designing, constructing, and/or operating stadium-style theater complexes. Taken together, the language of Standard 4.33.3, its preamble, and the ADA's history provide more than ample guidance concerning the meaning of this regulation.

As an initial matter, it bears emphasis that AMC's "void for vagueness" argument proves disingenuous in two significant respects. First, AMC's allegation that Standard 4.33.3's comparable-lines-of-sight requirement is so vague that it fails to provide "fair warning of what

the law requires" cannot be squared with the latter portion of its summary judgment memorandum in which AMC also claims that the phrase "lines of sight" has long been understood within the context of accessibility regulations as referring to "obstructions." Compare, e.g., AMC SJ Mem. at 9 with AMC SJ Mem. at 13-15. While the United States strongly disputes each of these contentions (i.e., that the phrase "lines of sight" had a well-understood regulatory meaning that referred only to "obstructions"and that Standard 4.33.3 suffers is impermissibly vague), the point is that AMC cannot have it both ways. Either the language of Standard 4.33.3 (when read in light of its regulatory and legislative history) is sufficiently definite to provide regulated parties with notice of its requirements, or it is not (and thus suffers from vagueness), but it cannot be both at the same time. Second, AMC's feigned "confusion" regarding the meaning of Standard 4.33.3's comparability requirement is a phenomenon of relatively recent origin. When litigating the Fiedler case in January 1995, AMC expressed no confusion regarding the meaning or application of Standard 4.33.3's comparability requirement to its movie theaters. Indeed, AMC expressly stated in Fiedler that, in the context of Standard 4.33.3, "[l]ines of sight for a patron in an auditorium are measured with reference to the horizontal and vertical angles of view the eye must encompass in seeing the screen." See discussion supra p. 9; see also US SJ Mem. at 19-20. Given this statement, AMC cannot now credibly claim to have been "confused" by Standard 4.33.3's comparable-line-of-sight requirement when AMC itself acknowledged – at least prior to this litigation – that "lines of sight" had a definite meaning and that meaning encompassed viewing angles.

Turning to the substance of AMC's vagueness argument, federal courts have long recognized that the Constitution does not demand absolute precision and that vagueness challenges are evaluate under varying standards depending on, among other things, the nature of the statute or regulation at issue. See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 & n.7, 102 S. Ct. 1186, 1191 & n.7 (1982); Botosan v. Paul McNally Realty, 216 F.3d 827, 836 (9th Cir. 2000); Great American Houseboat Co v. United States, 780 F.2d 741, 746-47 (9th Cir. 1986). Purely economic regulation that does not threaten to inhibit freedom of speech or other constitutionally-protected interests, such as Title III of the ADA and its

implementing regulations, are subject to the lowest level of constitutional scrutiny. Botosan, 216 F.3d at 836 ("Because the ADA is a statute that regulates commercial conduct, it is reviewed under a less stringent standard of specificity."); Pinnock v. International House of Pancakes Franchise, 844 F. Supp. 574, 580 (S.D. Cal. 1993) (holding that, for purposes of vagueness challenge, Title III and its implementing regulations were subject to lower standards of specificity). Under this standard, a law is not impermissibly vague simply because it "'requires a person to conform his conduct to an imprecise but comprehensible normative standard.'" Hoffman Estates, 455 U.S. at 495 n.7 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971)). Rather, what due process will not tolerate from economic regulation is a law that specifies "no standard of conduct . . . at all." Hoffman Estates, 402 U.S. at 495 & n.7; accord Pinnock, 844 F. Supp. at 580; see also Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 121, 87 S. Ct. 1563, 1570 (1967) (holding that to violate due process, a statute must be "so vague and indefinite as really to be no rule or standard at all").

Applying this standard to Standard 4.33.3's comparable-lines-of-sight requirement, it is plain that this regulation fits comfortably within the ambit of constitutional economic regulation. As discussed in the United States' summary judgment memorandum, the regulatory language is reasonably understood as requiring a qualitative comparison between the views of the screen afforded patrons who use wheelchairs with the views of the screen afforded most other members of the movie audience. See US SJ Mem. at 11-12. The meaning of this provision is further amplified by the fact that the phrase "lines of sight" is a well-established term of art in the context of theater design that encompasses factors (including physical obstructions, viewing angles, and distances from the screen) affecting the nature and quality of the viewing experience. Id. at 14-16. Finally, Standard 4.33.3's comparability requirement must also be read in the context of the underlying goals of Title III of the ADA and its implementing regulations of ensuring the accessibility and usability of movie theaters and other assembly areas for persons who use wheelchairs and their moviegoing companions. Id. at 4-6, 12-13; see also 56 Fed. Reg. 35544, 35571 (July 26, 1991) (DOJ preamble stating that Title III regulation governing assembly areas was promulgated in recognition of the fact that "[i]ndividuals who use wheelchairs

historically have been relegated to inferior seating" and forced to sit "separate from accompanying family and friends"); 46 Fed. Reg. 4270, 4270-73 (Jan. 16, 1981) (Access Board statement in final rulemaking notice emphasizing that Standard 4.33.3's predecessor regulatory guideline regarding assembly areas in federal buildings should be "liberally construed" to ensure the accessibility and usability of such facilities) (codified at 36 C.F.R. § 1190.6).

That Standard 4.33.3 does not regulate with "mathematical precision," moreover, proves of no constitutional impediment. Given the myriad of assembly areas to which Standard 4.33.3 applies, the Department of Justice reasonably and necessarily opted for a flexible regulatory standard that takes into account the configuration and nature of each assembly area so long as disabled patrons are provided comparable views of the screen, stage, or other spectacle being viewed. See US SJ Mem. at 11-13 & n.6. Simply put, the issue of regulating "comparable lines of sight" in assembly areas is not susceptible to a "one size fits all" approach.

The need for regulatory flexibility is especially important where, as here, the type of assembly area at issue (stadium-style movie theaters) did not even come into vogue until years after the promulgation of the challenged regulation. In addressing vagueness challenges, federal courts have long recognized the balancing act faced by legislators and regulators when drafting statutes and regulations – to make them precise enough to afford fair notice of the prohibited conduct, yet broad enough to reach a variety of situations, many of which cannot be anticipated at the time of drafting. As the Supreme Court stated when rejecting a vagueness challenge to regulations governing the transportation of hazardous materials:

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.

Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 330 (1952); see also Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 2300 (1972) (affirming constitutionality of anti-noise ordinance that was "marked by 'flexibility and reasonable breadth, rather than meticulous specificity'" and noting that "we can never expect mathematical certainty from our language") (internal citation omitted); Rock of Ages Corp. v. Secretary of Labor, 170

F.3d 148, 156 (2nd Cir. 1999) (noting that regulations need not achieve "meticulous specificity" and holding that due process is satisfied "as long as a reasonable prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what the regulations require"); Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm'n, 108 F.3d 358, 362 (D.C. Cir. 1997) (rejecting vagueness challenge to mine safety regulations in recognition of long-recognized principle that regulations must be sufficiently flexible to cover an "infinite variety" of situations and, hence, need not regulate with mathematical precision); Doyle v. Secretary of Health & Human Serv., 848 F.2d 296, 301 (1st. Cir. 1988) (affirming constitutionality of Medicare regulation because "'[t]he definition of adequate medial care cannot be boiled down to a precise mathematical formula'") (internal citation omitted).[6]

Taken togther, these considerations weigh strongly against any finding that Standard 4.33.3's comparable-lines-of-sight requirement provides "no standard at all." The language, history, and purpose of this provision collectively put AMC (and other regulated entities) on fair notice that the phrase "comparable lines of sight" should be read as requiring a qualitative comparison as between the views of the screen afforded patrons who use wheelchairs and most other members of the movie audience. This is all that the Constitution requires. See Botosan, 216 F.3d at 836

[6] None of the vagueness cases cited by AMC in its summary judgment memorandum prove to the contrary. See AMC SJ Mem. at 9-10. In Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985), for example, the court was faced with a vagueness challenge to a local vending ordinance. Id. at 755-56. In finding the challenged ordinance violated due process, the court placed great weight on the fact that city officials had repeatedly given the plaintiff-appellant conflicting advice regarding the proper interpretation of an ordinance with "obvious ambiguity." Id. at 757-58. Here, by contrast, Standard 4.33.3 is neither marred by ambiguity nor has the Department issued conflicting guidance concerning the interpretation and application of this regulation to stadium-style movie theaters. See discussion supra pp. 5-9, 19-20. Similarly, AMC's citation to Georgia Pacific Corp. v. O.S.H.R.C., 25 F.3d 999 (11th Cir. 1994) is inapposite because the due process challenge in that case concerned safety regulations imposing civil penalties, a type of regulation that is subject to a higher level of scrutiny that purely commercial or economic regulation such as Standard 4.33.3. See 25 F.3d at 1005-06; see also discussion supra pp. 18-19.

(rejecting vagueness challenge to Title III of the ADA and its implementing regulations); Pinnock, 844 F. Supp. at 579-84 (same).[7]

C. Lara Does Not Mandate Judgment In Favor of AMC on Its Stadium-Style Theater Complexes in Texas

AMC also argues that, in light of the Fifth Circuit's ruling in Lara II, summary judgment should be entered with regard to its twelve stadium-style theater complexes located in the Fifth Circuit irrespective of whether or not this Court agrees with the Lara II decision. See AMC SJ Mem. at 12. To do otherwise, AMC asserts, "would subject AMC to inconsistent legal duties." Id.

AMC's argument that the shadow of Lara II should extend all the way into a California federal court is both factually and legally mistaken. First, this Court has the authority to reach an independent decision on the legal issues in this matter regardless of the Fifth Circuit's decision in Lara II. See discussion supra p. 10. This is particularly true where, as here, the issue concerns the United States' interpretation of national civil rights legislation and its implementing regulations. See Railway Labor Executives' Ass'n v. Interstate Commerce Comm'n, 784 F.2d

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[7] In a last-ditch effort to salvage its due process claim, AMC devotes one sentence in the body of its summary judgment memorandum arguing that "[a]t most, the Department's 1998 expansion of § 4.33.3 is entitled to prospective application only." AMC SJ Mem. at 11. AMC's half-hearted retroactivity argument is meritless. First, this retroactivity argument necessarily rests on the assumption that the Department's purported "1998 expansion" constituted final agency action with all the attendant procedural requirements set forth in the Administrative Procedures Act (5 U.S.C. § 551 et. seq.) Yet this Court has already conclusively held that neither the Department's Lara *amicus* brief filed in 1998, nor any other statements or guidance issued by the Department since the promulgation of Standard 4.33.3 in 1991 pursuant to notice-and-comment rulemaking, constituted "final agency action." See US SJ Affirm. Def. Mem at 8-9. Second, in any event, AMC cannot credibly claim that it needed to read the Department's Lara *amicus* brief in order to realize the inferiority of the wheelchair seating locations in its stadium-style theaters. That the openings of AMC's stadium-style theater complexes were met with a storm of protest by disabled patrons, local building officials, and even some AMC officials, stands as powerful testament that AMC was well aware of the problems with these theaters from the very beginning of the stadium-style theater revolution in 1995. See discussion supra pp. 8-9. Moreover, when the Department of Justice launched its investigation of AMC's stadium-style theaters in November 1996, AMC was expressly informed that it was potentially in violation of the ADA for failing to place wheelchair seating in the stadium section of its stadium-style movie theaters. See US SJ Opp. App., Ex. 26.

959, 964 (9th Cir. 1986) ("[C]ourts do not require an agency of the United States to accept an adverse determination of the agency's statutory construction by any Circuit Court of Appeals as binding on the agency for all similar cases throughout the United States."). Second, AMC faces no risk of "inconsistent" legal duties from the Lara II decision since it was not a party to that litigation and, therefore, is not "bound" by its rulings. See, e.g., Colby v. J.C. Penny Co., Inc., 811 F.2d 1119 (7th Cir. 1987) (holding that district improperly granted summary judgment to defendant-employer based on its erroneous belief that ruling in another Circuit on same legal issue had *stare decisis* effect in that jurisdiction).[8] The Fifth Circuit's Lara II decision thus stands as no legal impediment to this Court's exercising its own independent judgment regarding the propriety of the Department's interpretation of Standard 4.33.3's comparability requirement as applied to all of AMC's over 80 stadium-style movie theater complexes nationwide.

D. Standard 4.33.3's "Clustering" Exception Does Not Apply to AMC's Stadium-Style Movie Theaters

As a last-ditch effort to avoid providing its disabled movie patrons and their moviegoing companions with comparable lines of sight, AMC now belatedly asserts that its stadium-style theaters need not comply with Standard 4.33.3's comparable-lines-of-sight requirement because these theaters fall within the "clustering" exception to this regulation. Standard 4.33.3's

[8] Ironically, AMC cites Colby as the primary "support" for its novel theory that a decision issued by the Fifth Circuit is "controlling" in this action, at least with respect to its stadium-style theater complexes located in that jurisdiction. AMC SJ Mem. at 12. Colby, however, provides no such support. Indeed, a careful reading of Colby reveals that this case instead stands for the more well-established principle that federal courts are not generally bound by the decisions of their sister circuits. As Colby noted: "[N]either this court nor the district courts of this circuit give the decisions of other courts of appeals [sic] automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment." 811 F.2d at 1123. Moreover, while Colby does acknowledge that some measure of deference (as opposed to automatic deference) may be appropriate in situations in which different outcomes would place a defendant under potentially inconsistent legal duties, the court emphasized that such cases arise only when "cases in different circuits challenge the *same* practice of the *same* defendant." Id. at 1124 (emphasis added). As noted above, however, AMC was not a party to the Lara litigation and thus can hardly be said to be facing inconsistent legal duties should this Court decline to follow the Fifth Circuits's Lara II decision.

"clustering" exception, however, is inapplicable to AMC's stadium-style theaters and does not afford AMC license to relegate patrons who use wheelchairs to seats with inferior lines of sight.

While Standard 4.33.3 generally mandates that wheelchair locations in assembly areas be placed in such a way as to ensure that such locations are "an integral part of any fixed seating plan" (the integration requirement), provide persons who use wheelchairs "lines of sight comparable to those for members of the general public" (the comparability requirement), and are dispersed when the seating capacity exceeds 300 persons (the dispersal requirement), a regulatory exception permits "clustering" of wheelchair seating under certain limited circumstances. The "clustering" exception to Standard 4.33.3 states:

> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

Id. The Department has long interpreted this exception to Standard 4.33.3 as exceptionally narrow, permitting "clustering" of wheelchair seating only in bleachers, balconies, and other discrete portions of assembly areas. See, e.g., Ex. A (Hurley Declaration) at 20-25 (United States' *amicus* brief in Fiedler discussing Standard 4.33.3's "clustering" exception). Moreover, Standard 4.33.3's "clustering" exception, even when applicable, **only** provides an exception to the regulation's dispersal requirement; this exception does not diminish in any fashion the regulation's integration and comparability requirements. To date, both federal courts that have addressed this exception have concluded, like the Department, that the exception to Standard 4.33.3 is a narrow one that does not permit a theater operator to avoid providing comparable lines of sight to disabled patrons. See Lara II, 207 F.3d at 787 n.3 (rejecting Cinemark's attempt to invoke exception to Standard 4.33.3 and noting that the exception "permits only the clustering of seats . . . [i]t does not permit Cinemark to avoid section 4.33.3's comparable lines of sight requirement"); Fiedler, 871 F. Supp. at 38-39 (holding that Standard 4.33.3's "clustering" exception "affords AMC no warrant to consign its wheelchair patrons to the back of the . . [t]heater").

Against this backdrop, AMC's eleventh-hour attempt to avoid providing comparable lines of sight to persons with physical disabilities by invoking Standard 4.33.3.'s "clustering" exception falls far short of the mark. First, the foregoing discussion makes plain that Standard 4.33.3's "clustering" exception is simply inapplicable to AMC's stadium-style theater complexes because each theater is typically housed on one floor level and has neither bleachers nor balconies.[9] Second, and most important, Standard 4.33.3's "clustering" exception (even assuming its applicability) provides AMC with "no warrant to consign its wheelchair patrons" to seating locations with inferior, non-comparable lines of sight as AMC has done in the vast majority of its stadium-style theater complexes. See Fiedler, 871 F. Supp. at 39. Simply put, AMC cannot use the exception to Standard 4.33.3 to avoid its obligation to provide comparable lines of sight to its patrons who use wheelchairs.

CONCLUSION

For the foregoing reasons, this Court should deny AMC's motion for [partial] summary judgment in its entirety.

[9] AMC's Pleasure Island 24 theater complex in Lake Buena Vista, Florida proves the singular exception to this general rule. In this complex, Auditorium Nos. 1 & 2, which each collectively seat over 550 movie patrons, contain balconies. Notably, however, both of these auditoria also provide dispersed wheelchair seating in their respective lower-level and upper-level balcony sections. See US SJ Opp. App., Ex. 28 (AMC Pleasure Island 24 seating plan).

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of November, 2002, true and correct copies of **Memorandum of Plaintiff United In Opposition to AMC's Motion for [Partial] Summary Judgment** were served by Federal Express, postage pre-paid, on the following parties:

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