UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. HOYTS CINEMAS CORPORATION, and NATIONAL AMUSEMENTS, INC., Defendants.	)	Civil Action No. 00-12567-WGY

CONSOLIDATED OPPOSITION OF UNITED STATES TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

The United States opposes the defendants' motions for summary judgment for a single, simple reason: the central factual issues raised by this case – whether the defendants' stadium-style movie theaters provide people with disabilities with (i) "comparable" "lines of sight," (ii) in locations that are an "integral part" of the fixed seating plan – are vigorously disputed. The government contends that the lines of sight are not comparable, based on facts demonstrating that a large number of the defendants' theaters fail to provide wheelchair access to the elevated sight lines of the auditoriums' full stadium risers. Instead, wheelchair users frequently are relegated to the inferior sight lines in the frontmost rows, much lower and closer to the screen. The government further contends that the wheelchair areas are segregated, in some instances due to walls and railings that physically separate them from other seats but also because of the de facto segregation that results from putting the wheelchair areas in inferior locations where most people choose not to sit.

The defendants disagree with both of the foregoing assertions. Despite the parties' material dispute over these core facts, the defendants have moved for summary judgment. They premise their motions on the contention that wheelchair seating areas provide comparable lines of sight so long as they are placed somewhere – anywhere – "among" other seats, no matter where those seats are located or how bad they might be. Defendants' argument is untenable. "Among" plainly does not equate to "comparable" if the seats one is "among" are the worst in the house. Defendants' interpretation also has the impermissible effect of reading the "lines of sight" requirement out of Standard 4.33.3 by striving to make it synonymous with defendants' construction of Standard 4.33.3's "integral part" requirement.

Defendants couple their argument regarding "lines of sight" with a rhetoric-laden assault that labels the government's interpretation of Standard 4.33.3 "absurd." (National Br. at 3). Defendants' arguments misstate both the evidence and the government's position. The United States has not created a "newly-minted" "objective viewing-quality test designed to "fail" the defendants' theaters. (Id. at 11-14). Rather, the government has relied on accepted theater design principles – principles supported by

a body of architectural literature that the defendants fail even to mention – to perform a comparative analysis of the sight lines in the defendants' theaters. The analysis yields a continuum of seats in each auditorium, ranging from those with the best sight lines to those with the worst. For those auditoriums where the wheelchair seating areas fall on the "worst" end of the continuum, the United States has informed the defendants of its intent to pursue ADA claims at trial.

The defendants level much of their rhetoric at the number of seats that do not "pass" all of the theater design principles. In doing so, they miss the point. The government has not used the design principles as an objective test of compliance with the ADA. There are 121 auditoriums with wheelchair locations that "fail" one or more of the design principles as to which the United States is not pursuing ADA claims. Irrespective of the number of "passing" or "failing" seats, the principles provide a comparative means of distinguishing, pursuant to the industry's own theater design standards, between the better seats and the worse seats, and then assessing where the wheelchair locations in each auditorium fall on the resulting continuum.

Defendants may – and do – disagree with the results of the government's analysis. That disagreement, however, involves factual disputes over the comparability and integration of the wheelchair areas in defendants' auditoriums – factual disputes that must be resolved at trial.

STATEMENT OF RELEVANT FACTS

With its consolidated opposition, the United States has filed three statements of facts: (1) The Government's Response to National's Statement of Undisputed Material Facts (hereafter, "Gov. Nat. Facts"); (2) The Government's Response to Hoyts' Statement of Undisputed Material Facts (hereafter, "Gov. Hoyts Facts"); and (3) The Government's Affirmative Statement of Relevant Facts (hereafter, "Gov. Aff. Facts").[1]

The United States also has filed the Government's Expert Architectural Report of Robert Luchetti Associates (the "Luchetti Report"), the expert statistical report of Pierre-Yves Cremieux (the

[1] The first two pleadings respond to the separate statements of allegedly "undisputed" facts submitted by each of the defendants. The third pleading sets forth relevant, material facts that the defendants omitted from their statements.

"Cremieux Report"), the Government's three-volume Appendix of Documentary Materials in Opposition to Summary Judgment ("Gov. Doc. App.") and the Government's one-volume Appendix of Deposition Testimony in Opposition to Summary Judgment ("Gov. Dep. App.").

ARGUMENT

I. DEFENDANTS' INTERPRETATION OF STANDARD 4.33.3'S "LINES OF SIGHT" REQUIREMENT IS UNTENABLE

Section 4.33.3 of the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A (hereafter "Standard 4.33.3") requires, inter alia, that public assembly areas, including movie theaters, be designed and constructed so as to provide people with disabilities with "lines of sight comparable to those for members of the general public." The Department of Justice (the "Department") construes this language to require that a theater operator provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons in the theater. Individuals who use wheelchairs need not be provided the best seats in the house, but neither can they be relegated to the worst. Instead, they must be afforded sight lines that are "comparable" – i.e., similar or equivalent – to those enjoyed by most other members of the audience. The Department has reasonably concluded that factors in addition to physical obstructions – such as viewing angles and distance from the screen – affect whether individuals' views of the movie screen are equivalent to those of other patrons. (Gov. Aff. Facts ¶ 61).

This reading of Standard 4.33.3 best comports with the language of the regulation, with the well-accepted usage of the term "lines of sight" in the context of theater design, and with the goals of Title III of the Americans with Disabilities Act ("ADA"). At the very least, the Department's interpretation of its regulation is a reasonable one to which the Court should defer.

Defendants' contrary interpretation – that Standard 4.33.3 requires only that wheelchair areas have an "unobstructed" view and be located "among" other seats (even if those seats are the worst in an auditorium) – is antithetical to the ADA's anti-discrimination principles and should be rejected.

A. "Lines of Sight" is a Well-Accepted Theater Design Term That Encompasses the Concept of Viewing Angles

Webster's dictionary defines a "line of sight" as "a line from an observer's eye to a distant point

toward which he is looking." Webster's Ninth New Collegiate Dictionary 695 (1991). In a movie theater, the observer is the seated patron. The points at which a patron looks are the areas on the screen at the front of the theater where the film is projected. Thus, in a movie theater, lines of sight are the range of line lengths and angles from a patron's eye to the various points on the screen where a film is projected. (Gov. Aff. Facts ¶¶ 4-9).

Architects and engineers who specialize in theater design have long recognized that the lengths and angles of a patron's lines of sight to the various points on the screen where the patron is looking have a material impact on the nature and quality of the patron's visual experience. An analysis of the quality of the "lines of sight" from a given seat involves more than just examining the issue of physical obstructions. It also includes an assessment of such factors as whether the lines of sight to the screen are at such angles that they cause distortion of the image, lead to physical discomfort for the viewer, or render the image overwhelming large or, conversely, too small. (Gov. Aff. Facts ¶ 10). The foregoing principles are set forth in numerous treatises, articles and publications on theater design, ranging from John Scott Russell's seminal "Treatise on Sightlines and Seating," published in the 1830's, to Lucasfilm's *Recommended Guidelines for Presentation Quality and Theatre Performance for Indoor Theatres*, published in 2000. (Gov. Aff. Facts ¶¶ 11-24).

In or about June, 1990, the Society of Motion Picture and Television Engineers ("SMPTE") surveyed the professional literature discussing lines of sight and theater design and assembled, from that literature, a list of architectural parameters and criteria for designing an "effective" cine theater in which "everyone can see and hear well." SMPTE published those theater design principles in SMPTE Engineering Guideline EG 18-1989: *Design of Effective Cine Theaters* (hereafter, the "SMPTE Guidelines") (reproduced at Gov. Doc. App., Ex. 4). Five of the principles relate to lines of sight. (Gov. Aff. Facts ¶¶ 15-21). They are:

1. Image size examines how much of a patron's field of vision is occupied by the projected image – i.e., how large is the screen and how close or far back from it can seats be located without having the screen appear overwhelmingly large or, conversely, too small. The SMPTE Guidelines recommend, inter alia, that the horizontal subtended angle created by a patron's lines of sight to the left and right edges of the screen be not less than 30 degrees.

2. Image Distortion causes circles to become ellipses, squares to become rhombuses and all shapes to become distorted as a "viewer's line of sight to the screen deviates from the perpendicular." The SMPTE Guidelines cite research published by Dr. Reubens Meister in 1966, defining three iso-deformation zones: (a) zone "i", in which image distortion would not be noticed; (b) zone "ii", in which distortion would be noticeable but tolerated; and (c) zone "iii", in which distortion would be sufficiently severe to cause viewers to reject those seats. The SMPTE Guidelines recommend that all seats be located within the 45 degree iso-deformation boundary line that defines zones "i" and "ii".

3. Visibility relates to the extent of any physical obstructions between a viewer and the screen. The SMPTE Guidelines recommend that every viewer "have an unobstructed vertical and horizontal sightline to the image on the screen."

4. Comfort involves, among other things, whether a patron's "vertical viewing angle to the top of the screen is excessive or the lateral viewing angle to the centerline of the screen requires uncomfortable head and/or body position." To avoid physical discomfort to viewers, the SMPTE Guidelines recommend that the "nearest viewer's vertical line of sight should not exceed 35° from the horizontal to the top of the projected image, and preferably should be 15° to the horizontal centerline of the screen image."

5. Architectural Distractions relate to whether elements of a theater's interior intrude on a patron's visual field such as to "distract the viewer's attention from the projected image." The SMPTE Guidelines recommend that such distractions be minimized.[2]

The theater design guidelines summarized by SMPTE represent a compilation of accepted architectural principles that are documented in an established body of professional literature relating to theater and auditorium design. (Gov. Aff. Facts ¶¶ 11-24).

B. The Theater Industry Itself Has Acknowledged that "Lines of Sight" Encompass More than Just Obstruction and that Seats in the Front Are the Worst.

Consistent with the architectural principles summarized above, the theater industry repeatedly acknowledged – up until the first stadium-style theater ADA lawsuit in 1997 -- that "lines of sight" meant more than just obstruction and that seats at the front of theaters had inferior lines of sight and were the least preferred.

Between 1991 and 1997, the National Association of Theatre Owners ("NATO"), the theater industry's trade and lobbying organization, took the position in writing on more than ten separate occasions that "lines of sight are most commonly measured in degrees"; that seats in the front of a movie theater are the "least desirable" and "the last to be taken"; and that seats in the rear provide lines

[2] SMPTE re-approved and reissued its theater design guidelines in 1994. (Govt. Doc. App., Ex. 6).

of sight that "are the best in the house," with the "smallest viewing angle" and are the "most favored." (Gov. Aff. Facts ¶¶ 26-41).

Hoyts likewise acknowledged that there were recognized architectural criteria defining "acceptable" versus "unacceptable" sight lines and that those criteria included more than just the issue of obstructions. In or about 1991, Hoyts' outside architect prepared a design guidelines manual for Hoyts' cinemas. The manual stated: "Seating areas should be designed to minimize viewing distortions and discomfort due to exaggerated viewing angles or incorrect viewing distances from the screen." The manual also discussed image distortion and iso-deformation zones at length. (Gov. Aff. Facts ¶ 45). At or about the same time, in March, 1991, Hoyts took the position, in writing, that the SMPTE Guidelines "best described" the "industry standards regarding sightlines."[3] (Gov. Aff. Facts ¶ 43).

It was not until the commencement of litigation concerning stadium-style theaters that NATO and its members reversed course and began arguing that the term "lines of sight" relates only to obstruction and that no seat is superior/inferior or more or less preferred to any other.

C. Pursuant to the Accepted Definition of "Lines of Sight," Defendants' Stadium-Style Movie Theaters Violate Standard 4.33.3's Comparability Requirement

Pursuant to the architectural principles published in theater design treatises and acknowledged by the theater industry itself (at least until 1997), a large number of the defendants' stadium-style auditoriums provide people with disabilities with inferior lines of sight.

Hoyts currently operates 25 theater complexes with stadium-style seating. National operates 32 and is building more. (Gov. Aff. Facts ¶ 69). In "stadium-style" cinemas, most of the seating is placed on tiers or risers, with each row generally elevated 12 to 18 inches above the row in front of it, as in a sports stadium. (Id. ¶ 66). The screens utilized in such theaters are substantially larger and "span wall-to-wall." The result, in the defendants' words, is "cutting edge theater design" that "[e]nsures

[3] Numerous architectural drawings prepared throughout the relevant time period further demonstrate that both Hoyts' and National's architects were analyzing sight lines (including sight line angles) to the bottom, middle and top of the screen. (Gov. Aff. Facts. ¶¶ 47, 48, 52-56).

moviegoers the ultimate cinematic experience" and represents "one of the greatest advances in moviegoing in years." (Id. ¶¶ 67-68).

The United States has submitted an expert architectural report, prepared by Robert Luchetti (the "Luchetti Report"),[4] containing drawings for each of the defendants' stadium-style auditoriums that depict the location of the wheelchair areas relative to the other seats in the same auditorium and analyze the corresponding lines of sight. The analysis is premised on the theater design principles summarized above, and includes an evaluation of the primary architectural criteria, such as image size, vertical viewing angle, and image distortion (iso-deformation), that are recognized and accepted in the professional literature as relevant to assessing the quality of lines of sight. (Id. ¶¶ 109-15). Luchetti does not opine in his report on whether wheelchair locations comply with the legal requirements of Standard 4.33.3. He simply performs an architectural analysis of lines of sight. (Id. ¶ 116).

Following completion of the Luchetti Report, the Department determined which of the defendants' stadium-style auditoriums the government intended to pursue for alleged violations of the ADA. It did so pursuant to a comparative analysis that examined whether the quality of the lines of sight from the wheelchair locations in any given auditorium was comparable (i.e., similar or equivalent) to the quality of the lines of sight provided most other members of the public.[5] The United States provided a list of the auditoriums as to which it intended to pursue ADA claims in Plaintiff's Second Supplemental Response to Defendants' First Set of Interrogatories. (Id. ¶ 117).[6]

For each of the listed auditoriums, the Luchetti Report's drawings set forth the factual bases for the government's assertion that the defendants have failed to provide people in wheelchairs with comparable lines of sight. Put simply, in the small and medium-sized auditoriums (those containing

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[4] Luchetti has substantial theater design experience. During the period from 1987 to 1996, he designed hundreds of theaters for General Cinemas Corporation. (Gov. Aff. Facts ¶ 70). By contrast, Hoyts' proposed expert, John Salmen, has never designed a movie theater and does not consider himself to be an expert in movie theater design. Similarly, National's proposed expert, John Paul Scott, has never served as architect of record in connection with the design or construction of any movie theater. Id.

[5] The government also evaluated the "integral part" requirement of Standard 4.33.3. See pp. 16-17, below.

[6] The government's Second Supplemental Response amended an earlier First Supplemental Response. (Id.)

fewer than 300 seats), the required wheelchair spaces generally are confined to the frontmost rows of the theater, on a flat or sloped floor or low riser, materially closer to the screen and at a lower elevation than the majority of the other seats. In large auditoriums (containing 300 or more seats), many of the required wheelchair spaces likewise are located in the frontmost rows.[7] (Gov. Aff. Facts ¶¶ 75-79, 119). The vertical and horizontal sight line angles from those rows are greater, forcing people in wheelchairs to tilt their necks and/or swivel their heads to look at the large screen immediately in front of them. Moreover, because of the proximity and size of the screen, the images are often distorted and overwhelmingly large. Wheelchair users are deprived access to the enhanced sight lines afforded from the elevated stadium risers situated farther back from the screen, because the risers can be reached only by climbing steps. (Gov. Aff. Facts ¶¶ 120-21).

Drawings and photographs for three sample auditoriums, Auditorium 2 at Hoyts' complex in Westboro, MA; Auditorium 11 at Hoyts' complex in Bellingham, MA; and Auditorium 1 at National's complex in Randolph, MA, demonstrate these points. See Tabs A, B and C, respectively. In all three auditoriums, the wheelchair areas are located on a flat floor, within the first 3 rows, much closer and lower to the screen than the stadium seats. The vertical sight line angles to the screen are significantly steeper. The areas fall within Meister's iso-deformation zone "iii" -- the zone in which image distortion is the greatest. They also do not provide the benefit of the elevated sight lines afforded from the stadium risers located farther back from the screen. By virtually all accepted measures, the wheelchair spaces fall within the seating area offering the worst lines of sight in the theater.

D. Defendants Have Long Been On Notice That the Sight Lines Provided to Wheelchair Users in Their Stadium-Style Theaters Are Inferior, Contrary to Standard 4.33.3's Requirements.

Defendants cannot claim ignorance concerning the inferior nature of the lines of sight that so many of their stadium-style theaters provide to patrons in wheelchairs. NATO has long acknowledged the poor quality of the sight lines from the front of the auditorium. (Gov. Aff. Facts ¶¶ 31-41). The

[7] It is not uncommon to see additional wheelchair areas in large auditoriums situated farther back from the screen. Depending on the auditorium, there may or may not be sight line problems relating to this second location.

theater design principles that provide the technical bases for analyzing sight line quality similarly have been in existence for many years. (Id. ¶¶ 10-24). These established principles, together with the language of the regulation, placed the defendants on notice that their stadium-style theaters failed to provide comparable lines of sight and hence violated Standard 4.33.3.[8]

In addition, Hoyts and National began receiving complaints regarding the inferior sight lines provided to wheelchair users in their stadium-style theaters almost as soon as the first theaters opened their doors. (Gov. Aff. Facts ¶¶ 80-92). The complainants included Suzanne Deck, who described National's stadium-style theater in Maumee, OH in the following terms:

> It's the most horrible movie experience I've had. You're just so close to the front of the screen. The screen is so large and so big that the image is all blurred and fuzzy and grainy, and you have to constantly move your head from side to side to get the whole screen or view in. It's just the most horrible experience I've had. Your neck is craned back. And I just refuse to go.

(Id. ¶ 92). Deck complained in person to National's then-Vice President of Construction, Peter Brady. (Deck Tr. at 87) (Gov. Dep. App, Ex. 1).

Defendants' own architects and consultants began advising, as early as April, 1996, that mezzanine level access be provided in order to permit placing wheelchair locations in the stadium seating sections. Thomas Bakalars, Hoyts' outside architect on Westboro, one of the company's first stadium-style complexes, prepared a schematic design in April, 1996 providing precisely that form of access. Hoyts rejected it, instructing Bakalars to "eliminate" the handicapped seating in the stadiums of all auditoriums under 300 seats because it needed to "[g]et the cost of building down" and there was

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[8] For these reasons, the defendants' sometimes-mentioned "void for vagueness" arguments are without merit. E.g., United States v. Professional Air Traffic Controllers Org., 678 F.2d 1, 3 (1st Cir. 1982) (an order using the term "picket" is not unconstitutionally vague, as the term is understood in "common parlance" and those to whom the order was directed only disclaimed understanding as a "legalistic afterthought."); Precious Metals Assoc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 907 (1st Cir. 1980) (Commodity Futures Trading Act and regulations adopted pursuant to it are not unconstitutionally vague, in part because the terms challenged were well understood by those the Act regulated); Doyle v. Secretary of Health and Human Services, 848 F.2d 296, 301 (1st Cir. 1988) (statutory obligation to provide medical care "of a quality which meets professionally recognized standards of health care" is not unconstitutionally vague because the phrase has a reasonably clear meaning to the medical profession who administer the standards); United States v. Bay State Ambulance and Hospital Rental Service, Inc., 874 F.2d 20, 32 (1st Cir. 1989) (statute is not unconstitutionally vague, in part because courts must analyze vagueness challenges with the knowledge that "most statutes must deal with untold and unforeseen variations in factual situations"), citing Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

"enough precedent to argue in court to do this." (Gov. Aff. Facts ¶¶ 95-97).

Rolf Jensen Associates, Hoyts' building code consultant on a number of stadium-style theater complexes, advised the company in September, 1997 that: "At this time, it is our recommendation that all new designs of stadium style facilities incorporate mid-level entry to facilitate wheelchair locations in the center of the stadium seating." Hoyts rejected that recommendation as well. (Id. ¶¶ 100-01).

Roncelli, Inc., a construction manager retained by National on several of its stadium-style theater projects, wrote in August, 1998:

> We feel that handicap 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 to every theater patron should be the goal of any plan.

(Gov. Aff. Facts ¶ 105).

Yet, notwithstanding the complaints of patrons and the recommendations of their architects and consultants, Hoyts and National constructed substantial numbers of stadium-style theaters that relegated people in wheelchairs to the inferior, frontmost seats. They did so not because it was impossible to do better, or because they did not know how.[9] Rather, the defendants apparently were driven by a desire to "get the cost[s] . . . down," coupled with a professed assertion that there was enough "precedent" to allow them to get away with it in "court." As the following section demonstrates, they are mistaken.

E. Defendants' Proposed Interpretation of "Comparable Lines of Sight" Should Be Rejected

Hoyts and National ask this Court to adopt an interpretation of Standard 4.33.3's "lines of sight" requirement that ignores accepted theater design principles, violates the core anti-discrimination tenets of the ADA, and, most fundamentally, runs counter to the common sense of anyone who has ever sat in the frontmost rows of a movie theater. Defendants claim that comparability requires only: (a) the absence of physical obstructions, and (b) that wheelchair areas be "among" other seats, no matter where those seats are located or how bad they might be. (National Br. at 7, 9). No rational support exists for

[9] To the contrary, as the number of complaints continued to mount, defendants ultimately did, in fact, modify their designs to improve the location of the wheelchair areas. See Tab D (Auditorium 8 in National's complex in Warwick, RI).

such a construction of Standard 4.33.3. Further, the three judicial decisions that have adopted defendants' interpretation are fundamentally flawed.

1. Defendants' Interpretation Ignores Recognized Theater Design Principles

Defendants' arguments fly in the face of common sense and recognized architectural principles. There is more to the comparability of "lines of sight" than just the absence of physical obstructions. (See pp. 3-8, above.) By definition, seats in the front row will generally never have a physical obstruction blocking the view of the screen. The seats still are "horrible." (Deck Tr. 150-51) (Gov. Dep. App., Ex. 1). The images are distorted. The size of the picture is overwhelming. A patron must tilt her neck back and move her head from side to side to watch the action. Id.. Our own eyes tell us the seats are the worst in the theater. NATO has admitted it.[10]

There is likewise more to comparability than simply being "among" other seats. Wheelchair users plainly do not have similar or equivalent lines of sight if the seats they are "among" are the worst in the house. That, however, is precisely where many of the wheelchair areas are located – in the frontmost rows where the sight lines are "inferior" and the seats are the "last taken."

2. Defendants' Interpretation Violates the ADA's Anti-Discrimination Principles and Accepted Tenets of Regulatory Construction

Defendants' proffered interpretation of Standard 4.33.3 violates the maxim requiring that regulations be interpreted in a manner consistent with the principles of the underlying statute. E.g., Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 320 (D.C. Cir. 1990) (regulation must be interpreted so as to harmonize with and further, not conflict with, the objective of the statute it implements); Campesinos Unidos, Inc. v. U.S. Dep't of Labor, 803 F.2d 1063, 1069 (9th Cir. 1986) (court's task is to interpret a regulation as a whole, in light of overall statutory and regulatory scheme). Title III of the ADA unambiguously prohibits discrimination by public accommodations and

[10] The defendants may seek to distinguish NATO's admissions by arguing that the comments were made in the days of sloped floor theaters. Not all of them were. See Gov. Aff. Facts ¶ 41 (summarizing NATO comments made in 1997). In any event, many of the wheelchair areas in the listed stadium-style auditoriums are likewise located on a sloped or flat floor. If seats in the frontmost rows of a 100% sloped floor theater are "inferior" and the "last taken" relative to other seats in the auditorium, that observation is even more true when the rest of the auditorium offers the enhanced sight lines of elevated

commercial facilities, including movie theaters. 42 U.S.C. §§ 12181-12189. It mandates, among other things, that all places of public accommodation and commercial facilities constructed after January 26, 1993, be "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a)(1). This mandate requires, inter alia, that the "service offered to persons with disabilities [be] equal to the service offered to others." H.R. Rep. No. 101-485 (III), at 499-500 (1990).

Defendants' proffered interpretation of Standard 4.33.3 flouts these anti-discrimination principles. If wheelchair areas can be placed anywhere in a theater so long as they are "among" obstruction-free seats, no matter where those seats are located or how bad they might be, then the defendants are free to construct stadium-style seating – "one of the greatest advances in moviegoing in years" – and deny access to that seating to the more than two million Americans who use wheelchairs.[11]

Defendants' contentions likewise ignore the deference that properly should be accorded the Department's construction of its own regulations. Bragdon v. Abbott, 524 U.S. 624, 646 (1998) ("the [Justice] Department's views are entitled to deference" in interpreting Title III of the ADA because it is the agency "directed by Congress to issue implementing regulations . . . , to render technical assistance explaining the responsibilities of covered individuals and institutions . . . , and to enforce Title III in court.").[12] The Department's interpretation must be upheld unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997). "In other words, [the Court] must defer to the [Department's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [Department's] intent at the time of the regulation's promulgation.'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). Circuit courts of appeal have applied this deferential standard in other contexts in upholding the Department's

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stadium risers.

[11] 1997 U.S. Census Bureau Report, *Americans With Disabilities: Household Economic Studies*, at 3, Table A (2001).

[12] The Department of Justice has principal authority for administering the provisions of the ADA that govern the design and construction of new facilities. The Attorney General has the sole power to issue binding regulations to carry out those new-construction provisions. 42 U.S.C. 12186(b); see also 42 U.S.C. 12183(a)(1). And the Department of Justice is the only federal agency with authority to bring suit to enforce Title III of the ADA, which includes the new-construction requirements. 42 U.S.C. 12188(b)(1)(B).

interpretations of its ADA regulations.[13]

Finally, defendants' contention that "comparable lines of sight" simply means "among" ignores the "cardinal principle" requiring that every clause and word of a statute or regulation be interpreted so as to give it effect. E.g., Bui v. DiPaolo, 170 F.3d 232, 237 (1st Cir. 1999); United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-52 (1st Cir. 1985). Defendants' proffered interpretation arguably is intended to render "lines of sight" little more than a synonym of Standard 4.33.3's separate requirement that wheelchair seating be an "integral part" of the fixed seating plan, thus improperly reading the "lines of sight" provision out of the regulation.[14]

3. The Judicial Decisions on Which Defendants Rely Were Wrongly Decided

Defendants' argument that the "history" of Standard 4.33.3 supports their interpretation is misplaced. (National Br. at 7-8). The argument is essentially bottomed on the Fifth Circuit's decision in Lara v. Cinemark, 207 F.3d 783 (5th Cir. 2000), and the two district courts that subsequently followed it.[15] The Lara decision, however, is fundamentally flawed.

First, the Fifth Circuit's interpretation finds no support in the regulation's language. Standard 4.33.3, on its face, requires that lines of sight be "comparable," not just unobstructed.

Second, the Fifth Circuit was mistaken in suggesting that the phrase "lines of sight" had traditionally been understood to mean only unobstructed view. Lara, 207 F.3d at 788-789. As explained above, the term "lines of sight" in the context of theater design has commonly been used to refer not just to the degree of obstruction but also the viewing angles of spectators.[16]

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[13] See Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584-585 (D.C. Cir. 1997) (Department's reading of Standard 4.33.3 on the issue of lines of sight over standing spectators); Botosan v. Paul McNally Realty, 216 F.3d 827, 833-834 (9th Cir. 2000) (Department's interpretation of another Title III regulation).

[14] Defendants' "among" argument was the interpretation given by the Fifth Circuit to Standard 4.33.3's "integral part" requirement in Lara v. Cinemark, 207 F.3d 783, 789 (5th Cir. 2000) (concluding that Cinemark's theaters satisfied 4.33.3's "integral" requirement because the wheelchair areas were located either among, or adjacent to, seating used by other members of the general public).

[15] Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 142 F.Supp.2d 1293 (D. Or. 2001); United States v. Cinemark USA, Inc., No. 1:99 CV-705 (N.D. Ohio Nov. 19, 2001).

[16] In support of its interpretation, the Fifth Circuit relied on three inapposite federal regulations. Id., citing 47 C.F.R.

Third, the Fifth Circuit erred in the importance that it placed on the absence of explicit references to viewing angles during the Department's promulgation of Standard 4.33.3 in 1991 or in the 1994 version of the Department's Title III Technical Assistance Manual. Lara, 207 F.3d at 788. Stadium-style multiplexes did not exist in 1991 or in 1994. The traditional sloped floor cinemas that were being built did not have the type of dramatic disparities in vertical viewing angles later found in the stadium-style theaters that began to be constructed in 1996. When the Department promulgated its regulation in 1991 and amended its Technical Assistance Manual in 1994, it was not required to anticipate every future design innovation that might affect the comparability of lines of sight in theaters and thus conceivably warrant mention and discussion. The Department's inability to predict the future, however, does not limit its authority to apply the language of its regulation to new factual situations as they develop. Cf. Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (ADA can be applied to prisons even assuming Congress did not anticipate coverage of prisons when it drafted statute). One reason that the judiciary defers to administrative agency interpretations is to allow an agency the flexibility to adjust to changing circumstances. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991) (agency has inherent authority to interpret its own regulations because "applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives").

Fourth, the Fifth Circuit erred, legally and factually, in concluding that the Department's interpretation of Standard 4.33.3 was not entitled to deference because, in the court's view, it was inconsistent with the Access Board's understanding of its ADA guidelines. Legally, the Fifth Circuit erred in assuming that any post-1991 interpretation of Standard 4.33.3 by the Access Board could limit

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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 pertain to topics that have no relevance to the ADA, wheelchair seating, or movie theaters. In addition, none of the regulations deals with the issue of whether lines of sight are "comparable." The United States does not dispute that persons in wheelchairs who have unobstructed views will have lines of sight to the screen. However, those lines of sight will not be comparable if the viewing angles are inferior to those enjoyed by most other patrons.

the authority of the Department of Justice to construe its own regulation. The Department of Justice, not the Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Although those regulations must be "consistent with the minimum guidelines and requirements issued by the" Access Board, 42 U.S.C. 12186(c), the Board's guidelines do not themselves have the force of law; and 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). As a result, it is the Department's views – not the Access Board's – to which the courts owe deference in determining the meaning of the Department's regulation. See 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).

Factually, the Fifth Circuit mistakenly assumed that the Access Board does not interpret Standard 4.33.3, as currently written, to require comparable viewing angles in theaters. See Lara, 207 F.3d at 788-789. In fact, the Board has recognized that viewing angles are relevant in determining whether sight lines in stadium-style theaters are "comparable." It explicitly has explained that:

> [a]s stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at *uncomfortable angles* and to constantly move their heads from side to side to view the screen. They are afforded *inferior lines of sight* to the screen.

64 Fed. Reg. 62,278 (Nov. 16, 1999) (emphasis added). The Access Board also has published a technical assistance manual explaining, in a section titled "Sight Lines," that "[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas. A variety of factors determine the quality of 'vertical' sight lines, such as the distance from the performance areas, row spacing, staggering of seats, and floor slope" (Gov. Aff. Facts ¶ 63).[17] Finally, the general counsel of

[17] It is true, as the Fifth Circuit noted, 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. 64 Fed. Reg. 62,278 (Nov. 16, 1999) (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

the Access Board testified at his deposition in this case that the Board agreed with the Department's interpretation of Standard 4.33.3. (Id. ¶ 65).

For these reasons, the defendants' reliance on Lara is misplaced. The Fifth Circuit court 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 but also would allow theater owners to restrict wheelchair users to decidedly inferior seating. This Court should decline to endorse a reading of Standard 4.33.3 that would so undermine the purposes of Title III of the ADA.

II. EVEN IF DEFENDANTS' FLAWED INTERPRETATION WERE ACCEPTED, THEIR WHEELCHAIR SEATING AREAS HAVE OBSTRUCTED LINES OF SIGHT AND ARE NOT INTEGRATED INTO THE SEATING PLAN

Summary judgment is not warranted even if the defendants' interpretation of Standard 4.33.3 were to be accepted, for two reasons. First, the view from the wheelchair seating areas in a considerable number of defendants' auditoriums is obstructed compared to other seats, due to the frequent placement of wheelchair areas at the back of cross-aisles. Such placement causes wheelchair users' views of the screen to be physically blocked each time a patron walks along the cross-aisle after the start of a film either to (a) get to a seat, or (b) leave the theater. (Gov. Aff. Facts ¶¶ 123-26). Hoyts has conceded, in writing, that "crossing patrons" are "disruptive" to wheelchair users sitting at the back of cross-aisles, (Id. 127-28), yet both Hoyts and National continue to locate many of their wheelchair areas there.

Second, in addition to the provision of comparable lines of sight, Standard 4.33.3 requires that wheelchair areas be an "integral part of any fixed seating plan." Hoyts has violated this "integration" requirement by physically segregating the wheelchair areas in 17 of its stadium-style auditoriums from the rest of the seating plan through the use of steps, railings and/or walls. (Id. ¶¶ 131-35).

In addition, both Hoyts and National have violated the "integral part" requirement by placing

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Board's comments about the Department's settlement negotiations shed little light on what the Board believes is mandated by the current version of the regulation. The 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. 62,278; ADAAG Manual at 117 (July 1998) (Gov. Doc. App., Ex. 14).

wheelchair areas in sections of the auditorium where, because of the inferior lines of sight, most people choose not to sit. This de facto segregation of people with disabilities was corroborated by a statistical seat selection survey that the United States conducted in this case, which demonstrated that in a significant percentage of the sampled theaters, patrons prefer not to sit in the frontmost rows of the theaters where wheelchair spaces are located. (Id. ¶¶ 139-41). Such segregation also has been implicitly conceded by NATO, in its repeated acknowledgment that the frontmost rows are the "least preferred" and the "last taken," (Id. ¶¶ 31-41), as well as by Hoyts, in its concession that the front row is a "dead" row that will hardly ever be used. (Id. ¶ 51). Standard 4.33.3's integration requirement is not satisfied by putting wheelchair spaces in rows at the fronts of auditoriums, in locations where the defendants know very few people (if anyone) will choose to sit.

III. DEFENDANTS MISCHARACTERIZE THE EVIDENCE AND THE GOVERNMENT'S POSITION REGARDING STANDARD 4.33.3.

Together with advancing their own interpretation of the law, the defendants attack what they claim to be the government's "absurd" interpretation of Standard 4.33.3. Their arguments misstate the evidence and the government's actual position in three principal respects:

1. The government's architectural expert, Robert Luchetti, did not "make up" the theater design principles that he used to evaluate lines of sight in the defendants' theaters. He relied on an established body of architectural and engineering literature, discussed above, which the defendants wholly fail to mention. The string of partial quotes that the defendants piece together from Luchetti's deposition neither fairly nor accurately summarize the explanation that Luchetti gave during his testimony (and also in his report) concerning the recognized design principles on which he relied. The United States has responded to the incomplete excerpting of Luchetti's deposition in its responses to the defendants' statements of "undisputed" material facts. (E.g., Gov. Nat. Facts ¶¶ 16, 21, 25, 33, 51).

2. The defendants mischaracterize the deposition testimony of a number of other witnesses, whom National describes as having "struggled helplessly" to define and explain "lines of sight" or the theater design principles on which Luchetti relied. (James Raggio, Ruth Lusher, David Capozzi, Andrew Lelling). (National Br. at 17). All of these witnesses testified that they had no training or

experience in movie theater design – a fact not mentioned by the defendants. (Gov. Nat. Facts. ¶¶ 36-50). James Raggio, in particular, reiterated his lack of knowledge concerning theater design more than fifty times in response to repeated questioning about the technical meaning of design terms. (Gov. Nat. Facts ¶ 42). As Raggio explained, however, the fact that he "personally" could not answer defense counsel's questions "doesn't mean that there are not other people who have the technical expertise in terms of designing movie theaters who could . . . ." (Id.) The witnesses' inability to define theater design terms does not mean that those terms have no recognized meaning – they do – nor does it mean that Luchetti made the terms up – he didn't.

3. The United States does not interpret – and never has interpreted – Standard 4.33.3 to require compliance with any "objective viewing-quality test." (National Br. at 11-14). Rather, the government consistently has contended that the regulation is a comparative one that requires theater owners and operators to provide people with disabilities with lines of sight of a quality that is similar or equivalent to the lines of sight provided to most other members of the public. (Gov. Aff. Facts ¶¶ 59-65). Here, the United States utilized accepted theater design principles to perform a comparative analysis of the quality of the sight lines provided in the defendants' theaters. The analysis yielded a continuum of seats in each auditorium, ranging from those with the best sight lines to those with the worst. For those auditoriums where the wheelchair seating areas fell on the "worst" end of the continuum, the United States informed the defendants of its intent to pursue ADA claims at trial.

The defendants' complaints about the number of seats that do not "pass" all of the referenced theater design principles miss the mark.[18] No one has ever claimed that movie theaters are designed with the objective of having all seats meet the design principles.[19] The fact that every theater likely has some (or even many) seats that fail one or more of the design principles does not mean, however, that

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[18] The complaints also are factually inaccurate. Defendants skew their pass/fail statistics by, among other things, erroneously including the 121 auditoriums as to which the United States has advised defense counsel it is not pursuing ADA claims. The government has noted these inaccuracies in its responses to the defendants' respective statements of fact. (E.g., Gov. Nat. Facts ¶¶ 9, 12, 13).

[19] The SMPTE Guidelines acknowledge that "[g]ood design has often been compromised by practical solutions and the belief that effective cinemas are not economically feasible." (Govt. Doc. App., Ex. 6 at 1.)

the criteria cannot validly be used for comparing the relative quality of sight lines between and among seats, any more than the fact that automobile manufacturers might not routinely build the "perfect" car precludes one from using accepted automotive design principles to compare a Mercedes to a Hyundai. Some seats pass by a lot; some pass by a little; some fail by a lot; some fail by a little. The result is a continuum, and what matters is where the wheelchair spaces fall on that continuum.

In sum, the government did not use the theater design principles as an objective pass/fail test of ADA compliance. Indeed, there are 121 auditoriums with wheelchair locations that "failed" one or more of the design principles as to which the United States is not pursuing ADA claims. (Gov. Aff. Facts ¶¶ 117-18).[20] The principles were used as a comparative means of analyzing, pursuant to the industry's own design standards, whether the sight lines from the wheelchair areas in each auditorium were comparable in quality to the sight lines provided most members of the general public.

IV. HOYTS' INJUNCTION ARGUMENTS ARE WITHOUT MERIT

Hoyts contends that even if the Court denies its motion for summary judgment on liability issues, it nevertheless should dismiss the demand for injunctive relief in this case. (Hoyts Br. at 15-20). The argument is without merit.

Hoyts does not cite a single case in which a request for injunctive relief was dismissed on summary judgment because the plaintiff's demand for such relief, or the pretrial pleadings relating to such relief, were insufficiently specific. Most of the cases arise under Fed. R. Civ. P. 65(d), which refers to the level of specificity required of injunctive orders issued by courts after trial, not the specificity of a party's pre-trial request for such relief. See United States v. Georgia Power Co., 301 F. Supp. 538, 543 (N.D. Ga. 1969) (denying motion to dismiss claim for injunctive relief because Rule 65(d) applies only to the form of the final order issued by the court and does not require that the demand for injunctive relief be specific).[21]

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[20] Defendants mention this fact in a footnote (e.g., National Br. at 6 n.5), but then proceed to disregard it.

[21] Three of the cases Hoyts cites analyze the language of an injunction after it has been issued. Henrietta D. v. Guiliani, 246 F.3d 176, 182 (2d Cir. 2001) (appeals court lacked jurisdiction over case after district court ordered injunctive relief, but asked a

In addition, Hoyts' argument ignores that the Court will be able to fashion injunctive relief with the specificity Rule 65(d) requires after the trial of this action. See, e.g., Pottinger v. City of Miami, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992) (court notes its ability to fashion injunctive relief that complies with Rule 65(d) after hearing evidence at trial).

CONCLUSION

The United States has set forth detailed factual bases to support its assertion that the auditoriums it is pursuing in this case provide wheelchair users with materially inferior lines of sight and segregate people with disabilities either in physically separate areas or in sections of the auditorium where, because of the inferior sight lines, most people choose not to sit. National and Hoyts remain free to dispute the government's factual evidence and, in many respects, they have. Such factual disputes, however, go to the heart of the core issues in the case and render summary judgment inappropriate. The defendants' motions should be denied.

Respectfully submitted:

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magistrate judge to decide the terms of the injunction); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531-32 (11th Cir. 1996) (vacating injunction because it was not specific and could not be enforced); Equal Employment Opportunity Comm'n v. General Lines, Inc., 865 F.2d 1555, 1565 (10th Cir. 1989) (upholding decision not to issue injunction because there was no likelihood of future unlawful act). In the district court cases to which Hoyts cites, the courts denied requests to issue injunctions because the factual record after trial did not support the requested relief. Wales v. Jack M. Berry, Inc., 192 F. Supp.2d 1291, 1312 (M.D. Fla. 2000) (court declines request for injunction after trial because there was no likelihood of future unlawful acts); Stephen v. PGA Sheraton Resort, 669 F. Supp. 1573, 1584 (S.D. Fla. 1987) (court declines request for an "obey the law" injunction after trial, and its rulings in favor of the plaintiff are later overturned on appeal), rev'd, 873 F.2d 276 (11th Cir. 1989).